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THE MEDICOLEGAL RIGHTS OF PHYSICALLY DISABLED PERSONS

COURSEBOOK



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INTRODUCTION

This course book was prepared as part of a series of national training seminars on "The Medicolegal Rights of the Physically Disabled Persons", which was made possible by a short-term training grant from the Rehabilitation Services Administration, Department of Health, Education & Welfare. The information contained in this booklet is designed to supplement the material presented in the series of national seminars. The overall objective of the project is to provide rehabilitation service personnel including health care workers, vocational counselors, physicians, legal advocates, representatives of government agencies, and physically disabled individuals with a working knowledge of the laws and administrative regulations relative to the enforcement of the legal and civil rights of handicapped individuals. The program committee has attempted to present information that will be of practical use in developing a basic understanding on the part of all concern citizens of the legal rights and alternatives available to the physically disabled client.

We wish to acknowledge the assistance of the following organizations in allowing us to reprint articles used as part of this training project:

The American Hospital Association
The Archives of Physical Medicine & Rehabilitation
The Disability Rights Center, Inc.
The Institute of Rehabilitation Issues
The Office for Civil Rights

For further information on the series of national training seminars, contact:

Attorney James F. Holzer
c/o Tufts-New England Medical Center
171 Harrison Avenue, Box 427
Boston, Massachusetts 02111
(617) 956-5513

RIGHTS OF DISABLED

in the

HEALTH CARE SYSTEM

SECTION I

PERMISSION HAS BEEN GIVEN BY ARCHIVES OF PHYSICAL MEDICINE AND REHABILITATION TO REPRINT THIS ARTICLE FOR USE IN - THE TRAINING PROGRAM ON " THE MEDICOLEGAL RIGHTS OF PHYSICALLY DISABLED PERSONS".

KEY WORDS: Health education; medical records; patient care team; physician-patient relationship

The Right to Know: Giving the Patient His Medical Record

Arnold Golodetz, M.D., Johanna Ruess, M.D., Raymond L. Milhous, M.D.

• Each patient admitted to the 16-bed Rehabilitation Medicine Service at Medical Center Hospital of Vermont since October 1972 has received a carbon copy of his full Admission and Discharge notes, containing the complete problem list, and for each problem the relevant data, the Assessment and the Plans. The objectives were to improve patient education; to improve the patient's chances to contribute to the planning of his care; and to increase the staff's accountability to the patient. Over a period of seven months, we evaluated the effect of this maneuver for 125 consecutive patients by means of (1) a report on the patient's reactions, completed by a nurse after she reviewed the record with the patient; (2) a report by the physician stating whether he had expurgated the record for patient use, and recording his observations of patient and family reaction; (3) a questionnaire mailed to patients after discharge. Results indicated that patients were generally comfortable about reading the record, found it educational and appreciated the trust implied. No substantial difficulties arose. Few records were expurgated. The staff has accepted this style as crucial to an appropriate sharing of responsibility between themselves and the patients. We conclude that giving the patient his record is a safe and inexpensive aid to the rehabilitation process, and is probably mandated by the changing relationships between professionals and their clients, and by the patient's need to negotiate his own health care in an increasingly complex and mobile society.

Each patient on the inpatient unit of the Rehabilitation Medicine Service at the Medical Center Hospital of Vermont receives a copy of his full Admission Evaluation and of his Discharge Summary. This practice was developed to improve patient education and to encourage feedback from the patient to the rehabilitation team. Because it is not widely practiced, we decided to study the effects of this procedure on the patient, the team and on our own methods of communicating with the patient.

A review of the literature uncovered only one report on giving the patient his official record. Bouchard and associates[1] report a high degree of patient acceptance in giving patients their office records in an internal medicine group practice. Shenkin and Warner[2] published a theoretical proposal for giving the entire medical record to patients. Some physicians give patients letters briefly summarizing their condition, but we found no published reports evaluating this practice. Skipper[3] discusses many problems in communication that can be seen on hospital wards, and the many ways in which the problems ramify, to the detriment of patient care.

A study on clinical decision-making by Vertinsky, Thompson and Uyeno[4] suggested that patients may desire a larger role in the direction of their own care; the nursing literature has for some time advocated greater knowledge by and participation for, patients.[5,6]

The American Hospital Association's "A Patient's Bill of Rights"[7] states "The patient has a right to obtain from his physician complete current information concerning his diagnosis, treatment and prognosis in terms the patient can reasonably be expected to understand." Nothing is said about a right to examine the official record. The Commission on Medical Malpractice has stated that records are the property of the person or institution maintaining them. In only nine states are medical records available to patients without resort to litigation. The Commission indicated

From the Department of Rehabilitation Medicine, University of Vermont School of Medicine, Burlington, VT.

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that the patient has a right to the information contained in his record, but did not state how he is to obtain this information.[8] Annas[9] has reviewed the rights of hospitalized patients with respect to their medical records.

Methods

All patients admitted to the 16-bed rehabilitation unit of the Medical Center Hospital of Vermont receive a copy of their typed Admission Note within two days after admission. This admission note is problem-oriented, based upon a complete problem list, and is derived from a comprehensive standard data base. Medical, social, psychological and environmental problems are included. Each problem is described in terms of its relevant data and a detailed Assessment and Plan. The note is reviewed fully with the patient by the nurse and, as needed, by the physician. The patient often shares it with his family. If the patient has serious cognitive or language disorder, the nurse reviews the record with the family, usually in the presence of the patient. The record is then used as a reference point on daily rounds, and becomes the agenda of team conferences, which are always attended by the patient and usually by his family. Later, when the Discharge Summary is prepared, the patient also receives a copy.

The effect of this procedure was evaluated by the following:

(1) The nurse completed a simple form after discussing the record with the patient. The form indicated degree of patient acceptance, whether the patient corrected the content in any way, and whether he asked questions based upon the note. Finally, the nurse added comments on the way in which the note was received.

(2) The attending physician completed a form indicating whether the written note had been expurgated in any way in consideration of the patient's receiving it. The physician also commented on positive and negative effects which occurred from sharing the record and discussing it at conference.

(3) The patient completed a questionnaire which was mailed within two weeks after discharge, indicating his reaction to the patient-education program.

(4) The team as a whole informally discussed how the sharing of the record had altered their work with the patient, and how it had affected the unit as a whole.

The instruments used were neither pretested nor checked for validity and reliability. This report is therefore intended as a preliminary study and a report of a new experience.

In the seven months from September 1973 through March 1974, 125 new patients were admitted and stayed at least a week. Our staff completed the requested report forms for 103 patients (in 10 instances, patients could not respond to the record because of global aphasia or dementia; in 12 other instances, reports are incomplete). Postadmission questionnaires were returned by 50 patients (40%), and follow-up beyond the initial mailing was not attempted. Tables 1 and 2 describe the patient population.

Table 1: Admitting Diagnoses, September 1973-March 1974

	All patients	Patients with ward evaluation completed	Patients with questionnaire returned
Cerebrovascular disease	33	27	12
Spinal cord injury	29	25	12
Back pain	20	17	7
Brain injury	11	6	5
Amputations	8	8	5
Degenerative neurologic disease	7	7	4
Arthritis	5	5	2
Miscellaneous	12	8	3
Total	125	103	50

Results

Preparation of the Record

Doctors used simple words where possible. Necessary technical language was explained to the patients. Eighty percent of those patients who responded felt they had understood enough to satisfy themselves. A few patients were deterred by the technical format and yet asked for no explanation.

In 10% of the records, the physician modified the content slightly, having in mind the patient's perusal.

Table 2: Patient Characteristics

Length of stay, average	19 days
Age, average	45 yrs
Age, range	16-76 yrs
Sex	
Male	66%
Female	34%
Educational level	
Eighth grade or less	19%
Some high school	24%
High school	27%
Higher education	11%
Unrecorded	18%
Cognitive function	
Moderate impairment	10%
Severe impairment	5%
Dysphasia	
Moderate impairment	3%
Severe impairment	6%
Psychological problems	
Psychosis	3%
Significant problems in emotional adaptation	18%

In no instance did this involve the withholding of factual material or the avoidance of a problem listing, except for one case where material was communicated in confidence by a spouse. Modifications were only in language used. In four instances, the prognosis was stated in a less discouraging way than it might have been otherwise. In three instances, the word "tumor" was used instead of "cancer." In five instances, a psychiatric label was avoided and the problem stated in terms of behaviors or feelings.

Patient's Acceptance

Eighty-four percent of responding patients expressed a strong desire to be well-informed about their conditions. The patients' initial reactions to receiving the records were generally, but not uniformly, affirmative. As they read the notes, 50% made some addition or correction on a point of fact, and 60% asked questions on vocabulary or meaning.

Patients often expressed a sense of relief at having the secrecy removed from their records, and were pleasantly surprised to be treated as adults. Others accepted the record passively, or rejected it; these behaviors offered early and valuable clues to the staff about a patient's emotional status and preferred style of dealing with problems.

Patients were asked whether they would rather have a copy of their medical record, a summary letter from their doctor or discussion only. Seventy-two percent preferred the medical record and 22% would have preferred a summary letter from the physician. Only 4% preferred discussion only. The record did give the patient a chance to criticize the completeness and accuracy of data base and problem definition and was generally so perceived.

A majority of the responding patients (68%) valued the receipt of the full record (coupled, as it is, with full oral discussions). A significant faction (26%) found the experience of team conferences preferable.

Procedure's Impact on Staff Work

Initial fears of the staff were soon dispelled by the realization that most patients were ready to handle the information and were waiting for this degree of openness. Patients who were in a stage of denial simply sorted out for themselves what they could deal with at that time and gave the staff adequate guidelines as to where they should stop. It was helpful for each team member to know that the patient already had access to everything in the record. There needed to be no hesitation based on "I don't know what he has been told." Each member could interact more freely and honestly with the patient. The effect on patient-team relationship was strong, tending away from paternalistic and caretaking relationships toward more collaborative and educational ones.

The admission note at the bedside became a central point in patient-team interaction. The nurse, in her role as the first person to discuss the record with the patient, found herself in a better position to do health care teaching. The patients used their records to explain themselves to their families. And inclusion of emotional and sexual issues on the problem list facilitated discussion of problems important to the patient.

Discussion

Shenkin and Warner[2] have suggested that "legislation be passed to require a complete and unexpurgated copy of all medical records . . . be issued routinely and automatically to patients as soon as the services provided are recorded." So far, there have been no reports of this being done. Our own procedure and that reported by Bouchard and associates[1] give the patient copies of the documents which summarize his medical status, and do not provide him a copy of every item in the record. To do so would be logistically difficult and expensive, and would present the patient with fragments of fact and half-formed opinions. We would be reluctant to do this.

To be practical, record-sharing depends on typewritten, well-organized records. The problem-oriented record with its complete problem-list and its logical arrangement of data is well suited for a patient's perusal.[10,11] Rehabilitation units are also ideal for record-sharing, since the emphasis on patient education is already strong, and the logistics of record-sharing are simple and cheap. Most medical diagnoses are established, the relationship between team and patient is close and the patient is expected to be active in his own care.[5,12]

Most patients reacted positively to the receipt of the written record. Some patients chose not to deal with the record, preferring other modes of communication or perhaps preferring not to accept the responsibility involved in knowing. We could identify no instance in which a patient was harmed by being offered his record. It seems likely that patients are better able to handle information than we usually assume. The procedure made it automatic for the patient to receive full information and expedited discussion between staff and patient. The fact that the report was a carbon copy of the hospital record was interpreted as a declaration of openness and trust.

Conclusion

Record-sharing is a tool that may serve to improve patients' satisfaction with their medical care. It may increase the ability of patients to care for themselves and to move about within the medical-care system in an orderly way. It may prove to be one form of audit for quality and efficiency of care. We conclude from the results of this study that the procedure is feasible and worthy of further evaluation.

Acknowledgment: The work here described was a total team effort, involving particularly Ruth Copp, R.N., Holly Reed, R.N., Linda Dion, R.N., Betsy Gardner, R.N., Hazel Parry, R.P.T., and Pat Markle, B.A.

ADDRESS REPRINT REQUESTS TO:
Arnold Golodetz, M.D.
DeGoesbriand Hospital
Burlington, VT 05401

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THE FOLLOWING MATERIAL ON THE FREEDOM OF INFORMATION ACT AND CONFIDENTIALITY IS REPRINTED FROM THE PROCEEDINGS ON - THE THIRD INSTITUTE ON REHABILITATION ISSUES, JUNE, 1976, "LEGAL CONCERNS OF THE REHABILITATION COUNSELOR".

Freedom of Information Act, 5 U.S.C.A., Sec. 552

Background - Why a Freedom of Information Act?

a. It is the desire of the Congress that each federal department or agency make all official records available to the public, to the maximum extent consistent with the need to protect the rights of individuals.

b. Before the Freedom of Information Act of 1976 became effective July 4, 1976, persons requesting access to government records were required to show that their need for the information outweighed the government's right to refuse (sometimes arbitrarily) such access. The FOI Act has completely reversed that process by establishing the public's "right" to know unless the government can demonstrate a legitimate need to withhold. Now, information can be withheld only by using one or more of the nine specific exemptions to mandatory disclosures provided in the Act. The 1974 Amendments to the FOI Act contain a new enforcement provision, giving the Civil Service Commission authority to discipline federal employees who act arbitrarily or capriciously in withholding information.

The nine exemptions from "mandatory" disclosure are:

1. Classified material (national defense and foreign policy).
2. Internal personnel rules and practices.
3. Matters exempt by other statutes (SSA, FDA, Welfare, etc.).
4. Trade secrets (normally privileged and confidential and commercial data obtained from a person).
5. Internal or intra-agency memoranda (applies only to the non-factual portions expressing opinions, judgments, appraisals, evaluations).
6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
7. Investigatory records for law enforcement purposes (applies

to cases before final actions or to closed cases when they would reveal names of informants, defamatory materials, policy recommendations, views or opinions, trade secrets, commercial or financial data).

8. Financial institution reports.
9. Geological and geophysical data.

The federal Freedom of Information Act, as amended, has no effect whatever on access to state records, since, by its terms, that Act is applicable only to federal agencies.

Also, information which includes personal facts such as financial information obtained from an individual on a confidential basis or medical information and similar information, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," is well protected under the Freedom of Information Act.

Privacy Act of 1974, 5 U.S.C., 552a

The Privacy Act of 1974 is intended to:

1. Permit an individual to ascertain what records pertaining to him are maintained in a system of records by a federal agency.
2. Permit an individual to gain access to records pertaining to him in such systems of records and to have copies made of all such records; and
3. Permit an individual to correct or amend a record pertaining to him in a system of records.

The Act imposes requirements on federal agencies with respect to the manner in which they collect, use, disseminate and otherwise maintain records which pertain to specific individuals.

Interaction Between the Freedom of Information Act and the Privacy Act

The Privacy Act is intended to prevent invasions of the privacy of individuals. It permits an individual to have some control over the accuracy and disclosures of records pertaining to him maintained by federal agencies.

On the other hand, the Freedom of Information Act is intended to permit the general public to be informed on the activities undertaken by its government. It provides that all records maintained by government agencies, with nine exemptions, are to be made available to the public.

Maintenance of Records. The Act requires that agencies maintain only those records which are relevant and necessary to accomplish an authorized agency purpose. An individual providing information to the government must be told what the agency's authority for collecting the information is, why it is being collected, whether he is required to provide the information, how the agency is going to use the information, including what disclosures will be made of the information without his consent as routine uses, and what effect, if any, his refusal to provide the information will have on him.

An individual may request to be notified whether a particular system of records identified by him contains a record pertaining to him. He may also request access to the record for the purposes of reviewing it.

Special Procedures for Medical Records. Agencies are permitted to establish special procedures for disclosure of or access to medical records, including psychological records. There are two procedures governing notification of or access to procedure for records of minors. A minor not represented by a parent or guardian may, however, request notification of or access to his own medical records under the procedure for adults.

Under the procedure for records of adults, an individual will be required to designate a representative at the time he makes a request for notification of or access to medical records. The representative may be the individual's physician, other health professional, or another responsibile individual. If, after consultation with a physician (if one is available at the location of the records) the responsible department official determines that direct access to the individual is likely to have an adverse effect on him, or if the responsible department

official does not believe himself qualified to make such a determination, the record will be transmitted to the designated representative. If the responsible department official determines that direct access is not likely to have an adverse effect on the individual, he may trasmit the record directly to the individual to whom the record pertains.

The privacy of a minor may be invaded by granting a parent or guardian direct notification or access to his medical records. Minors are permitted to receive medical treatment for various conditions without parental consent. The extent to which such treatment is available varies according to state law. The benefits achieved by permitting such treatment without the consent of a parent or guardian would be destroyed if the parent or guardian could, at a subsequent time, obtain access to the record of such treatment. A minor would be reluctant to seek out such treatment if he/she knew that his parents or guardian would later be able to obtain the specifics of the treatment received. Therefore, a special procedure has been established for disclosure of the medical records pertaining to minors.

Under the procedure for records of minors, the parent or guardian may make requests for notification of or access to the medical records on the behalf of the minor. However, a parent or guardian will not be granted direct access to the medical record. A parent or guardian will be required to designate a physician, or other health professional, at the time he makes the request, to whom the record will be sent. The designee will be alerted to the fact that the medical record may be sensitive, and he will be requested to consider the effect that the disclosure of the entire record to a parent or guardian would have on the minor. Because it is possible that a positive response to a request for notification of a specific system of records may in itself be an invasion of privacy, a parent or guardian requesting notification of or access to a medical record of a minor will be advised that if any such record was found it has been sent to the designated health professional.

Disclosure of Records. An individual may grant consent to the disclosure to third parties of records pertaining to him. The regulation

provides that the consent must be specific with respect to which record may be disclosed, to whom it may be disclosed, and during what time frame it may be disclosed. No blanket consent documents will be honored.

The Act also provides that certain limited disclosures of a record may be made without the consent of the individual to whom it pertains.

An accounting of most disclosures must be made. The accounting will contain the date, nature and purpose of the disclosure, as well as the name and address of the recipient of the record. In most instances, it will be made available to the individual to whom the record pertains upon his request.

The Privacy Act does not apply to grantees, including state and local governments or subdivisions thereof, administering federally funded programs. Those records that the granting federal agency maintains with respect to grant applications, awards and the management of grants are subject to the provisions of the Privacy Act because those are "systems of records" subject to the provision of the Act. Records maintained by the grantees, however, are not subject to the Privacy Act. State Disability Determination Service units are covered by the Act, as discussed later in this chapter.

Access by Individual or Representative

In conformity with the requirements of the Privacy Act, it is the policy of SSA to make available to the individual or the individual's legal guardian upon request all information in SSA records (except from properly specified exempt records, e.g., investigative and program integrity files). Where an individual requests access to his medical records, special procedures have been established to provide for the release of medical information.

Individual and Representive Defined

Individual - "Individual" means a "natural person" rather than a legal entity, such as a corporation. For the purpose of disclosure, only a legal guardian will be considered as the individual himself. (Consequently, consent of the individual is not required to permit a legal guardian access to the individual's records nor is an accounting of such disclosure required.)

Authorized Representative - "Authorized representative" means any person authorized by an individual, representative payee, or legal guardian to request or receive information maintained by SSA on the individual. The authorization must be in writing, signed and dated by the individual. The writing need not be in any particular form, so long as it clearly expresses an authorization, with any limitations which the individual wishes to place on the representative's authority to act for him.

Professional Representative - Authorization need not be in a specific format when the inquirer is a professional representative of an individual asking for his assistance. Examples of professional representatives include physician, attorney, veterans' service officer, labor or union officials whose aid

has been enlisted in the prosecution of the individual's claim. A declaration by the representative that he has been asked to assist the individual, if accompanied by a copy of the individual's written request, is sufficient.

Information Which Must Be Disclosed

General. With certain limitations, SSA makes available to an individual or the individual's authorized representative all information which is maintained in SSA records on the individual and which is retrievable by name, SSN or other identifier.

Claims Information. Information which directly concerns a claimant for benefits under Titles II, XVI or XVIII of the Social Security Act may be disclosed to him or, in the case of medical information to the concerned individual or to his representative. However, information concerning other claimants on the same SSN may not be disclosed without their consent.

Medical Information. Medical information about an individual may be disclosed directly to the individual if it has been determined that direct disclosure of this information will not be likely to have an adverse effect on him. This determination will be made by a physician on the Disability Determination staff. If it is determined that the disclosure of medical information to the individual is not likely to have an adverse effect on him, the DDS will make the requested disclosure and will annotate the record to show that this disclosure was made.

If the medical officer should determine that direct disclosure of the individual's medical information to him would be likely to have an adverse effect on him or the medical officer is uncertain whether or not disclosure would have an adverse effect on him, the medical information will not be disclosed directly to the individual. The individual will be requested to designate in writing a representative through whom the record may be disclosed.

NOTE: Direct disclosure of medical information must be made to the individual, upon his request, in any case in which he has requested a hearing or review by the Appeals Council.

Medical information about an individual may also be disclosed with the consent of the individual, directly to the individual's physician or to a medical institution which is treating the individual, for the purpose of the individual's care and treatment.

Accounting for Disclosure

The Privacy Act requires SSA to keep an accurate record of the date, nature and purpose of each disclosure of individually identifiable information made without the individual's (or his legal guardian's) consent. The only exceptions to this accounting under the Privacy Act are disclosures:

a. To SSA and other DHEW employees and SSA contractors having a need to know in carrying out certain responsibilities. SSA contractors with a need to know include employees of State Disability Determination Services (DDS's) when necessary to carry out agreements with the Secretary relating to disability determinations under Titles II and XVI.

b. To the individual himself, his legal guardian or conservator or anyone he authorizes to act on his behalf.

c. To the original source of the information.

Please see exhibit 1 (Form SSA-5000) for more detailed information on routine and non-routine disclosure by the Social Security Administration.

Privileged Communication and the Rehabilitation Counselor[2]

> Every counselor has probably wondered what he would do if he were subpoenaed to testify in court concerning confidential information given to him by a client. What are the counselor's legal rights in such a situation? Should he refuse to testify and risk being held in contempt of court, or should he negate his ethical obligation to this client and divulge the confidential information? Should the counselor's obligation as a citizen

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[2]Excerpted from Miller, L.A. and Obermann, C.E. Privileged communication and the rehabilitation counselor. SCERC Unit 1-017. Iowa City, IA: University of Iowa, 1968.

Form SSA-5000 - Collection and Use of Information by the Social Security Administration

Collection and Use of Information by the Social Security Administration

The Privacy Act of 1974 requires the Social Security Administration, along with other Federal agencies, to give the following facts to each person from whom it requests information:

- the statutory authority for the request,
- why the information is needed,
- whether it is voluntary or mandatory to give the information,
- the effects of not providing the information, and
- the uses which may be made of the information.

These items are more fully explained in the following sections. If you have any questions about your rights and responsibilities under the Privacy Act, you may contact any social security office.

I. Social security's authorization to collect information

Social security's authority to collect information is found in titles II, VII, XVI, and XVIII of the Social Security Act, as amended. Specifically, the authority can be found in sections 205(a), 702, 1631(e)(1)(A) and (B), 1631(f), 1872, and 1875 of the Act. Additional authority is in part B of title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended (section 411(b)).

II. Why the information is needed

Information is collected from individuals in connection with the various insurance and benefit paying programs administered by social security. These programs include retirement, survivors, and disability insurance; Medicare hospital and medical insurance; black lung benefits; and supplemental security income. Specifically, the information is needed to enable us to:

- assign social security numbers to individuals;
- establish and maintain records of workers' earnings;
- determine whether applicants and their families are entitled to insurance coverage and/or benefit payments;
- issue checks in the right amount for the right months to people entitled to payment; and
- conduct program-oriented research in areas of income distribution and maintenance and of health insurance.

III. Mandatory and voluntary information and possible effects of withholding information

It is not mandatory for a person to give information to social security *except* in certain situations explained below. However, while there are no penalties under social security law for refusing to supply *most* kinds of information, it is usually to the person's advantage to comply with the request because not providing requested data could prevent an accurate and timely decision on any claim filed or could result in the loss of some benefits or insurance coverage.

There are several instances when it is mandatory for information to be supplied to social security. Once a person becomes entitled to social security benefits or to supplemental security income payments, the law requires that the following events be reported:

- The person's yearly earnings from employment or self-employment are higher than the applicable exempt amount.
- Work is performed outside the United States on 7 or more days in a month, and the person is under age 72 and is not disabled.
- A child leaves the care of a person entitled to benefits as a wife, husband or mother (including a divorced mother), and the child is also entitled to benefits.
- There is a change in the income, resources, household composition, living arrangements, or other circumstances affecting eligibility of a person receiving supplemental security income.

Form SSA-5000 (9-75)

September 25, 1975

Form SSA-5000 - Collection and Use of Information by the Social Security Administration

If a person withholds information about any of the above events, *specific monetary penalties may be incurred under the Social Security Act* (sections 203(g) and (h) of title II and section 1631(e)(2) of title XVI).

Also, if a person withholds any information affecting rights to and/or amounts of benefits or insurance coverage with an intent to defraud the Social Security Administration, the person shall be guilty of a misdemeanor and may be fined, imprisoned, or both. These penalties are authorized in sections 208(d), 1632(3), and 1877(a)(3) of the Social Security Act.

IV. How information is used

In the course of administering its various insurance and benefit paying programs, social security must sometimes disclose data from its records to another agency or individual without the written consent of the person to whom the record pertains. Such disclosures are made for the following reasons:

- to enable a third party or an agency to assist social security in establishing an individual's right to benefits or coverage;
- to comply with Federal laws, including the Privacy Act, which require or authorize the release of information from social security records; and
- to facilitate statistical research and audit activities necessary to assure the integrity and improvement of the social security programs.

Specific situations where disclosure may occur are listed in the following sections.

A. Disclosures to assist social security in establishing the right to coverage or benefits may be made to the following persons or agencies:

1. Current or prospective applicants and claimants for benefits under the social security programs, authorized representatives, and representative payees in order to obtain data necessary to pursue social security claims and to receive and account for benefit payments.
2. Third parties in order to obtain or to verify information regarding an individual's eligibility for or entitlement to benefits under the social security programs, or the individual's capability to manage his/her affairs.
3. Third parties to establish or verify information provided by representative payees or payee applicants.
4. Any currently entitled individual whose claim could be adversely affected by the new applicant's claim, for the purpose of allowing the individual to defend his/her entitlement or benefit amount.
5. Employers or former employers for correcting or reconstructing earnings records and for social security tax purposes.
6. Third parties and Federal, State and local agencies in order to verify information given to social security by an individual concerning his/her eligibility under the supplemental security income program.
7. The Treasury Department as pertinent to the tax and benefit payment provisions of the Social Security Act (including collection of social security taxes and verification of social security numbers); and as necessary to the investigation of alleged theft, forgery, or unlawful negotiation of social security checks.
8. The U.S. Postal Service for investigating alleged forgery or theft of social security checks.
9. The Department of Justice for:
   (a) investigating and prosecuting violations of the Social Security Act to which criminal penalties apply;
   (b) representing the Secretary of Health, Education, and Welfare in court cases; and
   (c) Investigating issues of fraud by officers or employees of social security.
10. The Veterans Administration Regional Office in the Philippines and the Department of State for administering provisions of the Social Security Act in foreign countries.
11. Providers and suppliers of hospital and medical services for the purpose of administering the Medicare program.
12. Private medical and vocational consultants for making medical examinations or vocational assessments requested by social security or a State agency.
13. State social security administrators for administering agreements for the insurance coverage of State and local employees under the social security program.
14. The Railroad Retirement Board for the purpose of administering provisions of the Railroad Retirement and Social Security Acts relating to railroad employment and for coordination of payments under the two Acts.

Form SSA-5000 - Collection and Use of Information by the Social Security Administration

15. State Welfare Departments pursuant to agreements with social security for:
    (a) administering State supplementation payments;
    (b) determining an individual's Medicaid eligibility; and
    (c) enrolling of welfare recipients for supplementary medical insurance.
16. The Civil Service Commission for the purpose of identifying those annuitants not entitled to benefits under title II of the Social Security Act and for whose supplemental medical insurance premiums the Civil Service Commission is responsible.

B. Disclosures to comply with laws requiring or authorizing the release of information may be made to the following:

1. The Veterans Administration for administering Section 412 of Title 38 of the United States Code, relating to benefits payable in certain cases to survivors of deceased veterans.
2. The Department of Labor for administering the black lung benefits provisions of title IV of the Federal Coal Mine Health and Safety Act.
3. A State or municipal agency required by local law to be furnished information as to the existence of a legally reportable medical condition.
4. State Welfare Departments for administering sections 205(c)(2)(B)(i)(II) and 402(a)(25) of the Social Security Act requiring information about social security numbers assigned to applicants for Aid to Families with Dependent Children.
5. The General Accounting Office for matters relating to social security legislation considerations, for audits of benefit payments under the social security programs, and as the collection agent of the Federal government.
6. The Bureau of the Census for planning and conducting surveys and studies authorized by Title 13 of the United States Code.
7. The National Archives to preserve records of historical or other value.
8. The Departments of Justice and Treasury for national security matters or in connection with threats on the life of the President of the United States or other persons.
9. The Department of Justice as required by section 290(c) of the Immigration and Nationality Act in connection with locating aliens.
10. Third parties or agencies showing compelling circumstances affecting an individual's health or safety; or relating to the identity of an individual who is amnesic, mentally incompetent or unconscious.
11. Committees of the Congress of the United States for matters within their jurisdiction.
12. District Courts of the United States in connection with suits brought against the Social Security Administration under the civil remedies provisions of the Privacy Act or Freedom of Information Act.
13. The Department of the Treasury in accordance with section 7602 of the Internal Revenue Code of 1954 relating to social security tax cases and Federal income tax cases involving possible criminal violations.

C. Disclosure to facilitate statistical research and audit activities may be made to the following:

1. The Treasury Department, Office of Tax Analysis, for studying the effects of income taxes and taxes on earnings.
2. The Bureau of the Census to permit the collection and processing of data for research and statistical purposes directly relating to the Social Security Act.
3. The Civil Service Commission for the study of the relationship of civil service annuities to minimum social security benefits, and the effects on the trust funds.
4. State audit agencies for auditing State supplementation payments and Medicaid eligibility considerations.
5. Professional Standards Review Organizations and State Licensing Boards for review of unethical practices or nonprofessional conduct by practitioners and providers of health care services.
6. Institutions or facilities approved by social security to provide treatment for drug addicts or alcoholics in order to assist the institutions or facilities in the treatment of the individual's condition.
7. Private concerns under contract to social security for the performance of research and statistical activities directly relating to the Social Security Act.

CLIENT'S RIGHTS

Within The

VOCATIONAL REHABILITATION AGENCY

THE FOLLOWING MATERIAL IS REPRINTED FROM THE PROCEEDINGS ON THE THIRD INSTITUTE ON REHABILITATION ISSUES, JUNE, 1976, "LEGAL CONCERNS OF THE REHABILITATION COUNSELOR".

SECTION II

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SECTION II

RIGHTS OF THE CLIENT

The focal point in American society is the individual. Protection of his independence from restraints and individual rights are set forth in the cornerstone of our government - the United States Constitution. Recognition of this fundamental interest and concern for the individual in our society is found in the ever increasing federal/state assistance programs in many areas, including health, financial security, education, and vocational rehabilitation. Concomitant with the giving of these benefits is concern that the individual's right to these benefits is fully protected. Individual rights under these programs are increasingly identified with specificity. For instance, the right to a fair hearing is mandated in many of these laws when the individual feels these rights are deprived. It is noteworthy that the Rehabilitation Act of 1973 and its implementing regulations emphasize this right to a fair hearing seen in recent federal human resources legislation.

Touching on rights of the client has relevancy and a place in this treatise on Legal Concerns of the Rehabilitation Counselor for many reasons. The natural empathy for the client demands that the counselor, in the performance of duties as a counselor, be cognizant of the legal rights of the client so that the counselor can inform the client of those rights, guarantee those rights, and avoid violation or denial of those rights. There is a positive mandate placed on the counselor to inform the client of the right to a fair hearing. Also, the client's active participation in the development of the Individualized Written Rehabilitation Program is mandated. Thus, the counselor is inexorably interwoven in the skein of client rights.

The subject of client rights covers a broad spectrum. The client has rights both in the capacity as an individual and as a client. These rights are grounded in both the federal and state constitutions, statutes

and regulations, and in the common law.

At the outset, it should be clearly understood that the discussion of rights will not be all inclusive, but will be quite exclusive. For instance, the discussion will not involve the constitutional and statutory laws and court decisions involving an individual's right to education, to vote, to equal employment opportunity and other similar rights currently invoking public interest. The discussion will not even consider rights under the First, Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution and interpretative court decisions thereof as they relate to the rights of those handicapped by reason of mental illness or mental retardation to: treatment; education; protection from deterioration; compensation for institution maintaining labor; medical care; decent living conditions; physical therapy; protection from seclusion; protection from physical injury; least restrictive alternative setting for treatment; love; marry; bear children; hold property; have a job; go to court; and other similar rights - the whole gamut of rights of concern in the case of Wyatt v. Stickney[2] and related cases.

An attempt has been made to restrict the discussion to a limited number of rights accruing to an individual in the capacity or role as a client under the vocational rehabilitation program and which directly affect the counselor.

RIGHT TO A COOPERATIVE RELATIONSHIP WITH THE COUNSELOR

In the preceding paragraphs we have thought of the rights of vocational rehabilitation clients in terms of those guaranteed in legislation and the constitution. In other terms of reference, the question can be raised regarding the rights of the vocational rehabilitation clients and vocational rehabilitation counselors at the human level. While

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[2] Wyatt v. Stickney, 325 F. Supp. (M.D. Ala. 1971) affirmed as Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974)

these rights might be classified as extra-legal, they are no less important and could themselves warrant separate treatment. By virtue of the fact that people apply for services and relate to a vocational rehabilitation service provider within a professional relationship, what rights do the clients have; what can they expect from the provider? In the same vein, what can counselors or other service providers expect from the client at this level?

Because the service providers, practitioners or counselors are working as professionals, certain expectations are inherent regarding the manner in which others are treated. Since the vocational rehabilitation service providers are usually counselors, it is reasonable to expect them to know the basic principles and concepts of counseling. These principles provide the context for their manner and attitude in relating to not only the clients, but to other people in general. Based on good counseling practice, clients are entitled to the following considerations:

a) They are treated with respect and dignity because they are recognized as unique human beings who have individual needs, desires, and abilities. The counselor has empathy for the client and seeks to establish a meaningful rapport with the client.

b) They are taken seriously as persons. Their story is heard and they receive an honest, open response.

c) They receive equal treatment - in no way are they discriminated against. Services are provided equally and expeditiously.

d) The tone of the relationship is always constructive; the counselor will not act in a manner that is destructive or harmful to the client. A cooperative spirit is always present.

e) The client can expect to be understood within the professional competence of the counselor. If the client expresses hostility, criticism and other apparent "negative" feelings, the counselor should be sufficiently professional to understand the dynamics of the situation so that a proper distinction is made between immediate surface-level feelings, and

deeper-level desires and ambitions.

In thinking about the rights of counselors in relation to serving clients, these considerations are offered:

a) Counselors can expect clients to be serious in inquiring about services. The clients are expected to be motivated to fulfill their part of the Individualized Written Rehabilitation Program. Counselors must cope with the disincentives encountered, for example, in the vocational rehabilitation of Social Security beneficiaries. Counselors must exercise professional judgment with clients who are ambivalent about being dependent on vocational rehabilitation, or who may be depressed so that while wanting to be interested in rehabilitation, may not be capable of maintaining a sustained interest and motivation.

b) Counselors can expect the relationship with clients to be productive within the context of the vocational rehabilitation process. If counselors are unable to maintain such a working relationship with a client, counselors have the right to terminate the relationship by transferring the client to another counselor.

It is important and necessary that counselors understand the nature of their legal liability. However, it is a distortion to approach the complex task of rehabilitation with a central focus of simply avoiding liability. Upon examination, most would concur that the new emphasis on client rights is a positive development, but questions continue to arise as to whether client rights simply lead to greater responsibilities upon counselors or whether, in fact, the emergence of the same new aspects of the counselor-client relationship contain the needs of counselor rights also. While it is premature to speak of "legal rights" of counselors in the sense of imposing legally enforceable obligations upon various parties that relate to the counselor in his work (e.g., client, agency supervisor, other rehabilitation service providers, employers) it is constructive to begin to articulate the

rights and duties of these parties at the human level.

In discussing the relative rights of the counselor and client, it would not be amiss to observe that in terms of counselor rights vis-a-vis his agency, the counselor has the right to receive understandable guidance, both in terms of general policy and specific case situations, as to client rights and counselor duties. He also has a right to pursue within the agency through his supervisors, questions involving his clients' rights and welfare.

In addition, the counselor has the right to be secure in his belief that if he follows agency policy and carries out that policy in good faith and with competence, he will receive the protection of the state and agency in any question of legal liability that may arise.

There are limits to the law and limitations to addressing all issues in terms of legal rights. However, there are considerable benefits to be gained by further exploration and definition of the rights of all parties in the rehabilitation process. The task, and in this task counselors have a central role, is to develop and maintain within the rehabilitation system a rights perspective which enables all parties to think in human terms of the rights and responsibilities of all individuals in the system and how those individuals can make claims to influence institutions to meet their obligations and fulfill the reasonable expectations of their constituents.

RIGHT TO FREEDOM FROM DISCRIMINATION IN SERVICES BECAUSE OF RACE, COLOR OR NATIONAL ORIGIN

As stated above, in the following paragraphs the discussion has been restricted to a limited number of rights accruing to an individual in his capacity or role as a client under the vocational rehabilitation program which directly affect the counselor.

The first right to be discussed under this circumscribed approach is a legal right guaranteed under Title VI of the Civil Rights Act of 1964.

Later in the chapter consideration will be given to the client's

rights relating to the right to an administrative review and hearing, right to participate in the development of the IWRP, right to prompt, equitable and adequate services, right to equal opportunity in employment, right to an annual review of rehabilitation decisions, and a right to formal decision on eligibility for vocational rehabilitation services. A special chapter is devoted to the complex subject of confidentiality of client records and the right of the client to personal privacy.

Title VI of the Civil Rights Act of 1964 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.

To give this right prominence and acceptance of its significance, the U.S. Civil Rights Commission has insisted that the State Plan of every agency administering the vocational rehabilitation program contain a provision acceptable to the U.S. Civil Rights Commission, providing for compliance with Title VI of the Civil Rights Act of 1964. The negotiation of an acceptable provision in the State Plan has been left to negotiation between the respective Civil Rights Regional Offices and the state agencies.

In one federal region, the approach has been to place in the respective state plans of vocational rehabilitation agencies in the region a statement of commitments under Title VI with the provision that the respective states will develop a plan of operation to achieve the commitments. In this region, to effectuate compliance with Title VI, a state agency commits itself to implement a plan of operation which incorporates as a minimum the following commitments:

1. A policy of top level management support and direction of compliance with Title VI, including the designation of a person as Civil Rights Coordinator, qualified to carry out key related technical and administrative responsibilities,

who is knowledgeable of and sensitive to the problems of minority ethnic groups.

2. A method for communication of agency compliance policy and procedures, and responsibilities thereunder, to applicants for vocational rehabilitation services, clients, vendors, and the general public.
3. An ongoing training program to inform agency employees of Commission's Title VI policies and procedures and to instruct them as to their obligations under Title VI.
4. Assignment at all levels of supervision of responsibilities for implementation of agency compliance with Title VI.
5. An equitable and timely procedure for handling complaints of discrimination in violation of Title VI.
6. A system for periodic review and evaluation of agency success in achievement of compliance with Title VI.
7. A system for insuring compliance with Title VI by the agency's vendors.
8. Maintenance of adequate records to reflect agency actions in compliance with Title VI.
9. Such additional components as from time to time may be considered by DHEW, OHD/ORS and OCR be essential to the agency's compliance with Title VI.

RIGHT TO ADMINISTRATIVE REVIEW AND A FAIR HEARING

As mentioned earlier, in new federal and state laws, greater attention is being given to an individual's entitlement to a fair hearing in the adjudication of his rights under federal programs.

Historically, in the administration of the vocational rehabilitation program in the not too distant past, there was an exercise of a high degree of independence of individual judgment by the counselors in questions relating to vocational rehabilitation services to a client, including the question of denial thereto. The client either did not

know of his legal rights or was afraid to exercise such rights, and thus accepted the denial of services. While not widespread, in some instances the approach was in keeping with the philosophy that benefits were charitable in nature.

A landmark decision relating to a beneficiary of a federal program is Goldberg v. Kelly.[3] In this case, New York City residents receiving financial aid under a federally assisted program of Aid to Families with Dependent Children brought suit challenging the adequacy of procedures for notice and hearing in connection with the termination of such aid. Specifically, the question for decision was whether a state that terminates public assistance payments to a particular recipient without affording him the opportunity for an "evidentiary" hearing prior to termination, denied the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

The essentials of an evidentiary hearing include an opportunity for the beneficiary to confront management in person before an impartial arbiter, and cross-examine and otherwise obtain information serving as the basis of the denial of services, and to offer evidence in their own behalf.

Among the key principles announced in the decision were the following:

1. Welfare benefits are a matter of statutory entitlement for the persons qualified to receive them and their termination involves state action that adjudicates important rights, and procedural due process is applicable to termination of welfare benefits.
2. A constitutional challenge to termination of welfare benefits cannot be answered by argument that public assistance benefits are a "privilege" rather than a "right".
3. Procedural due process requires that a pre-termination evidentiary

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[3] Goldberg v. Kelly, 397 U.S. 254 (1970)

hearing be held when public assistance payments to welfare recipients are discontinued.

4. Governmental interests in conserving fiscal and administrative resources by stopping payments promptly on discovery of reason to believe that a welfare recipient is no longer eligible and by reducing number of evidentiary hearings actually held, would not be sufficient to justify failure to provide pre-termination evidentiary hearing and instead delay evidentiary hearing until after discontinuance of grants.
5. Due process would require that welfare recipients on proposed termination of public assistance benefits be given timely and adequate notice detailing reasons for proposed termination and an effective opportunity to defend by confronting any adverse witnesses and by presenting their own argument and evidence orally.
6. Procedures followed by the city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate, in failing to permit recipients to appear personally with or without counsel before the official who finally determined continued eligibility, and failing to permit recipients to present to that official orally or to confront or cross-examine adverse witnesses.
7. It is not enough to satisfy due process that welfare recipients on proposed termination of public assistance payments be permitted to present their position to decision makers in writing or second-hand through caseworkers; instead, recipients must be allowed to state their position orally and be given an opportunity to confront and cross-examine witnesses relied on by department.
8. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.
9. Rights of confrontation and cross-examination apply not only

in criminal cases but also in all types of cases where administrative actions are under scrutiny.

10. At a hearing to be provided the welfare recipient prior to termination of public assistance benefits, recipient must be allowed to retain an attorney if he so desires.

11. Decision maker's conclusion as to welfare recipient's eligibility to public assistance payments must rest solely on legal rules and evidence adduced at pret-termination hearing and, to demonstrate compliance with that requirement, decision maker should state reasons for his determination and indicate evidence he relied on, though his statement need not amount to full opinion or even formal findings of fact and conclusions of law.

Mr. Justice Brennan, in delivering the opinion of the Supreme Court, stated:

> The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Justice Brennan stressed that:

> The constitutional challenges cannot be answered by an argument that public assistance benefits are a "privilege and not a right." Relevant restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, denial of a tax exemption, or to discharge from public employment.

Thus, it is realistic today to regard welfare entitlements as more like "property" than a "gratuity". Much of the existing wealth in this country takes the form of rights that do not fall within the traditional common law concepts of property. It has been aptly noted by Mr. Reich in 74 Yale L.G. 1245 that:

> Society today is built around entitlement. The automobile

> dealer has his franchise; the doctor and lawyer their professional licenses; the worker his union membership, contract, and pension rights; the executive his contract and stock options; all being devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen; routes for airlines and channels for television stations; long-term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities: to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

In the preceding discussion major emphasis was placed on the case of Goldberg v. Kelly. The treatment of the subject of the right to an evidentiary hearing would not be complete without reference to the more recent Supreme Court decision of Mathews v. Eldridge.[4] The issue in the case as stated by the Supreme Court was "whether the due process clause of the Fourteenth Amendment requires that prior to the termination of social security benefit payments, the recipient be afforded an opportunity for an evidentiary hearing." The Court held that under the circumstances of this particular case such a hearing was not required before benefits were terminated. The Court made a detailed analysis of the administrative procedures of the Social Security Administration to include notice to the beneficiary that his benefits may be terminated; a summary of the evidence upon which this decision was based; an opportunity to review and rebut the evidence; and a right to an agency reconsideration. He is also advised of his right to an evidentiary hearing before an SSA administrative law judge. However, there is no requirement that this hearing be held before benefits are terminated.

In its opinion the Court discussed and distinguished its earlier decision in Goldberg v. Kelly where the Court held that an evidentiary hearing was required before public assistance payments to welfare recipients could be discontinued. In distinguishing the Goldberg case

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[4] Mathews v. Eldridge, 96 SC 893

from the Mathews case the Court stated that due process in these types of cases require consideration of three distinct factors:

1. The private interest that will be affected by the official action.
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.
3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In discussing these factors, the Court considered that in disability determination the benefit is not based on financial need as in welfare payments; disability is largely based on easily documented medical evidence while welfare eligibility often depends on conflicting evidence and witness credibility, and that the termination of aid to a welfare recipient pending a resolution of the controversy of eligibility may deprive an eligible recipient of the very means by which to live while he waits, and this situation is not usually true in disability determination.

Obviously, in reviewing these two cases the question arises as to the position of the vocational rehabilitation client. A decision in some future case will have to be made as to whether the vocational rehabilitation client situation is more closely akin to the Mathews disability situation or to the Goldberg welfare situation. One problem is that a vocational rehabilitation client may contest any dissatisfaction from the most trivial to the most important and unlike a disability determination, the resolution could depend on conflicting evidence and witness credibility. Another problem is that the scope of inquiry may not be the narrow type issue existing in the Mathews case and this fact may not become known until the hearing itself. In analyzing the usual vocational rehabilitation client situation against the three due process factors specified above by the Supreme Court, the following considerations would seem to be relevant:

1. The private interest affected in vocational rehabilitation cases is not the financial destitution situation of Goldberg v. Kelly,
2. The administrative review provided by the vocational rehabilitation agency reduces to a minumum the risk of an erroneous deprivation of a benefit; and
3. The range of issues that can be raised by a client, as indicated above, would result in an intolerable administrative burden if no final action could be taken without a prior evidentiary hearing.

The right of a client to an "evidentiary" hearing is addressed in the federal regulations implementing the Rehabilitation Act of 1973 in the following language:

> Section 1361.46 Administrative review of agency action, and fair hearing.
> (a) The State plan shall provide that an applicant for or recipient of vocational rehabilitation services under the State plan who is dissatisfied with any action, with regard to the furnishing or denial or such services, may file a request for an administrative review and redetermination of that action to be made by a member or members of the supervisory staff of the State agency. The State plan shall further provide that when the individual is dissatisfied with the finding of this administrative review, he shall be granted an opportunity for a hearing before the State administrator or his designee.
> (b) Each applicant for or recipient of vocational rehabilitation services shall be informed of the opportunity available to him under paragraph (a) of this section.

It is noted that provision is made for an administrative review and, if satisfaction is not received as a result of the administrative review, an opportunity is granted for an evidentiary hearing before the state administrator or his designee. In a large state agency administered through the use of geographical regions, the administrative review would consist of an appeal by an applicant or client to a supervisor from a counselor's decision and an appeal to a regional director from a supervisor's decision. If the applicant for vocational rehabilitation services or client, who has established eligibility is not satisfied with the regional director's decision in his case, he then asks for an evidentiary hearing.

When the regional director, or other agency staff member, decides against the applicant or client, the written communication announcing the decision should contain the following information:

a. Acknowledgement of a right to a fair hearing citing the pertinent legal authority setting forth such right.
b. A summary of the facts and legal basis for the decision.
c. An explanation of the hearing process. A special pamphlet setting forth the agency's hearing procedures prepared especially to meet the needs of the applicant and client should be available for such purposes. This pamphlet could contain such topics as purpose of pamphlet, legal basis for hearing, right of appeal, major objectives of the hearing, nature of the administrative hearing, the hearing officer's status and duties, hearing timetable, who is present at hearing, assistance available to the appellant, procedural rights of the appellant, conduct of the hearing, decision of the hearing officer, access to record of the hearing, appeal rights from decision of the hearing officer, and such other information of special significance to an appellant.

It should be noted that the administrative hearing can achieve a number of objectives.

It can be used to:

1. Provide each appellant an opportunity to assert his right to rehabilitation services and to secure, through the hearing process, equity in his situation in relation to the law and agency policies;
2. Enable the appellant and the agency to ascertain factual data upon which the agency may make a just decision;
3. Contribute to uniformity in application of the rehabilitation laws and policies;
4. Safeguard an appellant from mistaken, negligent, unreasonable,

arbitrary, or prejudicial action or inaction by agency staff;

5. Call attention to agency policies which are inequitable or injurious or work undue hardship so that needed modification and clarification may be made.

The right of appeal by an applicant or client in the vocational rehabilitation program means that an opportunity for an administrative hearing will be granted to any individual requesting a hearing because his claim for rehabilitation services is denied, modified, terminated, or not acted upon with reasonable promptness or, because he is aggrieved by any other agency action affecting the receipt or termination of rehabilitation services, or by agency policies as they affect his situation.

The administrative hearing should be an "evidentiary" hearing as defined heretofore. It is an informal, orderly and readily available proceeding held at the convenience of the appellant before the chief administrative officer or his designee in which a dissatisfied appellant, or his representative, including legal counsel, may present his case in a manner of his choosing to show why actions, or inactions or agency policies affecting his case should be corrected.

The hearing officer must be an impartial decision maker. Though prior involvement in some aspects of the case will not necessarily bar the hearing officer from acting as the decision maker, he should not have participated in making the determination under review.

Generally, the administrative hearing procedure established by the agency contains a timetable setting forth time limitations for the accomplishment of various steps in the hearing process. The appellant, for instance, might be given 30 days after receipt of the regional director's decision to petition the hearing office in writing for an administrative hearing. For reasonable cause made known to the hearing officer, the hearing officer may extend this time upon receipt of the petition. Guidance as to what constitutes reasonable cause is usually provided. The hearing officer arranges for a hearing with a designated period of time, 30 days for instance, and upon completion of the hearing

the hearing officer provides the appellant with his decision within a given period of time, say 60 days. A motion for rehearing should normally be filed with the hearing officer within 15 days after the date of the decision. If the hearing officer does not act on the motion within 45 days after the date of the decision, provision can be made that the motion for rehearing is overruled by operation of law.

The petition for a hearing should be in writing and contain a statement of the grievances of the appellant, whether the appellant intends to be represented by legal counsel or other representative and other information which will expedite the conduct of the hearing. A checklist listing grievances, name of representative, etc., with provision for "Remarks" is sometimes used.

When an applicant or client petitions for a hearing, all parties must be afforded an opportunity for hearing after reasonable notice. Reasonable notice should be established by the agency. Generally, it is some specific period from 10 to 20 days.

The notice should include:

(1) A statement of time, place and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes and rules involved; and

(4) A short and plain statement of the matters asserted.

An opportunity must be afforded all parties to respond and present evidence as agreed on all issues involved.

Unless precluded by law, an agency might want to make provision for an informal disposition by stipulation, agreed settlement, consent order, or default.

At the hearing the appellant is assisted in presenting his case, including all facts which he believes should be taken into consideration. The appellant may bring to the hearing any documents, pictures, or records which may help clarify the points at issue. The hearing officer has the responsbility to impartially assist the appellant in presenting

his case effectively. All issues which are bases of dissatisfaction are discussed in detail so that a fair decision may be made. The agency employees who are responsible for the decision being appealed should be present.

The appellant, or his representative, must be provided an adequate opportunity:

1. To examine all documents and records to be introduced at the hearing at a reasonable time before the date of the hearing as well as during the hearing;
2. At the appellant's option, to present the case himself or with the aid of an authorized representative;
3. To bring witnesses;
4. To establish all pertinent facts and circumstances;
5. To advance any arguments without undue interference; and
6. To question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses.

If the hearing officer makes a decision on the basis of information given in confidence which cannot be shared with the appellant, the decision is invalid. To avoid this, the hearing officer will obtain other information which can be shared with the appellant.

The appellant may be represented at the hearing by friends, relatives, or legal counsel if desired. While the appellant has the right to be represented by legal counsel, it is not the general practice of the agency to pay the attorney's fee. Correspondence relating to the hearing should be directed to the attorney, not the client. Since the hearing is not generally open to the public, all persons attending the hearing must be present at the invitation of the appellant or agency. The witnesses are given an opportunity to give material and relevant information pertinent to the issues under consideration.

The administrative hearing is a quasi-judicial proceeding and the strict rules of evidence governing in a court proceeding are not generally followed. An agency that desires to provide some guidance with reference to admissible evidence could state that irrelevant, immaterial and unduly

repetitious evidence should be excluded and that rules of evidence, as applies in nonjury civil cases in the state district courts of the state, shall be followed.

As a matter of practice, a judge in a nonjury case exercises discretion in the admission of evidence and does not adhere to the strict rules of evidence applicable in a jury case. The judge will on occasion admit, for instance, hearsay evidence or permit a leading question to be asked. The judge's legal training and experience safeguards the affected person from the possible injury which served as the basis for their exclusion in jury cases.

Those agencies having available attorneys knowledgeable in rehabilitation law and practices to serve as hearing officers are most fortunate with reference to all aspects of client rights, especially as related to the administrative procedure aspect.

Upon the conclusion of the hearing, the hearing officer prepares a record of the hearing. This record can serve many purposes:

1. Serve as the official record of the hearing.
2. Provide a statement of the points at issue.
3. Provide a summary of the appeal hearing.
4. Report findings of fact.
5. Report conclusions of law.
6. Summarize the hearing officer's evaluation of evidence.
7. Record exhibits and other documents, photographs or other material considered as evidence in the hearing.
8. Serve as the official decision of the hearing officer.
9. Serve as the official record of a dismissed or withdrawn appeal.

The following information is illustrative of what would appear in a record of the hearing:

1. The names of persons present for the hearing and the capacity in which each appears, i.e., regional director, friend, legal counsel, minister, counselor, etc.
2. The date of decision from which appellant is appealing; date appellant petitioned for a fair hearing; hour, date and place

for the hearing or, if the hearing was postponed, the hour, date and place of the actual hearing presently being recorded.

3. The reasons given by the appellant for the appeal.
4. All pleadings, motions, and intermediate rulings.
5. Evidence received or considered.
6. A statement of matters officially noticed.
7. Questions and offers of proof, objections, and rulings of them.
8. Proposed findings and exceptions.
9. A statement which will verify the hearing officer has fully discharged the duties as a hearing officer and fulfilled the obligation to see the appellant has a fair hearing.
10. A concise and explicit statement of the findings of fact and the underlying supporting evidence.
11. Those conclusions of law that are applied to the findings of fact to reach the decision.
12. The decision of the hearing officer which is the final administrative decision for the agency.

Proceedings, or any part of them, should be transcribed on written request of any party. Generally, an agency has authorization to pay the cost of the transcript or assess the cost to one or more parties.

The agency rules governing administrative hearings should prescribe specifically that findings of fact must be based exclusively on the evidence and on matters officially noticed.

The finality of the decision of the hearing officer varies from state to state. At one extreme the decision of the hearing officer is the definitive and final administrative action by the state and appeal from such decision is directly to the courts.

In some states, the decision of the hearing officer is not final and must be reviewed in turn by the administrative head of the agency and the board of the agency.

It must be emphasized that an appeal procedure varies from state agency to state agency and the procedure set forth above provides but

one procedure for achieving equitable and timely consideration of a client's complaint. The detailed discussion attempts to provide a clearer understanding of the appeal process.

RIGHT OF CLIENT TO PARTICIPATION IN THE INDIVIDUALIZED WRITTEN REHABILITATION PROGRAM (IWRP)

Traditional and current views of vocational rehabilitation counseling hold that counselor and client will cooperate in the establishment, development and implementation of a rehabilitation program intended to assist the client with achieving a suitable vocational objective. This cooperative relationship is the foundation which gives substance to the therapeutic "contract" between counselor and client. With the enactment of the Rehabilitation Act of 1973, the assumptions regarding the participatory nature of the relationship between client and counselor became explicit in the law.

The regulations concerning IWRP clearly indicate that for each client determined eligible for VR services such a program will be initiated and continuously developed. The regulations state that:

> The individualized written rehabilitation program shall be developed jointly by the appropriate State agency staff member and the handicapped individual...and a copy of the written program, and any amendments, thereto, shall be provided to the handicapped individual...(Federal Register, Vol. 40, No. 228; Tuesday, November 25, 1975.)

That the Act of 1973 should contain specific guidelines for the participation of the client in his vocational rehabilitation program is consonant with broader societal trends. Consumer participation is a national

reality and a reflection of renewed societal concern for the individual's right to determine his destiny. The protection of this fundamental right through the inclusion of specific guidelines in federal legislation governing rehabilitation practice is, therefore, a seemingly natural outgrowth of the broader based consumer movement, and Congress' response to it. Practicing counselors are, however, concerned about the possible legal implications of the IWRP component particularly as it might affect their personal and professional legal status.

Ledbetter, Parmley and Chastain (1975)[5] dealt with the legal and psychological aspects of IWRP. They examined the IWRP for its potential as a legal contract and concluded that while a counselor may not be liable under contract law, such may not be the case in terms of tort liability in a malpractice suit. In this instance, they suggest that the "standard of care" applied in such a suit would be the counselor's responsibility. Discussion of this article with attorneys serving on this Prime Study Group produced some disagreement with Ledbetter, et. al. in their assumption of a professional standard of care doctrine as a base for deciding a malpractice suit.

As is suggested in the Confidentiality section of this manual, there are not legally-recognized standards of performance for the rehabilitation counseling profession which would lead to the use of a standard of care doctrine in a court suit. The section of this manual dealing with liability suggests that the "reasonable man" doctrine would be the standard which would probably apply. The discussion in this section further points out that as rehabilitation counselors develop a standard of performance which is adhered to by counselors, there may be a change in the court's perception of the counselor's standard of conduct from that of "reasonable man" to that of a rehabilitation counseling professional.

Because the counselor is employed by a state agency whose manual

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[5]Ledbetter, James E., Parmley, Robert A., and Chastain, Randall M. Rehabilitation services through contractual agreement: Legal and psychological considerations. Journal of Applied Rehabilitation Counseling, 1975, 6(3), 144-153.

and state plan must be in compliance with the federal law in order to be approved, the counselor's best hedge against legal liability at this time is to be sure his counseling practice conforms to the manual for his agency. A judge, in the view of attorneys on this Prime Study Group, is most likely to use this "standard" in his deliberations. While this interpretation may serve as a guideline, it is incumbent upon the counselor to determine from his agency's legal counsel the agency's specific support position vis-a-vis suits brought against individual counselors. A survey of state agencies dealing with this question is included as Appendix B.

As suggested earlier, participation in the initiation and development of IWRP is the fundamental client right made explicit in the Rehabilitation Act of 1973. The pervasiveness of this concept in the legislation makes it incumbent upon the counselor to examine the decision-making process in his practice and evaluate it in terms of the extent to which the client is afforded opportunity for input.

Other rights which accrue to the client in the legislation refine more specifically the nature of involvement to be expected and the knowledge base upon which decisions will rest. This model for understanding the IWRP was drawn from the Training Guide for Rehabilitation Counselors developed by the Research and Training Center at the University of West Virginia (Randolph, et. al. 1974)[6]. They perceived that the IWRP required that the client had a right to knowledge concerning (5) specific aspects of the rehabilitation process and the right for involvement in seven (7) specific decision areas.

Concerning the knowledge rights of clients, Randolph, et. al. (1974) deals with the following:

1. A definition of vocational rehabilitation.
2. An understanding of the need to determine eligibility or ineligibility and the criteria upon which such determinations are made.

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[6]Randolph, A., Greever, K., Fetzer, L., Markay, L., Welch, C., Lauda, S., Ciediford, G., Miller, K., and LaRocca, J. Understanding the guidelines for the rehabilitation act of 1973 on individualized written rehabilitation program. West Virginia: Research and Training Center, Institute, 1974.

3. Knowledge of procedures that can be employed in the event of a determination of ineligibility. This is to include the right to an administrative review, and the right to a fair hearing.
4. Knowledge of his right to confidentiality.
5. Knowledge that contingencies beyond the control of the agency or client may have a bearing on the progress of the vocational rehabilitation program.

The seven areas where the client has a right to involvement in the decision-making process include:

1. The use of extended evaluation (i.e. status 06) in terms of its meaning, possible outcomes, as well as the development of goals for extended evaluation;
2. The decision regarding eligibility or ineligibility;
3. The development of the vocational goal which is the long-term objective of the vocational rehabilitation process;
4. Establishing the intermediate objectives necessary for the ultimate realization of the vocational goal;
5. Sharing and joint evaluation of progress during the vocational rehabilitation program with at least a yearly review of the terms of the IWRP;
6. Resolution and understanding of responsibilities in terms of what both counselor and client are expected to do in carrying out provisions of the IWRP; and
7. Joint consultation and discussion of any amendments of the IWRP (Randolph, et. al. 1974).

These twelve points summarize the parameters which the client can expect the counselor will establish so as to ensure that client's right to full participation in his vocational rehabilitation through the development of the IWRP. Examination of these mandated provisions suggest that the Act of 1973 makes explicit what practicing counselors have heretofore subsumed under the heading of sound professional counseling practice. Cooperative participation has been and continues to be the sine qua non of a counseling relationship. The IWRP does not change this fundamental precept; it reinforces and makes it explicit.

In summary, this section has explored the obligations of the counselor and client with respect to involvement in the IWRP. Also discussed are client's rights which have been made explicit in the regulations governing the implementation of the IWRP section of the Act of 1973. The fact that these rights of the client are explicit makes

it incumbent upon the counselor to establish and maintain a professional practice which is consistent with the state agency policy manual and provides for the twelve (12) conditions affecting client participation in the IWRP. These twelve conditions have always been standards for counseling practice. As such, the IWRP and regulations regarding its implementation could be perceived as a set of standards against which the counselor evaluates the vocational rehabilitation service he renders his client.

RIGHT OF CLIENT TO PROMPT, EQUITABLE, AND ADEQUATE SERVICES

The federal regulations (Federal Register, Vol. 40, No. 228, Tuesday, November 25, 1975) in Section 1361.30 require standards and procedures in each state to assure expeditious and equitable handling of referrals and applications for vocational rehabilitation services. The regulations further imply and/or expect the individual to move through the rehabilitation process at a pace favorable to the individual, not necessarily to the system. It must be pointed out that the status system "00" - "32" is merely an instrument or tool to provide information at a given point. The length of time in any status is only important or relevant in relationship to the individual in that status at that time. If we lose sight of the system as being an instrument to guide or measure an individual's progress toward employability, then we force the individual to fit the system and become nothing more than a statistic.

The following table reflects the evaluation standards that might be used by a state agency to evaluate the total case load of a counselor. Again, it must be noted that this table is an instrument to indicate possible areas of concern and should not be the sole guide to judge each individual counselor case load management. The time periods in the table do not represent time periods experienced or used by any specific state agency, but are intended solely to be illustrative. A table can be developed to set standards for a particular agency.

RIGHTS OF THE HANDICAPPED

AGAINST

DISCRIMINATION

SECTION III

TITLE I—VOCATIONAL REHABILITATION SERVICES

PART A—GENERAL PROVISIONS

DECLARATION OF PURPOSE; AUTHORIZATION OF APPROPRIATIONS

Federal grants.

SEC. 100. (a) The purpose of this title is to authorize grants to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities.

(b)(1) For the purpose of making grants to States under part B of this title to assist them in meeting costs of vocational rehabilitation services provided in accordance with State plans under section 101, there is authorized to be appropriated $650,000,000 for the fiscal year ending June 30, 1974, and $680,000,000 for the fiscal year ending June 30, 1975.

Post, p. 370.

(2) For the purpose of carrying out part C of this title (relating to grants to States and public and nonprofit agencies to assist them in meeting the cost of projects to initiate or expand services to handicapped individuals, especially those with the most severe handicaps) and part D of this title (relating to the study of comprehensive service needs of individuals with the most severe handicaps), there is authorized to be appropriated $37,000,000 for the fiscal year ending June 30, 1974, and $39,000,000 for the fiscal year ending June 30, 1975, and there is further authorized to be appropriated for such purposes for each such year such additional sums as the Congress may determine to be necessary. Of the sums appropriated under this paragraph for each such fiscal year, $1,000,000 in each such year shall be available only for the purpose of carrying out Part D of this title.

Post, p. 372.

Post, p. 374.

STATE PLANS

SEC. 101. (a) For each fiscal year in which a State desires to participate in programs under this title, a State shall submit to the Secretary for his approval an annual plan for vocational rehabilitation services which shall—

State agency for plan administration, designation.

(1)(A) designate a State agency as the sole State agency to administer the plan, or to supervise its administration by a local agency, except that (i) where under the State's law the State agency for the blind or other agency which provides assistance or services to the adult blind, is authorized to provide vocational rehabilitation services to such individuals, such agency may be designated as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for the blind (or to supervise the administration of such part by

a local agency) and a separate State agency may be designated as the sole State agency with respect to the rest of the State plan, and (ii) the Secretary, upon the request of a State, may authorize such agency to share funding and administrative responsibility with another agency of the State or with a local agency in order to permit such agencies to carry out a joint program to provide services to handicapped individuals, and may waive compliance with respect to vocational rehabilitation services furnished under such programs with the requirement of clause (4) of this subsection that the plan be in effect in all political subdivisions of that State;

Waiver authority.

(B) provide that the State agency so designated to administer or supervise the administration of the State plan, or (if there are two State agencies designated under subclause (A) of this clause) to supervise or administer the part of the State plan that does not relate to services for the blind, shall be (i) a State agency primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of handicapped individuals, (ii) the State agency administering or supervising the administration of education or vocational education in the State, or (iii) a State agency which includes at least two other major organizational units each of which administers one or more of the major public education, public health, public welfare, or labor programs of the State;

(2) provide, except in the case of agencies described in clause (1)(B)(i)—

State rehabilitation bureau, director, staff.

(A) that the State agency designated pursuant to paragraph (1) (or each State agency if two are so designated) shall include a vocational rehabilitation bureau, division, or other organizational unit which (i) is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of handicapped individuals, and is responsible for the vocational rehabilitation program of such State agency, (ii) has a full-time director, and (iii) has a staff employed on such rehabilitation work of such organizational unit all or substantially all of whom are employed full time on such work; and

(B)(i) that such unit shall be located at an organizational level and shall have an organizational status within such State agency comparable to that of other major organizational units of such agency, or (ii) in the case of an agency described in clause (1)(B)(ii), either that such unit shall be so located and have such status, or that the director of such unit shall be the executive officer of such State agency; except that, in the case of a State which has designated only one State agency pursuant to clause (1) of this subsection, such State may, if it so desires, assign responsibility for the part of the plan under which vocational rehabilitation services are provided for the blind to one organizational unit of such agency, and assign responsibility for the rest of the plan to another organizational unit of such agency, with the provisions of this clause applying separately to each of such units;

State financial participation.

(3) provide for financial participation by the State, or if the State so elects, by the State and local agencies to meet the amount of the non-Federal share;

Political subdivisions, participation, waiver.

(4) provide that the plan shall be in effect in all political subdivisions, except that in the case of any activity which, in the judgment of the Secretary, is likely to assist in promoting the vocational rehabilitation of substantially larger numbers of handi-

capped individuals or groups of handicapped individuals the Secretary may waive compliance with the requirement herein that the plan be in effect in all political subdivisions of the State to the extent and for such period as may be provided in accordance with regulations prescribed by him, but only if the non-Federal share of the cost of such vocational rehabilitation services is met from funds made available by a local agency (including, to the extent permitted by such regulations, funds contributed to such agency by a private agency, organization, or individual);

(5)(A) contain the plans, policies, and methods to be followed in carrying out the State plan and in its administration and supervision, including a description of the method to be used to expand and improve services to handicapped individuals with the most severe handicaps; and, in the event that vocational rehabilitation services cannot be provided to all eligible handicapped individuals who apply for such services, show (i) the order to be followed in selecting individuals to whom vocational rehabilitation services will be provided, and (ii) the outcomes and service goals, and the time within which they may be achieved, for the rehabilitation of such individuals, which order of selection for the provision of vocational rehabilitation services shall be determined on the basis of serving first those individuals with the most severe handicaps and shall be consistent with priorities in such order of selection so determined, and outcome and service goals for serving handicapped individuals, established in regulations prescribed by the Secretary; and

(B) provide satisfactory assurances to the Secretary that the State has studied and considered a broad variety of means for providing services to individuals with the most severe handicaps;

(6) provide for such methods of administration, other than methods relating to the establishment and maintenance of personnel standards, as are found by the Secretary to be necessary for the proper and efficient administration of the plan;

(7) contain (A) provisions relating to the establishment and maintenance of personnel standards, which are consistent with any State licensure laws and regulations, including provisions relating to the tenure, selection, appointment, and qualifications of personnel, and (B) provisions relating to the establishment and maintenance of minimum standards governing the facilities and personnel utilized in the provision of vocational rehabilitation services, but the Secretary shall exercise no authority with respect to the selection, method of selection, tenure of office, or compensation of any individual employed in accordance with such provision;

(8) provide, at a minimum, for the provision of the vocational rehabilitation services specified in clauses (1) through (3) of subsection (a) of section 103, and the remainder of such services specified in such section after full consideration of eligibility for similar benefits under any other program, except that, in the case of the vocational rehabilitation services specified in clauses (4) and (5) of subsection (a) of such section, such consideration shall not be required where it would delay the provision of such services to any individual;

Individualized written rehabilitation program.

(9) provide that (A) an individualized written rehabilitation program meeting the requirements of section 102 will be developed for each handicapped individual eligible for vocational rehabilitation services under this Act, (B) such services will be

provided under the plan in accordance with such program, and (C) records of the characteristics of each applicant will be kept specifying, as to those individuals who apply for services under this title and are determined not to be eligible therefor, the reasons for such determinations;

Reports, recordkeeping.

(10) provide that the State agency will make such reports in such form, containing such information (including the data described in subclause (C) of clause (9) of this subsection, periodic estimates of the population of handicapped individuals eligible for services under this Act in such State, specifications of the number of such individuals who will be served with funds provided under this Act and the outcomes and service goals to be achieved for such individuals in each priority category specified in accordance with clause (5) of this subsection, and the service costs for each such category), and at such time as the Secretary may require to carry out his functions under this title, and comply with such provisions as he may find necessary to assure the correctness and verification of such reports;

Intergovernmental cooperation.

(11) provide for entering into cooperative arrangements with, and the utilization of the services and facilities of, the State agencies administering the State's public assistance programs, other programs for handicapped individuals, veterans programs, manpower programs, and public employment offices, and the Social Security Administration of the Department of Health, Education, and Welfare, the Veterans' Administration, and other Federal, State, and local public agencies providing services related to the rehabilitation of handicapped individuals;

Community resources, utilization.

(12) provide satisfactory assurances to the Secretary that, in the provision of vocational rehabilitation services, maximum utilization shall be made of public or other vocational or technical training facilities or other appropriate resources in the community;

Disabled Federal employees.

(13) (A) provide that vocational rehabilitation services provided under the State plan shall be available to any civil employee of the United States disabled while in the performance of his duty on the same terms and conditions as apply to other persons, and

Disabled public safety officers.

(B) provide that special consideration will be given to the rehabilitation under this Act of a handicapped individual whose handicapping condition arises from a disability sustained in the line of duty while such individual was performing as a public safety officer and the proximate cause of such disability was a criminal act, apparent criminal act, or a hazardous condition resulting directly from the officer's performance of duties in direct connection with the enforcement, execution, and administration of law or fire prevention, firefighting, or related public safety activities;

Residency requirement, prohibition.

(14) provide that no residence requirement will be imposed which excludes from services under the plan any individual who is present in the State;

Continuing studies.

(15) provide for continuing statewide studies of the needs of handicapped individuals and how these needs may be most effectively met (including the State's needs for rehabilitation facilities) with a view toward the relative need for services to significant segments of the population of handicapped individuals and the need for expansion of services to those individuals with the most severe handicaps;

Employment review and reevaluation.

(16) provide for (A) periodic review and reevaluation of the status of handicapped individuals placed in extended employment in rehabilitation facilities (including workshops) to determine the feasibility of their employment, or training for employment, in the competitive labor market, and (B) maximum efforts to place such individuals in such employment or training whenever it is determined to be feasible;

State facilities, construction costs, Federal share.

(17) provide that where such State plan includes provisions for the construction of rehabilitation facilities—

(A) the Federal share of the cost of construction thereof for a fiscal year will not exceed an amount equal to 10 per centum of the State's allotment for such year,

Post, p. 384.

(B) the provisions of section 306 shall be applicable to such construction and such provisions shall be deemed to apply to such construction, and

(C) there shall be compliance with regulations the Secretary shall prescribe designed to assure that no State will reduce its efforts in providing other vocational rehabilitation services (other than for the establishment of rehabilitation facilities) because its plan includes such provisions for construction;

Policy planning, trainee participation.

(18) provide satisfactory assurances to the Secretary that the State agency designated pursuant to clause (1) (or each State agency if two are so designated) and any sole local agency administering the plan in a political subdivision of the State will take into account, in connection with matters of general policy arising in the administration of the plan, the views of individuals and groups thereof who are recipients of vocational rehabilitation services (or, in appropriate cases, their parents or guardians), working in the field of vocational rehabilitation, and providers of vocational rehabilitation services; and

(19) provide satisfactory assurances to the Secretary that the continuing studies required under clause (15) of this subsection, as well as an annual evaluation of the effectiveness of the program in meeting the goals and priorities set forth in the plan, will form the basis for the submission, from time to time as the Secretary may require, of appropriate amendments to the plan.

Plan disapproval, hearing opportunity.

(b) The Secretary shall approve any plan which he finds fulfills the conditions specified in subsection (a) of this section, and he shall disapprove any plan which does not fulfill such conditions. Prior to such disapproval, the Secretary shall notify a State of his intention to disapprove its plan, and he shall afford such State reasonable notice and opportunity for hearing.

Noncompliance, payment limitation.

(c) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this section, finds that—

(1) the plan has been so changed that it no longer complies with the requirements of subsection (a) of this section; or

(2) in the administration of the plan there is a failure to comply substantially with any provision of such plan,

the Secretary shall notify such State agency that no further payments will be made to the State under this title (or, in his discretion, that such further payments will be reduced, in accordance with regulations the Secretary shall prescribe, or that further payments will not be made to the State only for the projects under the parts of the State plan affected by such failure), until he is satisfied there is no longer

any such failure. Until he is so satisfied, the Secretary shall make no further payments to such State under this title (or shall limit payments to projects under those parts of the State plan in which there is no such failure).

(d) If any State is dissatisfied with the Secretary's action under subsection (b) or (c) of this section, such State may appeal to the United States district court for the district where the capital of such State is located and judicial review of such action shall be on the record in accordance with the provisions of chapter 7 of title 5, United States Code. Judicial review. 5 USC 701.

INDIVIDUALIZED WRITTEN REHABILITATION PROGRAM

SEC. 102. (a) The Secretary shall insure that the individualized written rehabilitation program required by section 101(a)(9) in the case of each handicapped individual is developed jointly by the vocational rehabilitation counselor or coordinator and the handicapped individual (or, in appropriate cases, his parents or guardians), and that such program meets the requirements set forth in subsection (b) of this section. Such written program shall set forth the terms and conditions, as well as the rights and remedies, under which goods and services will be provided to the individual.

(b) Each individualized written rehabilitation program shall be reviewed on an annual basis at which time each such individual (or, in appropriate cases, his parents or guardians) will be afforded an opportunity to review such program and jointly redevelop its terms. Such program shall include, but not be limited to (1) a statement of long-range rehabilitation goals for the individual and intermediate rehabilitation objectives related to the attainment of such goals, (2) a statement of the specific vocational rehabilitation services to be provided, (3) the projected date for the initiation and the anticipated duration of each such service, (4) objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, and, (5) where appropriate, a detailed explanation of the availability of a client assistance project established in such area pursuant to section 112. Annual review.

(c) The Secretary shall also insure that (1) in developing and carrying out individualized written rehabilitation program required by section 101 in the case of each handicapped individual primary emphasis is placed upon the determination and achievement of a vocational goal for such individual, (2) a decision that such an individual is not capable of achieving such a goal and thus not eligible for vocational rehabilitation services provided with assistance under this part, is made only in full consultation with such individual (or, in appropriate cases, his parents or guardians), and only upon the certification, as an amendment to such written program, that the evaluation of rehabilitation potential has demonstrated beyond any reasonable doubt that such individual is not then capable of achieving such a goal, and (3) any such decision shall be reviewed at least annually in accordance with the procedure and criteria established in this section. Ineligibility.

SCOPE OF VOCATIONAL REHABILITATION SERVICES

SEC. 103. (a) Vocational rehabilitation services provided under this Act are any goods or services necessary to render a handicapped individual employable, including, but not limited to, the following:

(1) evaluation of rehabilitation potential, including diagnostic and related services, incidental to the determination of eligibility for, and the nature and scope of, services to be provided, including,

where appropriate, examination by a physician skilled in the diagnosis and treatment of emotional disorders, or by a licensed psychologist in accordance with State laws and regulations, or both;

(2) counseling, guidance, referral, and placement services for handicapped individuals, including followup, follow-along, and other postemployment services necessary to assist such individuals to maintain their employment and services designed to help handicapped individuals secure needed services from other agencies, where such services are not available under this Act;

(3) vocational and other training services for handicapped individuals, which shall include personal and vocational adjustment, books, and other training materials, and services to the families of such individuals as are necessary to the adjustment or rehabilitation of such individuals: *Provided*, That no training services in institutions of higher education shall be paid for with funds under this title unless maximum efforts have been made to secure grant assistance, in whole or in part, from other sources to pay for such training;

(4) physical and mental restoration services, including, but not limited to, (A) corrective surgery or therapeutic treatment necessary to correct or substantially modify a physical or mental condition which is stable or slowly progressive and constitutes a substantial handicap to employment, but is of such nature that such correction or modification may reasonably be expected to eliminate or substantially reduce the handicap within a reasonable length of time, (B) necessary hospitalization in connection with surgery or treatment, (C) prosthetic and orthotic devices, (D) eyeglasses and visual services as prescribed by a physician skilled in the diseases of the eye or by an optometrist, whichever the individual may select, (E) special services (including transplantation and dialysis), artificial kidneys, and supplies necessary for the treatment of individuals suffering from end-stage renal disease, and (F) diagnosis and treatment for mental and emotional disorders by a physician or licensed psychologist in accordance with State licensure laws;

(5) maintenance, not exceeding the estimated cost of subsistence, during rehabilitation;

(6) interpreter services for deaf individuals, and reader services for those individuals determined to be blind after an examination by a physician skilled in the diseases of the eye or by an optometrist, whichever the individual may select;

(7) recruitment and training services for handicapped individuals to provide them with new employment opportunities in the fields of rehabilitation, health, welfare, public safety, and law enforcement, and other appropriate service employment;

(8) rehabilitation teaching services and orientation and mobility services for the blind;

(9) occupational licenses, tools, equipment, and initial stocks and supplies;

(10) transportation in connection with the rendering of any vocational rehabilitation service; and

(11) telecommunications, sensory, and other technological aids and devices.

(b) Vocational rehabilitation services, when provided for the benefit of groups of individuals, may also include the following:

(1) in the case of any type of small business operated by individuals with the most severe handicaps the operation of which

can be improved by management services and supervision provided by the State agency, the provision of such services and supervision, along or together with the acquisition by the State agency of vending facilities or other equipment and initial stocks and supplies; and

(2) the construction or establishment of public or nonprofit rehabilitation facilities and the provision of other facilities and services which promise to contribute substantially to the rehabilitation of a group of individuals but which are not related directly to the individualized rehabilitation written program of any one handicapped individual.

NON-FEDERAL SHARE FOR CONSTRUCTION

SEC. 104. For the purpose of determining the amount of payments to States for carrying out part B of this title, the non-Federal share, subject to such limitations and conditions as may be prescribed in regulations by the Secretary, shall include contributions of funds made by any private agency, organization, or individual to a State or local agency to assist in meeting the costs of construction or establishment of a public or nonprofit rehabilitation facility, which would be regarded as State or local funds except for the condition, imposed by the contributor, limiting use of such funds to construction or establishment of such facility.

PART B—BASIC VOCATIONAL REHABILITATION SERVICES

STATE ALLOTMENTS

SEC. 110. (a) For each fiscal year, each State shall be entitled to an allotment of an amount bearing the same ratio to the amount authorized to be appropriated under subsection (b)(1) of section 100 for allotment under this section as the product of (1) the population of the State and (2) the square of its allotment percentage bears to the sum of the corresponding products for all the States. The allotment to any State (other than Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands) under the first sentence of this subsection for any fiscal year which is less than one-quarter of 1 per centum of the amount appropriated under subsection (b)(1) of section 100, or $2,000,000, whichever is greater, shall be increased to that amount, the total of the increases thereby required being derived by proportionately reducing the allotments to each of the remaining such States under the first sentence of this subsection, but with such adjustments as may be necessary to prevent the allotment of any such remaining States from being thereby reduced to less than that amount.

(b) If the payment to a State under section 111(a) for a fiscal year is less than the total payments such State received under section 2 of the Vocational Rehabilitation Act for the fiscal year ending June 30, 1973, such State shall be entitled to an additional payment (subject to the same terms and conditions applicable to other payments under this part) equal to the difference between such payment under section 111(a) and the amount so received by it. Payments attributable to the additional payment to a State under this subsection shall be made only from appropriations specifically made to carry out this subsection, and such additional appropriations are hereby authorized. Additional payments. 79 Stat. 1282. 29 USC 32.

(c) Whenever the Secretary determines, after reasonable opportunity for the submission to him of comments by the State agency administering or supervising the program established under this title, that any payment of an allotment to a State under section 111(a) for Unused funds, distribution.

any fiscal year will not be utilized by such State in carrying out the purposes of this title, he shall make such amount available for carrying out the purposes of this title to one or more other States to the extent he determines such other State will be able to use such additional amount during such year for carrying out such purposes. Any amount made available to a State for any fiscal year pursuant to the preceding sentence shall, for the purposes of this part, be regarded as an increase of such State's allotment (as determined under the peceding provisions of this section) for such year.

PAYMENTS TO STATES

SEC. 111. (a) From each State's allotment under this part for any fiscal year (including any additional payment to it under section 110 (b)), the Secretary shall pay to such State an amount equal to the Federal share of the cost of vocational rehabilitation services under the plan for such State approved under section 101, including expenditures for the administration of the State plan, except that the total of such payments to such State for such fiscal year may not exceed its allotment under subsection (a) (and its additional payment under subsection (b), if any) of section 110 for such year and such payments shall not be made in an amount which would result in a violation of the provisions of the State plan required by clause (17) of section 101(a), and except that the amount otherwise payable to such State for such year under this section shall be reduced by the amount (if any) by which expenditures from non-Federal sources during such year under this title are less than expenditures under the State plan for the fiscal year ending June 30, 1972, under the Vocational Rehabilitation Act.

68 Stat. 652.
29 USC 31 note.

(b) The method of computing and paying amounts pursuant to subsection (a) shall be as follows:

(1) The Secretary shall, prior to the beginning of each calendar quarter or other period prescribed by him, estimate the amount to be paid to each State under the provisions of such subsection for such period, such estimate to be based on such records of the State and information furnished by it, and such other investigation, as the Secretary may find necessary.

(2) The Secretary shall pay, from the allotment available therefor, the amount so estimated by him for such period, reduced or increased, as the case may be, by any sum (not previously adjusted under this paragraph) by which he finds that his estimate of the amount to be paid the State for any prior period under such subsection was greater or less than the amount which should have been paid to the State for such prior period under such subsection. Such payment shall be made prior to audit or settlement by the General Accounting Office, shall be made through the disbursing facilities of the Treasury Department, and shall be made in such installments as the Secretary may determine.

CLIENT ASSISTANCE

Pilot projects.
Post, p. 381.

SEC. 112. (a) From funds appropriated under section 304 for special projects and demonstrations in excess of an amount equal to the amount obligated for expenditure for carrying out such projects and demonstrations from appropriations under the Vocational Rehabilitation Act in the fiscal year ending June 30, 1973, the Secretary shall set aside up to $1,500,000, but no less than $500,000 for the fiscal year ending June 30, 1974, and up to $2,500,000 but no less than $1,000,000 for the fiscal year ending June 30, 1975, to establish in no less than 7

nor more than 20 geographically dispersed regions client assistance pilot projects (hereinafter in this section referred to as "projects") to provide counselors to inform and advise all clients and client applicants in the project area of all available benefits under this Act and, upon request of such client or client applicant, to assist such clients or applicants in their relationships with projects, programs, and facilities providing services to them under this Act.

(b) The Secretary shall prescribe regulations which shall include the following requirements: Regulations, requirements.

(1) No employees of such projects shall be presently serving as staff or consultants or receiving benefits of any kind directly or indirectly from any rehabilitation project, program, or facility receiving assistance under this Act in the project area.

(2) Each project shall be afforded reasonable access to policymaking and administrative personnel in State and local rehabilitation programs, projects, and facilities.

(3) The project shall submit an annual report, through the State agency designated pursuant to section 101, to the Secretary on the operation of the project during the previous year, including a summary of the work done and a uniform statistical tabulation of all cases handled by such project. A copy of each such report shall be submitted to the appropriate committees of the Congress by the Secretary, together with a summary of such reports and his evaluation of such projects, including appropriate recommendations. Annual reports, submittal to congressional committees. Ante, p. 363.

(4) Each State agency may enter into cooperative arrangements with institutions of higher education to secure the services in such projects of graduate students who are undergoing clinical training activities in related fields. No compensation with funds appropriated under this Act shall be provided to such students. Graduate student services.

(5) Reasonable assurance shall be given by the appropriate State agency that all clients or client applicants within the project area shall have the opportunity to receive adequate service under the project and shall not be pressured against or otherwise discouraged from availing themselves of the services available under such project.

(6) The project shall be funded, administered, and operated directly by and with the concurrence of the State agency designated pursuant to section 101.

Part C—Innovation and Expansion Grants

State allotments

Sec. 120. (a)(1) From the sums available pursuant to section 100 (b)(2) for any fiscal year for grants to States to assist them in meeting the costs described in section 121, each State shall be entitled to an allotment of an amount bearing the same ratio to such sums as the population of the State bears to the population of all the States. The allotment to any State under the preceding sentence for any fiscal year which is less than $50,000 shall be increased to that amount, and for the fiscal year ending June 30, 1974, no State shall receive less than the amount necessary to cover up to 90 per centum of the cost of continuing projects assisted under section 4(a)(2)(A) of the Vocational Rehabilitation Act, except that no such project may receive financial assistance under both the Vocational Rehabilitation Act and this Act for a total period of time in excess of three years. The total of the increase required by the preceding sentence shall be derived by propor- Ante, p. 363. 82 Stat. 299. 29 USC 34.

tionately reducing the allotments to each of the remaining States under the first sentence of this section, but with such adjustments as may be necessary to prevent the allotment of any of such remaining States from thereby being reduced to less than $50,000.

Unused funds, redistribution.

(b) Whenever the Secretary determines that any amount of an allotment to a State for any fiscal year will not be utilized by such State in carrying out the purposes of this section, he shall make such amount available for carrying out the purposes of this section to one or more other States which he determines will be able to use additional amounts during such year for carrying out such purposes. Any amount made available to a State for any fiscal year pursuant to the preceding sentence shall, for purposes of this part, be regarded as an increase of such State's allotment (as determined under the preceding provisions of this section) for such year.

PAYMENTS TO STATES

SEC. 121. (a) From each State's allotment under this part for any fiscal year, the Secretary shall pay to such State or, at the option of the State agency designated pursuant to section 101(a)(1), to a public or nonprofit organization or agency, a portion of the cost of planning, preparing for, and initiating special programs under the State plan approved pursuant to section 101 to expand vocational rehabilitation services, including programs to initiate or expand such services to individuals with the most severe handicaps, or of special programs under such State plan to initiate or expand services to classes of handicapped individuals who have unusual and difficult problems in connection with their rehabilitation, particularly handicapped individuals who are poor, and responsibility for whose treatment, education, and rehabilitation is shared by the State agency designated in section 101 with other agencies. The Secretary may require that any portion of a State's allotment under this section, but not more than 50 per centum of such allotment, may be expended in connection with only such projects as have first been approved by the Secretary. Any grant of funds under this section which will be used for direct services to handicapped individuals or for establishing or maintaining facilities which will render direct services to such individuals must have the prior approval of the appropriate State agency designated pursuant to section 101.

Ante, p. 363.

(b) Payments under this section with respect to any project may be made for a period of not to exceed three years beginning with the commencement of the project as approved, and sums appropriated for grants under this section shall remain available for such grants through the fiscal year ending June 30, 1976. Payments with respect to any project may not exceed 90 per centum of the cost of such project. The non-Federal share of the cost of a project may be in cash or in kind and may include funds spent for project purposes by a cooperating public or nonprofit agency provided that it is not included as a cost in any other federally financed program.

(c) Payments under this section may be made in advance or by way of reimbursement for services performed and purchases made, as may be determined by the Secretary, and shall be made on such conditions as the Secretary finds necessary to carry out the purposes of this section.

TITLE V—MISCELLANEOUS

EFFECT ON EXISTING LAW

SEC. 500. (a) The Vocational Rehabilitation Act (29 U.S.C. 31 et seq.) is repealed ninety days after the date of enactment of this Act and references to such Vocational Rehabilitation Act in any other provision of law shall, ninety days after such date, be deemed to be references to the Rehabilitation Act of 1973. Unexpended appropriations for carrying out the Vocational Rehabilitation Act may be made available to carry out this Act, as directed by the President. Approved State plans for vocational rehabilitation, approved projects, and contractual arrangements authorized under the Vocational Rehabilitation Act will be recognized under comparable provisions of this Act so that there is no disruption of ongoing activities for which there is continuing authority.

Repeal.
68 Stat. 652; 79 Stat. 2182; 82 Stat. 297.
Unused funds.
Savings provision.

(b) The authorizations of appropriations in the Vocational Rehabilitation Act are hereby extended at the level specified for the fiscal year 1972 for the fiscal year 1973.

Appropriations, extension.

EMPLOYMENT OF HANDICAPPED INDIVIDUALS

SEC. 501. (a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Interagency Committee on Handicapped Employees, establishment.
83 Stat. 864.
5 USC 5315 note.
Committee functions.

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Civil Service Commission

Federal agencies, affirmative action program plans.

and to the Committee 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. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

Rehabilitated individuals, employment.

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

Report to congressional committees.

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

Unpaid Federal work experience.

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this Act, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

Federal agency cooperation.

(f) (1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Establishment; membership.

SEC. 502. (a) There is established within the Federal Government the Architectural and Transportation Barriers Compliance Board (hereinafter referred to as the "Board") which shall be composed of the heads of each of the following departments or agencies (or their designees whose positions are Executive Level IV or higher):

83 Stat. 864. 5 USC 5315 note.

(1) Department of Health, Education, and Welfare;
(2) Department of Transportation;
(3) Department of Housing and Urban Development;
(4) Department of Labor;

(5) Department of the Interior;
(6) General Services Administration;
(7) United States Postal Service; and
(8) Veterans' Administration.

(b) It shall be the function of the Board to: (1) insure compliance with the standards prescribed by the General Services Administration, the Department of Defense, and the Department of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968 (Public Law 90-480), as amended by the Act of March 5, 1970 (Public Law 91-205); (2) investigate and examine alternative approaches to the architectural, transportation, and attitudinal barriers confronting handicapped individuals, particularly with respect to public buildings and monuments, parks and parklands, public transportation (including air, water, and surface transportation whether interstate, foreign, intrastate, or local), and residential and institutional housing; (3) determine what measures are being taken by Federal, State, and local governments and by other public or nonprofit agencies to eliminate the barriers described in clause (2) of this subsection; (4) promote the use of the International Accessibility Symbol in all public facilities that are in compliance with the standards prescribed by the Administrator of the General Services Administration, [ie Secretary of Defense, and the Secretary of Housing and Urban Development pursuant to the Architectural Barriers Act of 1968; (5) make to the President and to Congress reports which shall describe in detail the results to its investigations under clauses (2) and (3) of this subsection; and (6) make to the President and to the Congress such recommendations for legislation and administration as it deems necessary or desirable to eliminate the barriers described in clause (2) of this subsection.

82 Stat. 718; 84 Stat. 49. 42 USC 4151.

International Accessibility Symbol, promotion.

Reports to President and Congress.

(c) The Board shall also (1) (A) determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of handicapped individuals; (2) determine what measures are being taken, especially by public and other nonprofit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems and (B) to make housing available and accessible to handicapped individuals or to meet sheltered housing needs; and (3) prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for handicapped individuals, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

Transportation barriers.

(d) In carrying out its functions under this section, the Board shall conduct investigations, hold public hearings, and issue such orders as it deems necessary to insure compliance with the provisions of the Acts cited in subsection (b). The provisions of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, shall apply to procedures [nder this section, and an order of compliance issued by the Board [all be a final order for purposes of judicial review.

5 USC 551, 701.

87 STAT. 393

(e) The Board is authorized to appoint as many hearing examiners as are necessary for proceedings required to be conducted under this section. The provisions applicable to hearing examiners appointed under section 3105 of title 5, United States Code, shall apply to hearing examiners appointed under this subsection.

80 Stat. 415.

Technical assistance.

(f) The departments or agencies specified in subsection (a) of this section shall make available to the Board such technical, administrative, or other assistance as it may require to carry out its functions under this section, and the Board may appoint such other advisers, technical experts, and consultants as it deems necessary to assist it in carrying out its functions under this section. Special advisory and technical experts and consultants appointed pursuant to this subsection shall, while performing their functions under this section, be entitled to receive compensation at rates fixed by the Secretary, but not exceeding the daily pay rate, for a person employed as a GS-18 under section 5332 of title 45, United States Code, including traveltime, and while serving away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently.

5 USC 5332 note.

80 Stat. 499; 83 Stat. 190.

Report to Congress.

(g) The Board shall, at the end of each fiscal year, report its activities during the preceding fiscal year to the Congress. Such report shall include an assessment of the extent of compliance with the Acts cited in subsection (b) of this section, along with a description and analysis of investigations made and actions taken by the Board, and the reports and recommendations described in clauses (5) and (6) of subsection (b) of this section. The Board shall prepare two final reports of its activities under subsection (c). One such report shall be on its activities in the field of transportation barriers to handicapped individuals, and the other such report shall be on its activities in the field of the housing needs of handicapped individuals. The Board shall, prior to January 1, 1975, submit each such report, together with its recommendations, to the President and the Congress. The Board shall also prepare for such submission an interim report of its activities in each such field within 18 months after the date of enactment of this Act.

Report to the President and Congress.

Appropriation.

(h) There are authorized to be appropriated for the purpose of carrying out the duties and functions of the Board under this section $1,000,000 each for the fiscal years ending June 30, 1974, and June 30, 1975.

EMPLOYMENT UNDER FEDERAL CONTRACTS

SEC. 503. (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6). The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

Ante, p. 361.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with th United States, relating to employment of handicapped individuals,

such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination. Waiver authority.

NONDISCRIMINATION UNDER FEDERAL GRANTS

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 under any program or activity receiving Federal financial assistance. Ante, p. 361.

Approved September 26, 1973.

Public Law 93-516
93rd Congress, H. R. 17503
December 7, 1974

REHABILITATION ACT AMENDMENTS OF 1974

SEC. 111. (a) Section 7(6) of such Act is amended by adding at the end thereof the following new sentence: "For the purposes of titles IV and V of this Act, such term means 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.".

SECTION 504 OF THE REHABILITATION ACT OF 1973

FACT SHEET

Handicapped Persons

Rights Under Federal Law

July, 1977

U. S. Department of Health, Education, and Welfare
Office of the Secretary
Office for Civil Rights
Washington, D.C. 20201

"Today I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans--the blind, the deaf persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps.

"The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." (Statement by Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare on April 28, 1977.)

In September 1973, Congress passed a law that prohibits discrimination on the basis of physical or mental handicap in every federally assisted program or activity in the country. That law is Section 504 of the Rehabilitation Act.

Section 504 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."

In April 1977, a final Section 504 regulation was issued for all recipients of funds from HEW, including elementary and secondary schools, colleges, hospitals, social service agencies, and in some instances, doctors. The Section 504 regulation will effect fundamental changes in many facets of American life, in the actions and attitudes of institutions and individuals toward handicapped persons.

The term handicap includes such diseases or conditions as speech, hearing, visual and orthopedic impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, heart disease, mental retardation, emotional illness, and specific learning disabilities such as perceptual handicaps, dyslexia, minimal brain dysfunction and developmental aphasia.

In accordance with a formal opinion of the Attorney General of the United States, alcohol and drug addicts are also considered handicapped individuals. Physical or mental impairments do not constitute a handicap, however, unless they are severe enough to substantially limit one or more of the major life functions.

PROGRAM ACCESSIBILITY

The regulation provides that programs must be accessible to handicapped persons. It does not require that every building or part of a building must be accessible but the program as a whole must be accessible. Structural changes to make the program accessible must be made only if alternatives, such as reassignment of classes or home visits, are not possible. The intent is to make all benefits or services available to handicapped persons as soon as possible. Institutions are given three years to complete structural changes to their physical plants; nonstructural changes must be made in 60 days.

In meeting the objective of program accessibility, a recipient must take care not to isolate or concentrate handicapped persons in settings away from nonhandicapped program participants.

All buildings for which site clearance has begun after June 3, 1977, must be designed and constructed to be accessible to handicapped persons from the start. The design standards of the American National Standards Institute (ANSI) can be used to determine minimal requirements for accessibility.

PRESCHOOL, ELEMENTARY AND SECONDARY, AND ADULT EDUCATION

The basic requirements are:

--That no handicapped child can be excluded from a public education because of disability; this requirement is effective immediately.

--That every handicapped child is entitled to a free appropriate education, regardless of the nature or severity of handicap; complete compliance with this requirement must be achieved by September 1, 1978.

--That handicapped students must not be segregated in public schools but must be educated with nonhandicapped students to the maximum extent appropriate to their needs.

--That evaluation procedures be improved in order to avoid the inappropriate education that results from misclassification.

--That procedural safeguards be established so parents and guardians can object to evaluation and placement decisions made with respect to their children.

--That state or local educational agencies locate and identify unserved handicapped children.

An appropriate education can be afforded by many different methods, including use of regular classes with or without aids, depending on need; in private or public homes or institutions, or through combinations of such methods so long as handicapped and nonhandicapped students are educated together to the maximum extent possible. The result should be to provide the education program best suited to the individual needs of handicapped people.

It should be emphasized that where a handicapped student is so disruptive that education of other students in the classroom is impaired, the student can be reassigned. A common sense rule of reason applies in such cases.

The regulation provides that school systems bear special responsibilities, in some instances, for transportation of handicapped people to and from education programs. Where placement in a public or private residential program is necessary, the school district has responsibility for the costs of the program, nonmedical care, room and board, and transportation.

POSTSECONDARY EDUCATION

In colleges and other postsecondary institutions, recruitment, admissions, and the treatment of students must be free of discrimination.

Quotas for admission of handicapped persons are ruled out, as are preadmission inquiries as to whether an applicant is handicapped. However, voluntary postadmission inquiries may be made in advance of enrollment concerning handicapping conditions to enable an institution to provide necessary services.

Higher education institutions must assure accessibility of programs and activities to handicapped students and employees. Architectural barriers must be removed where the program is not made accessible by other means. A university, however, is not expected to make all its classroom buildings accessible in order to comply with program accessibility standards. It may have to undertake some alterations, or it may reschedule classes to accessible buildings, or take other steps to open the program to handicapped students. Handicapped persons should have the same options available to others in selecting courses.

Other obligations of the institutions include:

--Tests which a college or university uses or relies upon, including standardized admissions tests, must not discriminate against handicapped persons. Tests must be selected and administered so that the test results of students with impaired sensory, manual or speaking skills are not distorted unfairly but measure the student's aptitude or achievement level, and not his or her disability.

--Students with impaired sensory, manual or speaking skills, must be provided auxiliary aids although this may often be done by informing them of resources provided by the government or charitable organizations.

--Colleges and universities must also make reasonable modifications in academic requirements, where necessary, to ensure full educational opportunity for handicapped students. Such modifications may include the extension of time for completing degree requirements, adaptation of the manner in which specific courses are conducted, and elimination of rules prohibiting handicapped persons from having tape recorders in class or dog guides on campus.

--Physical education must be provided in a nondiscriminatory manner and handicapped students cannot be unnecessarily segregated in physical education classes.

--Infirmary services must be provided handicapped students on a par with those offered others.

HEALTH, WELFARE AND SOCIAL SERVICES

The provisions for accessibility and reasonable accommodation that apply to other programs also apply to health, welfare, and social service institutions. Benefits and services may not be denied on the basis of handicap.

Providers of these services may find it necessary to remove barriers, make house calls, or meet handicapped people in offices that are accessible. Institutions with 15 or more employees must also provide auxiliary aids to their clients. Further, health and welfare providers must ensure that persons with impaired sensory or speaking skills are provided effective notice concerning the provision of benefits, waivers of rights and consent to treatment. Hospitals must make special arrangements for handling deaf patients.

Health, welfare and social services for handicapped people must be equal in quality to those in the institution's overall program, and equitable standards of eligiblity are required.

GENERAL EMPLOYMENT PROVISIONS

Employers may not refuse to hire or promote handicapped persons solely because of their disability. Reasonable accommodation may also have to be made to the person's handicap, where needed.

For employees as well as students or patients, accessibility is a primary necessity. Examples of reasonable accommodations might include a cassette recorder for a blind employee, changes in the physical location of the task to be performed, or similar actions. Under certain circumstances, an employer might find it necessary to make more extensive changes. The size and type of employing agency and the cost involved are considerations in determining undue hardship.

Failure to employ or promote an employee who is unqualified or who cannot be helped by reasonable accommodation is not discrimination. However, an employer may not reject an applicant simply because reasonable accommodation is necessary.

Pre-employment physical examinations cannot be required and pre-employment inquiry cannot be made about a person's handicapping condition although employers may ask about an applicant's ability to perform job-related functions. Employers may make an offer of employment conditional on a medical examination as long as the examination is required of all employees and no one is disqualified on the basis of a physical condition that is not job-related.

ADDICTION

As noted earlier, drug and alcohol addiction are covered under the Section 504 regulation. The regulation, however, protects rights of "qualified" handicapped people and this term implies limitations on what is expected of employers or institutions providing services. In regard to addiction, an employer is not required to change performance

or behavioral standards regarding past work performance, or disruptive, abusive or dangerous behavior, even if these actions stem from a person's alcoholism or drug addiction.

Nothing in the regulation prohibits a school from applying its rules concerning use of drugs and alcohol to students with addiction problems just as it would to other students, as long as the rules apply equally to all students. Schools or colleges, like other employers, may apply their standards of employment performance to alcohol and drug problems as they would apply them in any other case.

IMPORTANT DATES FOR SECTION 504 COMPLIANCE

April 28, 1977	Final regulation signed by HEW Secretary Joseph A. Califano, Jr.
May 4, 1977	Final regulation published in the Federal Register.
June 3, 1977	Regulation in effect.
July 5, 1977	Deadline for return of Assurance of Compliance (Form HEW 641) from all institutions receiving financial assistance from HEW.
August 2, 1977	Deadline for programs or activities in existing facilities to be made accessible (where structural changes are not required). See paragraph 84.22(d) in regulation.
September 2, 1977	HEW fund recipients that employ 15 or more employees shall, by this date, make initial notification that they do not discriminate on the basis of handicap in accordance with paragraph 84.8(a) of the regulation.

December 2, 1977	In the event that structural changes in existing facilities are necessary to make programs accessible, recipients of HEW funds shall, by this date, develop a transition plan outlining the steps needed to complete these changes. A copy of the transition plan would be made available for public inspection. See paragraph 84.22(e) of the regulation.
June 2, 1978	Deadline for HEW recipients to complete a self evaluation process in consultation with handicapped individuals and organizations. See paragraph 84.6(c) of the regulation.
September 1, 1978	Deadline for public elementary and secondary schools to provide to each qualified handicapped student a free appropriate education in accordance with paragraph 84.33(d) of the final regulation.
June 2, 1980	Deadline for structural changes to be made in existing facilities where necessary to achieve program accessibility.

HOW TO FILE A COMPLAINT OF DISCRIMINATION

Any person who has a complaint that discrimination on the basis of physical or mental handicap exists in any program funded by HEW may notify the Office for Civil Rights. A complaint should be filed by letter to: Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201.

Letters of complaint should explain: who was discriminated against; in what way; by whom or what institution; when the discrimination took place; who was harmed by the discriminatory act; who can be contacted for further information; the name, address, and telephone number of the complainant; and as much background information as possible. These are suggestions, not requirements. However, the Office for Civil Rights can move more efficiently if it is well-informed. Citizens may ask the Office for Civil Rights for help in writing a complaint.

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PART IV



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

NONDISCRIMINATION ON BASIS OF HANDICAP

Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This regulation implements section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, with regard to federal financial assistance administered by the Department of Health, Education, and Welfare. 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." The regulation, which applies to all recipients of federal assistance from HEW, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap. The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving assistance from the Department. As employers, recipients must make reasonable accommodation to the handicaps of applicants and employees unless the accommodation would cause the employer undue hardship. As providers of services, recipients are required to make programs operated in existing facilities accessible to handicapped persons, to ensure that new facilities are constructed so as to be readily accessible to handicapped persons, and to operate their programs in a nondiscriminatory manner.

EFFECTIVE DATE: June 3, 1977.

FOR FURTHER INFORMATION, CONTACT:

John Wodatch, Director, Office of New Programs, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-1821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Public Law 93-112) Congress enacted section 504, which provides that "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 under any program or activity receiving Federal financal assistance." In the same statute, Congress defined the term "handicapped individual" solely with relationship to employment; section 7(6) of the 1973 Act defined the term "handicapped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services * * *." However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public Law 93-516), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined 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." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

THE PROBLEM OF DISCRIMINATION

From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved. The rulemaking process in which the Department has engaged has, however, provided a basis for an initial resolution of those issues. The Secretary believes the resulting regulation offers genuine promise of providing an effective and workable program for ending discrimination against handicapped persons.

RULEMAKING HISTORY

On May 17, 1976, the Department published a Notice of Intent to Issue Proposed Rules, seeking public comment on fifteen identified critical issues. 41 FR 20296. A draft proposed rule was attached to the Notice of Intent, as was a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821.

Over three hundred written comments were received in response to the Notice of Intent. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country.

On July 16, 1976, the Department published a Notice of Proposed Rulemaking analyzing comments received on the critical issues identified in the Notice of Intent and setting forth a revised proposed regulation for public comment. 41 FR 29548. The initial 60-day comment period was extended in response to numerous requests until October 14, 1976. Additional comments received since that date have also been considered to the extent feasible. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking; they have been analyzed along with approximately 150 comments sent in response to May 17 Notice that were received too late to be analyzed during the first comment period. Finally, an additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the writ-

ten comments. Copies of these transcripts, as well as the written comments, are available for public inspection in Room 5400, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The Secretary believes that both the written comments and the views expressed at the public meetings have illuminated the complex issues involved in implementing section 504 in an effective and workable fashion. The Secretary's response to the comments of interested parties, and the explanation for changes in the proposed regulation, are set forth in the section-by-section analysis of each subpart of the regulation, which appears as Appendix A to the regulation. As that analysis explains, a number of provisions in the proposed regulation have been eliminated as duplicative or unnecessary; others have been shortened or clarified. The goal throughout has been to design a regulation that preserves the essential elements of a strong and effective program for ending discrimination, while avoiding the imposition of unnecessary or counterproductive administrative obligations on recipients.

Overview of Regulation

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the important terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employes and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addition and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

Subparts A, B, and C of the regulation, as well as subpart G—which incorporates by reference the Department's procedures under title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary, and secondary education. Its provisions have been closely coordinated with those of the Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education to each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

Subpart E deals with postsecondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.

Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

Executive Order 11914

Under Executive Order 11914 (41 FR 17871, April 28, 1976), the Department is required to issue general standards for other departments and agencies of the Federal government to follow in promulgating regulations implementing Section 504. This responsibility will be fulfilled promptly and independently from this regulation. The Department does, however, expect to incorporate the definition of handicapped person adopted in § 84.3 (j) of this regulation in the standards for determining what persons are covered by the Act. The Secretary also anticipates that the relevant provisions of Subparts A, B and C of the regulation will be the basis for guidelines, pursuant to the Executive Order, as to what are discriminatory practices.

Economic Impact

The Department has previously certified, in issuing the Notice of Intent and the Notice of Proposed Rulemaking, that the economic and inflationary impact of the proposed regulation had been carefully evaluated in accordance with OMB Circular A-107. That analysis, which was printed at 41 FR 20312 (May 17, 1976), has been revised and updated, and is available on request.

Section-by-Section Analysis of Regulation

Appended to the final regulation is a section-by-section analysis of the regulation, which describes the basis and purpose of each section, discusses significant comments, and explains the basis for any changes made from the proposed regulation published in July 1976.

In consideration of the foregoing, Part 84, to read as set forth below, is hereby ordered to be added to Title 45 of the Code of Federal Regulations.

Dated: April 28, 1977.

Joseph A. Califano, Jr.,
Secretary, Department of Health, Education, and Welfare.

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APPENDIX A—ANALYSIS OF FINAL REGULATION

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94–142, 89 Stat 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93–516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or 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 has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life acitivities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

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

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

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

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

(v) Aid or perpetuate discrimination against a qualified handicapped person

by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

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

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b) (2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evalution.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years followed completion of the evaluation required under paragraph (c) (1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

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

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

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

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

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

(5) Leaves of absense, sick leave, or any other leave;

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

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

(8) Employer sponsored activities, including social or recreational programs; and

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

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

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

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

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

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

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accu-

rately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 84.15—84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

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

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance 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)),[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§§ 84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such

sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guaradian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct peri-

odic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55–84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6–80.10 and Part 81 of this Title.

§§ 84.62–84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient"*. Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipients whose sole source of federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"*. In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person"*. Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93–516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent,

or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several

commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3–18 as of September 1978, and 3–21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) (formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75–0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that

grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paperwork burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8 (a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10 (a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

Subpart B—Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive federal procurement contracts in excess of $2500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirement of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the federal government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HEW funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria

and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

Subpart C—Program Accessibility

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this tax deduction. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit

staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§ 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

Subpart D—Preschool, Elementary, and Secondary Education

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process precedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be con-

sistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirements to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

New paragraph (b) specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the

provisions of § 84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision, and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first-year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational re-

habilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons, pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health and related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized 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.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F—Health, Welfare, and Social Services

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed §84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, § 84.53 has been combined with proposed § 84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4 (b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For Example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regula-

tion as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or services. Thus, although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be resonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

Subpart G—Procedures

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

Appendix B—Enforcement Procedures

Sections 80.6-80.10 and Part 81 of Title 45 of the Code of Federal Regulations are reprinted here without change for the convenience of the reader:

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible De-

partment official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

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AUTHORITY: The provisions of this Part 81 are issued under 5 U.S.C. 301 and 45 CFR 80.9(d).

SOURCE: The provisions of this Part 81 appear at 32 F.R. 15156, Nov. 2, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health, Education, and Welfare, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him as respondent.

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.107.

§ 81.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted.

Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also requre the parties to submit trial briefs.

§ 81.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible De-

partment official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 81.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

[FR Doc.77-12620 Filed 4-28-77;4:35 pm]

federal register

FRIDAY, JANUARY 13, 1978
PART V



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

IMPLEMENTATION OF EXECUTIVE ORDER 11914

Nondiscrimination on the Basis of Handicap in Federally Assisted Programs

[4110-12]

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 85—IMPLEMENTATION OF EXECUTIVE ORDER 11914, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This rule implements Executive Order 11914, "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate governmentwide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION, CONTACT:

Anne Beckman, Office for Civil Rights, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201, 202-245-6118.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Pub. L. 93-112), Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The definition of "handicapped individual" applicable to section 504 is contained in section 111(a) of the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516).

On April 28, 1976, the President issued Executive Order 11914 (41 FR 17871) to provide for consistent governmentwide enforcement of section 504; the executive order is reprinted at Appendix A to this rule. The order directs the Secretary of Health, Education, and Welfare to coordinate the implementation of section 504 by all Federal departments and agencies that extend financial assistance to any program or activity. Specifically, section 1 directs the Secretary to establish standards for determining who are handicapped individuals and to establish guidelines for determining what are discriminatory practices under section 504 and to assist other agencies as necessary to assure the coordinated and consistent implementation of section 504. Sections 2 and 3 also contemplate that this Department will establish procedures to guide other Federal departments and agencies in implementing section 504.

In addition to setting forth the responsibilities of this Department, the executive order directs other agencies to issue regulations consistent with HEW standards and procedures, to furnish the Secretary with reports and information upon request, and to cooperate with this Department in their implementation of section 504.

Finally, the executive order, in section 3, contains general procedures and sanctions for securing compliance with section 504 and, in section 5, requires the consistent implementation of all of Title V of the Rehabilitation Act of 1973 as well as the Architectural Barriers Act of 1968 (Pub. L. 90-480).

On May 4, 1977, this Department issued its final regulation implementing section 504 as to recipients of financial assistance from HEW.

On June 24, 1977, the Department issued a proposed rule to carry out its responsibilities under the executive order by specifying procedures for the promulgation and enforcement of section 504 regulations by all agencies providing financial assistance, standards for determining who are handicapped individuals, and guidelines for determining what practices are discriminatory under section 504. Fifty comments were received during the 30-day public comment period. The Secretary's response to these comments and the explanation for changes in the proposed rule are set forth below in the summary of the final regulation.

SUMMARY OF RULE AND ANALYSIS OF COMMENTS

Subpart A of this regulation sets forth general definitions and uniform procedures for the enforcement of section 504.

Section 85.3(e) defines the term "federal financial assistance." Several commenters objected to the exclusion of contracts of insurance and guaranty from that definition because programs whose only federal assistance is in the form of federal loan guarantees, such as the Federal Deposit Insurance Corporation (FDIC) and Federal Housing Administration (FHA) programs, are thereby exempt from coverage. In light of this concern, the Department asked the Department of Justice for an opinion as to whether contracts of insurance and guaranty are covered by section 504. The Department of Justice has advised this Department, on the basis of its analysis of the legislative history of section 504, that Congress intended the reach of section 504 to be "co-extensive with that of (titles VI and IX), thus excluding programs of guarantee and insurance." The final regulation reflects that determination.

Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ. Several commenters misunderstood the exclusion of "ultimate beneficiaries" in § 85.3(d); an ultimate beneficiary is not the final "recipient," but the student, patient, or other individual who participates in the assisted program.

One comment asked whether the definition of facility in § 85.3(f) applies only to land-based facilities. Although the definition is not so limited, the Department agrees with the observation that different standards may be needed for vessels than for other facilities. The appropriate mechanism for the recognition of such differences, however, is in the regulations of the agencies that provide assistance to programs involving vessels.

Section 85.4 contains procedures for the promulgation of agency regulations. In accordance with section 2 of the executive order, such regulations are required to be consistent with the standards and guidelines contained in this regulation. Agencies are encouraged to examine Subparts A, B, and C of the HEW section 504 regulation to determine whether their regulations should include any of the more detailed provisions to be found there. In addition, each agency should examine the programs and activities to which it provides assistance to determine whether detailed requirements concerning any such program or activity should be included in its regulation, similar to those contained in Subparts D, E, and F of the HEW section 504 regulation.

A number of recipients objected to the requirement in paragraph (a) that each agency issue a separate section 504 regulation and would have preferred implementation through one regulation enforced by one agency—the system used for section 503. Although the provision for interagency cooperation set forth in § 85.6 should take care of many of the problems foreseen by these commenters, there are admitted advantages to the single agency system. This approach is precluded here, however, because section

504, unlike section 503, does not place rulemaking authority in a single agency and the executive order itself directs each federal agency to issue its own regulation. Furthermore, because section 504 covers the provision of services as well as employment, it does not lend itself as readily to a single regulation as does section 503: While employment presents fairly uniform issues from agency to agency, the problems that arise in various service programs differ widely.

Section 85.4(b) sets forth the schedule for issuing agency regulations. In response to comment, the time for preparation of a proposed rule has been extended to 90 days. Three agencies commented that more than 90 days would be required for this purpose. While the Department recognizes that the problems to be resolved by these agencies are complex, it believes that every effort should be made to meet this schedule.

As stated in the proposed regulation, the Secretary believes that the provision for review of each agency's draft final regulation by the Director of the HEW Office for Civil Rights before it is finally issued is an effective and appropriate method of promoting consistency of regulation under section 504 throughout the government. Although a few commenters suggested the need for some additional, formal mechanism for determining whether an agency regulation conforms to this regulation, we believe that public comment, together with review by the Office for Civil Rights, will suffice.

One change has been made in paragraph 4(c). The phrase "aid, benefits, or services" has been substituted for the word "services" so as to describe more adequately the nonemployment elements of various assisted programs and activities.

One comment requested a statement by the Department that this regulation creates no judicially enforceable rights. Such a statement, we believe, is inappropriate and unnecessary. Whether any legally enforceable rights are created by this regulation is a matter for courts to decide. We would only observe that the regulation applies to Federal agencies, not to recipients, and that it has no retroactive reach.

Comments led to three changes in section 85.5 (Enforcement). Adoption of title VI enforcement procedures is not a required element of the enforcement system; even those commenters who do not entirely support the title VI procedures favored their inclusion because of the advantages of a single complaint mechanism. The language of the consultation requirement has been made consistent with the corresponding language of the HEW section 504 regulation. A requirement that recipients conduct self-evaluations has also been added because of the benefits to be gained by agencies, recipients, and handicapped persons of a mechanism for effecting compliance without Federal intervention. More specific guidance for conducting an evaluation, as well as a specific time for its completion, should be provided in each agency's regulation.

Despite these additions, § 85.5 is still not intended to be exhaustive. Agencies may wish to consider other additions from the HEW section 504 regulation, such as the designation by a recipient of an employee to coordinate 504 enforcement. Although § 85.5 has not been amended to require agencies to conduct pre-grant compliance reviews, as suggested, the Department does agree that they are an effective means of ensuring compliance and therefore encourages agencies to conduct such reviews as a routine matter, especially with respect to major grants.

Section 85.6 contains provisions concerning interagency cooperation. Although commenters were pleased that the issue of coordination of enforcement among the various Federal agencies had been addressed, many felt that this section failed to resolve adequately problems of the recipient who receives grants from more than one agency: Multiple assurance forms, inconsistent regulations or enforcement procedures, multiple investigations. Several commenters also suggested that the final regulation incorporate some method for determining the primary enforcement agency (such as the agency that provides the largest grants). While the Department is sympathetic with recipients' concerns, it believes that these problems can be resolved by the agencies themselves without further regulation. As noted in the proposed regulation, agencies are encouraged to extend existing title VI delegations to section 504. Ensuring consistent regulations should alleviate the problem as well. If, however, these mechanisms prove to be inadequate, the Department will issue further rules on the subject.

One comment suggested the need for standardized referral procedures when complainants appeal to the wrong agency. Although no change has been made in the regulation, the Department feels the issue is an important one. Each agency should adopt internal procedures to ensure that misdirected complaints are referred to the proper agency, rather than being returned to complainants, and to ensure that complainants are promptly notified of the referral.

Section 85.7 contains provisions for coordination with sections 502 and 503 of the Rehabilitation Act; two minor clarifying changes have been made.

One commenter inquired as to the precise meaning of "consult" and "coordinate" as used in this section. The terms are not meant to specify any explicit procedures. The requirement for consultation with the Architectural and Transportation Barriers Compliance Board (ATBCB) in developing requirements for the accessibility of new construction and alteration is based simply on the Department's belief that agencies should take advantage of the Board's expertise in this area.

The coordination requirement is designed to avoid inconsistent or duplicative enforcement where the jurisdiction of sections 502 or 503 overlaps with that of section 504. The ATBCB itself suggested that each agency be required to enter into a memorandum of understanding with the Board. Requiring formal agreements for this purpose, we believe, is neither necessary nor advisable.

Two agencies suggested that all matters of employment discrimination against handicapped persons be coordinated by the Department of Labor (DOL) to avoid inconsistent requirements being imposed upon entities that are both federal recipients and federal contractors. We believe that the requirements of the two regulations are not inconsistent despite some variance in language. There must, of course, be close coordination of enforcement with DOL when a recipient is also a contractor. A general rule that DOL should be the primary enforcement agency in this situation would not, however, be appropriate. Where a corporation that is a federal contractor gets minimal assistance from another agency, DOL would be the natural lead agency. But where, for example, a university with a major HEW grant is also a federal contractor, HEW would more appropriately take the primary enforcement role, even with respect to employment.

Several suggestions were received concerning consultation and coordination with other agencies in areas of potential overlap. The Department is reluctant to build in any more of these requirements. The opportunity that each agency will have to comment on the regulation proposed by each of the other agencies should suffice to handle any other similar situations.

As noted in the proposal, the Department will, on a continuing basis, fulfill its responsibilities under the executive order to assist and consult with other agencies in their implementation of section 504 and to monitor compliance with the executive order.

Subpart B of this regulation contains the standards for determining who are "handicapped persons" and "qualified handicapped persons" within the meaning of section 504. Except for the addition noted below, the definition of handicapped person (§ 85.31) is identical to the one contained in § 84.3(j) of HEW's section 504

regulation. Further discussion of its provisions may be found in paragraph 3 of Appendix A of that regulation (42 FR at 22685-6). A final sentence has been added to the definition listing, for illustrative purposes, some of the diseases and impairments that are included in the term "physical or mental impairment." It should be noted that this definition of handicapped person does not supersede or interfere with the narrower definitions of the term established by statute for specific purposes, such as reduced transportation fares or eligibility for vocational rehabilitaion services. Agencies using such definitions may not, however, substitute them for the definition prescribe in this regulation in connection with their implementation of section 504.

It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments. As stated in the proposal, the question of section 504's application to drug addicts and alcoholics was a difficult one on which the Secretary of HEW sought the advice of the Attorney General. In an opinion dated April 12, 1977, the Attorney General concluded that drug addiction and alcoholism are physical or mental impairments and are thus handicaps for the purpose of section 540 if they result in a substantial limitation of a "major life activity."

A detailed analysis of the implications of the inclusion of drug addicts and alcoholics within the scope of section 504 is set forth in paragraph 4 of Appendix A of the HEW regulation (42 FR at 22686). In response to concern again expressed in a number of comments, we emphasize that the fact that drug addiction and alcoholism may be handicaps does not mean that the behavioral manifestations of these conditions must be ignored in determining whether a person is qualified for services or employment. The statute applies only to qualified handicapped persons.

The definition of qualified handicapped person in §85.32 has been adapted from §84.3(k) of the HEW section 504 regulation. Other agencies may wish to supplement its provisions with additional guidance concerning qualifications for specific programs, as was done in §84.3(k) (2) and (3) of the HEW section 504 regulation. Several comments objected to the difference in wording between §85.32(a) of this regulation and section 60-741.2 of the Department of Labor section 503 regulation. No difference in substance is thereby intended; this Department believes that its definition more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.

A number of comments from the transportation field raised the question of whether such factors as safety may be considered in determining whether a handicapped person, especially one who is or has been alcoholic or emotionally ill, is qualified for a job. The Secretary again wishes to reassure recipients that such considerations are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

Subpart C of this regulation, sets forth guidelines for determining discriminatory practices; these are, in general, minimum requirements. Except where obvious discrepencies in implementation would result, other agencies may exceed these standards if they wish. The subpart is divided into three parts: General, based on §84.4 of the HEW section 504 regulation; Employment, based on Subpart B of the HEW section 504 regulation, and Program Accessibility, based on Subpart C of the HEW section 504 regulation. A more detailed discussion of these subparts than is contained below may be found in Appendix A of the HEW regulation.

The general prohibitions against discrimination on the basis of handicap set forth in §85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons.

Several commenters asked about the effect of §85.51 on the previously issued regulation of the Department of Transportation (DOT) implementing the Urban Mass Transportation Act (UMT Act) with respect to handicapped persons. This Department has not reviewed the UMTA regulation because it was issued before the promulgation of these guidelines. In the course of developing its regulation to implement section 504, DOT will undoubtedly examine its prior regulations with a view toward incorporating or revising their underlying concepts in its 504 regulation. The DOT section 504 regulation will be subject to public comment and to reveiw by this Department.

Furthermore, the Department's interpretation of §85.51 on matters of physical accessibility is set forth in §§85.56-58; it is these sections that, in general, should be looked to for guidance on this subject. This observation is also relevant to the many questions raised by commenters concerning the application of various provisions of §85.51 to specific transportation situations. In response to comment, the Department wishes to make clear that it does not construe this section, nor §§85.56-58, to preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services, nor do these sections require door-to-door transportation service. Neither does paragraph (b)(4) of this section require buses to move their regular route stops to the doors of handicapped riders.

Section 85.51 (b)(3) prohibits recipients from utilizing criteria or methods of administration that would have the effect of subjecting handicapped persons to discrimination on the basis of handicap. The main application of this provision is to state agencies that recieve federal funds and then distribute the funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination on the basis of handicap either by the second-tier recipients or by the manner in which the funds are distributed. The prohibitions of this paragraph, as well as of paragraph (b)(1), apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency. Specifically, §85.53 could be supplemented, as is the corresponding §84.12 of the HEW section 504 regulation, with examples of actions constituting reasonable accommodation and with factors to be considered in determining undue hardship; and §85.54, with provisions adapted from the more specific requirements of the parallel §84.13 of the HEW section 504 regulation.

One comment raised an issue of interest to those agencies that decide to augment §85.53 with examples of reasonable accommodation. Because of the tendency of some readers to

equate this requirement with physical accommodations, any list of examples should include other types of actions, such as job restructuring and modified work schedules.

One comment to §85.52, raised in the context of the transportation industry but of general applicability, inquired about the effect of this section on local, state, and federal laws that govern, in the interest of safety, driver eligibility. Local and state laws affecting the eligibility of handicapped persons for employment may continue to be applied, but only if they set standards that are job related and that do not unjustifiably disqualify such persons for particular jobs. Federal regulations as well should be reviewed to determine whether they meet this standard.

In response to comment, a new paragraph (b), taken from the HEW section 504 regulation, has been added to this section. It is designed to emphasize the prohibition on such practices as classifying certain jobs as being for handicapped persons.

In §85.54, the word "nonjob-related" has been deleted as redundant. A test or other selection criterion "discriminates" if it screens out or tends to screen out handicapped persons but is not job related.

Although §85.55, like §84.14 of the HEW section 504 regulation, generally bans preemployment medical examinations and inquiries concerning handicap, certain qualifications to this general prohibition, found in §84.14 and cross-referenced in §85.55, should be noted. First, while employers may not, during the application process, inquire about the existence of a specific handicap (for example, epilepsy), they may ask about the applicant's ability to perform duties necessary to the job in question. Second, they may make voluntary inquiries as to handicap if they are subject to remedial or affirmative action obligations or if they are undertaking voluntary action to increase their employment of handicapped persons. Third, they may condition an offer of employment on the successful completion of a medical examination: *Provided*, That the examination follows the requirements of §84.14(c) and that no offer is withdrawn on the basis of medical conditions that are not job related.

Several comments objected to the difference between the positions taken in the section 503 regulation and §85.55 of this regulation on the question of preemployment inquiries and medical examinations. As discussed above, §85.55 requires physical examinations and inquiries as to handicap to be postponed until after the hiring decision (which, again, may be conditioned on the result of the examination), whereas the section 503 regulation allows such examinations and inquiries to be made before an offer of employment.

The issuance of the DOL section 503 regulation preceded that of the HEW section 504 regulation by several years. During that time, the Department received extensive comment on the need to limit inquiries as to handicap in order to reduce the potential for discrimination, especially with respect to persons with nonvisible handicaps. We believe that the standard outlined above, although different from that of the DOL section 503 regulation, is necessary to achieve that objective; one virtue of this standard is that it makes it possible to determine whether the reason for not hiring a handicapped person is because of handicap. We also believe that legitimate purposes for obtaining such information are fulfilled as well at this later stage in the hiring process.

The misunderstanding of this section apparent in many comments makes it important to emphasize again that this provision does not prohibit taking job-related conditions into account in making employment decisions, nor does it preclude a recipient from obtaining information as to such conditions. It merely affects the time at which and the manner in which the information may be obtained.

Sections 85.56-58 concern "program accessibility," a term that summarizes the concept of prohibiting the exclusion of handicapped persons from programs by virtue of architectural barriers to such facilities as buildings, vehicles, and walks, while not requiring that existing facilities be completely barrier-free. Although new facilities are to be designed and constructed so as to be physically accessible to handicapped persons, structural modifications of existing facilities need be undertaken only where other methods are inadequate to assure that a program is available to handicapped persons. This final regulation has been amended to take into account the special problems of making various modes of transportation "program accessible," and the Department recognizes that the implementation of the concept of program accessibility will necessarily vary in other programs. As stated in the proposal, however, the Department believes that the basic principles contained in §§85.56-58, as amended, are appropriate governmentwide and are essential to the effective and consistent implementation of section 504.

Section 85.56 establishes the general standard for nondiscriminatory physical access to federally assisted programs and activities under section 504. It does not prohibit architectural barriers; it does prohibit exclusion of handicapped people from federally assisted programs and activities by virtue of such barriers. Sections 85.57-8 describe the means by which this standard is to be reached.

Section 85.57 has been amended and divided into three paragraphs. A new sentence has been added to paragraph (a) to rectify the misunderstanding, evident in some comments, that each existing facility must be altered.

Agencies are urged to set forth in their regulations illustrative types of actions that recipients may use as alternatives to structural changes to existing facilities. If they do so, agencies should also include the requirement, intrinsic to section 504, that priority be given to methods that offer programs and activities to handicapped persons in the most integrated setting appropriate. (See §84.22(b) of the HEW section 504 regulation.) Agencies may also wish to consider supplementing §85.57 with other details from section 84.22 of the HEW section 504 regulation.

In response to comment, the Department wishes to make clear that §85.57 does not preclude other agencies from allowing recipients to choose among appropriate alternative methods of achieving program accessibility, so long as the agency itself sets an acceptable standard for what constitutes program accessibility.

Several transportation comments proposed that the word "program," for purposes of program accessibility, be interpreted to mean the entire transportation system of a certain geographic area, as opposed to particular modes of transportation (bus, rail) in the area. The Department rejects this concept as a general matter.

We recognize, however, that there are special problems to achieving program accessibility with the three-year time period for certain modes of transportation. Paragraph (b) has, therefore, been amended to allow more than three years for compliance for any mode of transportation in which program accessibility can be achieved within that period only through extensive alterations entailing extraordinary costs. Such exceptions may be allowed only where alternate, accessible modes of transportation are available. The specific period of time for compliance is to be established by the federal agency administering the transportation program (the Department of Transportation, in practically all cases); it may vary from mode to mode. The Department believes that this departure from the general scheme is justified by the lack of acceptable alternatives to extremely expensive alterations in the provision of some transportation services.

The Department recognizes that special problems may also be encountered in achieving program accessibility in existing public housing projects within the three-year schedule. Because the program accessibility stan-

dard itself requires only that a small percentage of units be accessible (and that there be access to the project itself), the Department believes that the standard can be met within the prescribed schedule. We are prepared to consult with the Department of Housing and Urban Development as compliance progresses and will reexamine the situation if circumstances so warrant.

Another issue raised during the comment period is the question of the effect of § 85.57 upon the requirements of the Architectural Barriers Act of 1968, Pub. L. 90-480. The relevant portion of that Act requires that, after 1968, all new construction and alteration receiving direct Federal financial assistance be accessible. One commenter feared that recipients who had undertaken construction subject to the Architectural Barriers Act but who had failed to comply with the Act might feel that compliance with the Architectural Barriers Act would be excused if its program, on the whole, were accessible and thus in compliance with § 85.57. Such is not the case. The Department does not intend, and has no authority, to interfere in any way with the requirements of the Architectural Barriers Act.

Two comments requested that an exception be added to § 85.57 for modifications of historic structures. While we agree that it is important to preserve historical structures, we believe that the flexibility of the program accessibility standard will permit recipients, with appropriate technical assistance and advice, to make their programs accessible without impairing the integrity of historic buildings.

Paragraph (c), added in response to comment, requires that transition plans be developed in cases where structural modifications are necessary to achieve program accessibility. The schedule for completion of these plans, as well as any further requirements deemed appropriate, is left to the determination of each regulating agency. The plan is to be developed with the aid of handicapped persons or their organizations.

Section 85.58 requires new facilities and, to the maximum extent feasible, alterations in existing facilities to be readily accessible. No accessibility standards have been specified here, but agencies should note that the HEW section 504 regulation requires HEW recipients either to meet the standards developed by the American National Standards Institute, Inc. (ANSI), or to provide equivalent accessibility. Each agency should, in the interest of governmentwide consistency, carefully consider adoption of the ANSI standards or their equivalent for any of its programs to which the standards are applicable.

A difficult problem that has arisen during the comment period with respect to § 85.58 is its effect upon buses ordered in the interval between the final issuance of individual agency 504 regulations and the effective date of the Department of Transportation's ruling concerning Transbus. (That ruling requires that all buses acquired with the assistance of the Urban Mass Transportation Administration (UMTA), ordered after September 30, 1979, meet the specifications for Transbus—a low-floor, ramped bus.) Because of the complexity of the bus accessibility issue, the final regulation has been amended to allow the Department of Transportation (DOT) to defer the effective date for requiring all new buses to be accessible if DOT concludes during its section 504 rulemaking process that it is not possible to do so by the effective date of its own section 504 regulation and if comparable, accessible services are available to handicapped persons in the meantime. The date may not, however, be deferred beyond the present effective date of the Transbus decision—October 1, 1979.

Because this Department agrees that Transbus is the most effective means of providing handicapped persons with accessible bus transportation, it encourages the Department of Transportation to take all possible steps to expedite the purchase of Transbus by its recipients.

The effective date of this regulation is January 13, 1978. Because the regulation applies only to other federal agencies rather than to the public and because the governmentwide implementation of section 504 should proceed without further delay, the Department believes that this departure from the normal 30-day waiting period is warranted.

NOTE.—The Department of Health, Education, and Welfare has determined that this document does not contain a major proposal requiring preparation of an economic impact analysis (EIA) statement under Executive Orders 11821 and 11949 and OMB Circular A-107.

In consideration of the foregoing, Part 85 is hereby added to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: January 3, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary.

Subpart A—Federal Agency Responsibilities

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Appendix A—Executive Order 11914.

AUTHORITY: Executive Order 11914, 41 FR 17871; sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

Subpart A—Federal Agency Responsibilities

§ 85.1 Purpose.

The purpose of this part is to implement Executive Order 11914, which requires the Department of Health, Education, and Welfare to coordinate the implementation of section 504 of the Rehabilitation Act of 1973.

§ 85.2 Application.

This part applies to each Federal department and agency that is empowered to extend Federal financial assistance.

§ 85.3 Definitions.

As used in this regulation, the term:

(a) "Executive order" means Executive Order 11914, titled "Nondiscrimination with respect to the Handicapped in Federally Assisted Programs," issued on April 28, 1976.

(b) "Section 504" means section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(c) "Agency" means a Federal department or agency that is empowered to extend financial assistance.

(d) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(e) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a con-

tract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(f) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

§ 85.4 Issuance of agency regulations.

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

(b) Each agency shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part. Each agency shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation: *Provided,* That the agency shall submit its proposed final regulation to the Director of the Office for Civil Rights, HEW, for review at least 45 days before it is to be issued.

(c) Each such agency regulation shall: (1) Define appropriate terms, consistent with the definitions set forth in § 85.3 and with the standards for determining who are handicapped persons set forth in Subpart B of this Part; and (2) prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in Subpart C of this Part. The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

§ 85.5 Enforcement.

(a) Each agency shall establish a system for the enforcement of section 504 and its implementing regulation with respect to the programs and activities to which it provides assistance. The system shall include: (1) The enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964, and (2) a requirement that recipients sign assurances of compliance with section 504.

(b) Each agency regulation shall also include requirements that recipients: (1) Notify employees and beneficiaries of their rights under section 504, (2) conduct a self-evaluation of their compliance with section 504, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and (3) otherwise consult with interested persons, including handicapped persons or organizations representing handicapped persons, in achieving compliance with section 504.

§ 85.6 Interagency cooperation.

(a) Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall: (1) Coordinate compliance with section 504, and (2) designate one of the agencies as the primary agency for section 504 compliance purposes.

(b) Any agency conducting a compliance review or investigating a compliant of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

§ 85.7 Coordination with sections 502 and 503.

(a) Agencies shall consult with the Architectural and Transportation Barriers Compliance Board in developing requirements for the accessibility of new facilities and alterations, as required in § 85.58, and shall coordinate with the Board in enforcing such requirements with respect to facilities that are subject to section 502 of the Rehabilitation Act of 1973, as amended, as well as to section 504.

(b) Agencies shall coordinate with the Department of Labor in enforcing requirements concerning employment discrfmininationwith respect to recipients that are also federal contractors subject to section 503 of the Rehabilitation Act of 1973, as amended.

§§ 85.8–85.30 [Reserved]

Subpart B—Standards for Determining Who are Handicapped Persons

§ 85.31 Handicapped person.

(a) "Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) "Physical or mental impairment" means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

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

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

(4) "Is regarded as having an impairment" means (i) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

§ 84.32 Qualified handicapped person.

"Qualified handicapped person" means (a) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

§§ 85.33–85.50 [Reserved]

Subpart C—Guidelines for Determining Discriminatory Practices

General

§ 85.51 General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

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

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

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

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

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

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

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

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

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

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

Employment

§ 85.52 General prohibitions against employment discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

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

(1) Recruitment, advertising, and the processing of applications for employment;

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

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

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

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

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

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

(8) Employer sponsored activities, including social or recreational programs; and

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

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

§ 85.53 Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

§ 85.54 Employment criteria.

A recipient may not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

§ 85.55 Preemployment inquiries.

A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 45 CFR 84.14.

Program Accessibility

§ 85.56 General requirement concerning program accessibility.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

§ 85.57 Existing facilities.

(a) A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not necessarily require

a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(b) Where structural changes are necessary to make programs or activities in existing facilities accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of the agency regulation: *Provided*, That, if the program is a particular mode of transportation (e.g., a subway system) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities and if other accessible modes of transportation are available, the federal agency responsible for enforcing section 504 with respect to that program may extend this period of time, but only for a reasonable and definite period, such period to be set forth in the agency's regulation.

(c) In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within a definite period to be established in each agency's regulation, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

§ 85.58 New construction.

(a) Except as provided in paragraph (b) of this section, new facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) The Department of Transportation may defer the effective date for requiring all new buses to be accessible if it concludes on the basis of its section 504 rulemaking process that it is not feasible to require compliance on the effective date of its regulation: *Provided*, That comparable, accessible services are available to handicapped persons in the interim and that the date is not deferred later than October 1, 1979.

§§ 85.59–85.99 [Reserved]

APPENDIX A.—NONDISCRIMINATION WITH RESPECT TO THE HANDICAPPED IN FEDERALLY ASSISTED PROGRAMS

EXECUTIVE ORDER 11914. APRIL 28, 1976

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including section 301 of title 3 of the United States Code, and as President of the United States, and in order to provide for consistent implementation within the Federal Government of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it is hereby ordered as follows:

SECTION 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended, hereinafter referred to as section 504, by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504. The Secretary shall assist Federal departments and agencies to coordinate their programs and activities and shall consult with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504.

SEC. 2. In order to implement the provisions of section 504, each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

SEC. 3. (a) Whenever the appropriate department or agency determines, upon all the information available to it, that any recipient of, or applicant for, Federal financial assistance is in noncompliance with the requirements adopted pursuant to this order, steps to secure voluntary compliance shall be carried out in accordance with standards and procedures established pursuant to this order.

(b) If voluntary compliance; cannot be secured by informal means, compliance with section 504 may be effected by the suspension or termination of, or refusal to award or continue, Federal financial assistance or by other appropriate means authorized by law, in accordance with standards and procedures established pursuant to this order.

(c) No such suspension or termination of, or refusal to award or continue, Federal financial assistance shall become effective unless there has been an express finding, after opportunity for a hearing, of a failure by the recipient of, or applicant for, Federal financial assistance to comply with the requirements adopted pursuant to this order; however, such suspension or termination of, or refusal to award or continue, Federal financial assistance shall be limited in its effect to the particular program or activity or part thereof with respect to which there has been such a finding of noncompliance.

SEC. 4. Each Federal department and agency shall furnish the Secretary of Health, Education, and Welfare such reports and information as the Secretary requests and shall cooperate with the Secretary in the implementation of section 504.

SEC. 5. The Secretary of Health, Education, and Welfare may adopt rules and regulations and issue orders which he deems are necessary to carry out his responsibilities under this order. The Secretary shall ensure that such rules, regulations, and orders are not inconsistent with, or duplicative of, other Federal Government policies relating to the handicapped, including those policies adopted in accordance with sections 501, 502, and 503 of the Rehabilitation Act of 1973, as amended, or the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*).

GERALD R. FORD

The White House,
April 28, 1976.

[FR Doc. 78-929 Filed 1-12-78; 8:45 am]

OFFICE FOR CIVIL RIGHTS

The Office for Civil Rights, Office of Program Review and Assistance, Section 504 Technical Assistance Unit, has the following materials available to the public:

1. Nondiscrimination on the Basis of Handicap (Section 504), Department of Health, Education and Welfare, Office of the Secretary. Nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from Federal Financial Assistance.

2. Section 504 Fact Sheet - a summary of the Regulation, and role of the Office for Civil Rights in ensuring compliance with the Regulation.

3. Secretary Califano's 504 Statement - April 28, 1977.

4. Office for Civil Rights Director Tatel's 504 Statement - July 29, 1977.

5. Executive Order 11914 - April 28, 1977, which extends Section 504 coverage to all Federal Departments.

6. Public Law 93-112 and Public Law 93-516 sheet.

7. HEW Implementation of Executive Order 11914 - Reprint of Federal Register - June 24, 1977. (Extends Section 504 coverage to all Federal Departments).

8. OCR Publication - Title V of the Rehabilitation Act of 1973.

9. OCR Publication - Title VI, Title IX, and Section 504-Comparison of Statutes.

10. OCR Publication - Discrimination Against Handicapped Persons by Dave M. O'Neill - May 4, 1977, which defines the cost and benefits of implementation of the Regulation.

11. Timetable for Section 504 Compliance Activities.

12. A Resource Guide to Literature on Barrier-Free Environments; Architectural and Transportation Barriers Compliance Board 1977. This book provides a large number of resources on issues associated with barrier-free environments.

13. Federal Assistance for Programs serving the Handicapped - Office for Handicapped Individuals - September, 1977. This book provides detailed information on locating sources of financial assistance for setting up programs designed to serve the handicapped.

14. Barrier-free meetings by Redden, Fortuanto-Schwandt, and Brown.

    The book presents ways to accomplish accessibility through the use of common sense approaches. By general application of the information, barrier-free design can benefit handicapped persons in a practical and positive manner.

15. Some Thoughts on the Education of Blind Children by Robert Rottman.

    This document conveys a positive approach in the educational process of blind school-age children. The attitudes presented have application to all handicapped children.

16. Your School Includes a Blind Student by Willoughby, Lansing, Barber and Maucer.

    This booklet contains resource information that will serve to allay some of the fears and misconceptions that prohibit the inclusion of blind children in public school classrooms.

17. Accessibility Modification by Ron Mace.

    This book is an excerpt from the State Building Code of North Carolina. It contains technical information that will assist in constructing a barrier-free environment. It is positive in approach and written in an understandable manner.

18. A Handbook for the Blind College Student by the National Federation of the Blind.

    A consumer-oriented booklet that may serve as a valuable resource not only to handicapped college students, but also recipients.

19. American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)).

    The ANSI standard is referred to in the Regulation. It or a comparable standard is a minimal guide for barrier-free environment in new construction and alteration.

20. The Blind and Physically Handicapped in Competitive Employment, by the National Federation of the Blind.

Employment of the handicapped is a vital area in the civil rights effort. This document lends insight into the problems that handicapped persons face in employment.

21 An Illustrated Handbook of the Handicapped, Section of the North Carolina State Building Code by, Ron Mace and Betsy Laslett.

This book provides many illustrated suggestions which may be of assistance in providing building accessibility to the handicapped simply and inexpensively.

22. Planning for Accessibility, by Margaret Milner.

This booklet is a guide to developing and implementing campus transition plans.

OFFICE FOR CIVIL RIGHTS
INFORMATION REQUEST FORM

Please mail all requests to:
Office of Public Affairs
Office for Civil Rights
330 Independence Avenue
Washington, D.C. 20202.

Please Print Clearly:

Your name: _____

Institution or Organization: _____

Address information should be sent to:

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Please check the space next to the number of each item you would like the Office for Civil Rights to send you. See the attached page for the title and a description of each item.

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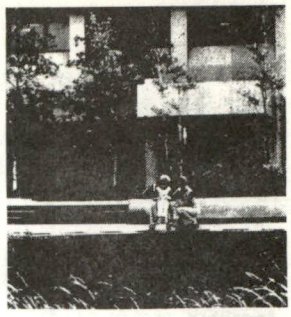
TO REPRINT THIS ARTICLE FOR USE

IN THE TRAINING PROGRAM ON "THE

MEDICOLEGAL RIGHTS OF THE PHYSIC-

ALLY DISABLED PERSONS".

BARRIER-FREE DESIGN REFLECTS SPIRIT OF THE LAW



by Frank W. Rees Jr. and Emily Burch

Creative barrier-free designs allow handicapped complete access to facilities, with minimal construction cost

Section 504 of the Rehabilitation Act of 1973 constitutes new definitive constraints in the design of hospitals. It requires that all institutions receiving federal funding from the Department of Health, Education, and Welfare ensure handicapped persons access to all of their programs, services, and employment opportunities.

It is not the intent of the law to require expensive modifications to existing structures, especially those for which later renovations or removal are planned as part of an institution's regular building program. The intent simply is to ensure handicapped persons access to activities. Modifications to existing structures are not required to be completed until June 3, 1980. All new construction and remodeling begun after June 3, 1977, as part of an institution's regular building program must be designed in accordance with American National Standards Institute (ANSI) standard All-1961 (R-1971).

Hospitals may choose one of two approaches to comply with section 504 in the design phase of new construction or remodeling. The first approach is to comply with ANSI standards only. Because the ANSI standards are minimal requirements, this approach may lead to providing separate access and accommodations in "out-of-the-way" places for the handicapped.

The other approach is the barrier-free or "civil" approach, which is more in keeping with the spirit of the law, which is to create environments that will allow the handicapped to enter the mainstream of society. With this approach, all facilities, entrances, streets, and so on, are designed barrier-free for the handicapped to use so that separate facilities are not necessary. This approach is not necessarily more expensive and, in many cases, it is actually more cost-efficient than providing separate facilities.

Section 504 is specific about the design of certain architectural features for the handicapped, but it is not specific about the number of features required. Because of the nonspecific, open nature of the law, compliance with section 504 is best achieved by looking at the experience of other hospitals in which remodeling and new construction have been designed in compliance with section 504.

The major design constraints resulting from section 504 apply to the public areas of a facility. Design of the site, building circulation, and facilities for public use are

Frank W. Rees Jr. is president and Emily Burch is a project coordinator, Rees Associates, Inc., Oklahoma City.

particularly affected. The following case studies provide examples of the major design constraints affecting hospital design and of barrier-free solutions to these major constraints. Specific examples are drawn from three adjacent structures at the Oklahoma Health Center, Oklahoma City: University Hospital and Clinics, Presbyterian Hospital, and Dean A. McGee Eye Institute.

Major consequences

Grade restrictions have extensive ramifications in the design process and may be the major design constraint to be considered. The law requires that pedestrian circulation on the site and in the building be no steeper than a 1-foot rise in a 20-foot distance (a 5 percent gradation). Any length of circulation steeper than five percent is considered a pedestrian ramp, the gradation of which may not be greater than 8.3 percent, or one foot per 12 feet. Also, pedestrian ramps must have handrails as well as landings every 30 feet.

One example of how grade restrictions significantly affect the design of parking facilities is evident at University Hospital and Clinics. In parking garage design, it is not cost-efficient to separate pedestrian circulation ramps from driveways. Therefore, driveway/parking ramps must be no steeper than five percent. This restriction, then, ultimately determines what length the parking garage should be. In turn, the parking garage design becomes a major factor in the design of the entire site, including the location of the building. The length of the proposed University Hospital and Clinics' parking garage was determined by the five percent restriction, because driveway/parking ramps and pedestrian ramps were combined. This length, determined where the building would be located on the site.

The location of the buildings on the site also can be affected by grade restrictions if a pedestrian tunnel is planned. For example, the 8.3 percent grade restriction and required landings for pedestrian ramps determined the length of the tunnel that links Presbyterian Hospital and Dean A. McGee Eye Institute. Without the Section 504 restraints, the institute would have been designed 30 feet nearer the hospital. Obviously, grade restrictions concerning circulation must be studied and considered before locations of buildings are determined. If not, the site plan inevitably will have to be redesigned.

To design building entrances that comply with the new law, architects must reorient past thinking, which associated large ceremonial-type entrances with multilevel, monumental staircases.* The civil approach to designing entrances for the handicapped would encompass a ceremonial entrance that the handicapped as well as the ambulatory could use. Although stairs should not be entirely excluded because they are easier to climb than ramps for the majority of ambulatory people, a ceremonial entrance could be designed close to the ground level with a combination of stairs for the ambulatory and ramps for the handicapped. Such an entrance would be in keeping with barrier-free design, and also would be less expensive to build.

At Presbyterian Hospital, the main visitor entrance is located at grade level, which is reached by a circular drive. Although the drive is lined by a curb, curb cuts for the handicapped are provided at the building entrance. A canopy extends over the driveway for weather protection. In addition, the design of Presbyterian Hospital provides the handicapped access to all other major building entrances. Although emergency department entrances tended to be built at grade level before the new law was passed, access for the handicapped to visitors' and outpatient entrances previously had been overlooked.

Special provisions

In designing walks, ramps, and curbs for wheelchair accessibility, design for other handicaps such as blindness must be kept in mind. For example, the barrier-free approach to street and sidewalk design either eliminates all curbs or modifies their design to a shallow ramped surface at pedestrian crossings, which is confusing to the blind and to seeing-eye dogs who have been trained to stop at standard curbs. This problem was solved at the Oklahoma Health Center by providing a contrasting surface texture in the concrete of ramps and curb cuts to warn the blind of entry to a street or hazardous area.

Signage also was a special consideration at the McGee Eye Institute. All identification signs have recessed white letters on a black background with braille beneath.

For the 85 percent of the blind who do not read braille and for the partially sighted, ANSI standards require that identification signs for the general public have letters and numbers of contrasting colors that are raised or recessed. The American Foundation for the Blind recommends that letters and numbers be six inches high and three- and one-half inches wide.

ANSI standards also require that international symbol of access for the handicapped be prominently displayed at entrances to parking areas, buildings, facilities, and all other access points. This symbol also may be used to mark routes within facilities along which no architectural barriers exist.

For identification of hospital rooms, rest rooms, offices, and so on, identification plaques with raised or recessed letters or numerals should be used. They should be mounted between four feet, six inches and five feet, six inches above the floor and should be placed on the handle side of a door opening.

In addition, emergency alarms; switches; controls for light, heat, ventilation, and windows; and all similar control devices of frequent or essential use should be placed within reach of those in wheelchairs. Door hardware should be designed with single-lever action and should require no more than eight pounds

*Amicus. June 1977, pp. 31-36.

of pressure to open the door. Also, emergency alarms should be both visible and audible. Exit signs may be designed to flash when the emergency alarm is on. However, it should be kept in mind that flashing red lights can cause headaches, nausea and, in extreme cases, epileptic seizures. Testing of this type of alarm system should be rigidly controlled. For identification of hazardous areas such as mechanical areas, stages, and fire escape ladders, door knobs or pulls should be equipped with a knurled surface.

Often, it is not only possible and economically feasible but also necessary to design beyond specific regulations. According to the law, a handicapped employee cannot be restricted from employment because areas where he would work are not accessible. To provide accessibility to a handicapped staff member of Dean A. McGee Eye Institute, special provisions were made in the eye pathology laboratory and in the photography facilities.

In general, laboratory facilities can be designed with the capability of being modified for use by a handicapped employee. Laboratory systems are available with storage units and portions of case work that are movable and have adjustable shelves.

Consideration of wheelchair use and blindness also heavily affects the design of building circulation. First, all corridors must be traversable in wheelchairs, which require a minimum width of 60 inches for passageway and the elimination of raised thresholds. Second, protrusions and obstacles such as standing ashtrays and water fountains should be eliminated in passageways for the nonambulatory and the blind, as well as for the elderly.

Widening corridors to accommodate ashtrays or fountains will not serve as a solution, because the blind and the infirm walk along walls for support. One workable solution is to provide alcoves along the wall for water fountains. Handrails should include a warning to the blind that they will be interrupted at the alcove.

Elevators must be accessible to handicapped persons on the same level on which they enter the building. All essential elevator controls, including emergency buttons, must be mounted within 54 inches of the floor. Pre-engineered elevators can be purchased that contain elevator controls low enough to meet the regulations for wheelchair use. The required minimum clearance of the cab interior is both 56-inches wide and long with a minimum door opening of 32 inches. While hospitals may plan longer, narrower elevators, only in rare instances would hospitals contain elevators with less square footage than the 21.8 square feet that would result from the 56-inch dimensions. Therefore, although the number of elevators that must be designed for wheelchair use per person load is not specified in the regulations, all elevators should be planned with a 56-inch minimum dimension. Additional design considerations include automatic or self-leveling elevators to be within one-half inch above or below the adjoining floor.

The law does not require a specific floor surface for ease of wheelchair use. However, barrier-free design of floor surfaces can be accomplished at no additional cost. Carpet may be used, but it should be third-generation nylon of low, thick pile, it should weigh 22 to preferably 30 ounces per square yard, and it should be glued directly to the floor.

New considerations

The new regulations concerning design for the handicapped do not significantly affect the design of areas previously designed for the handicapped, such as nursing units, surgery facilities, physical therapy units, or other patient service departments. However, other nonpublic areas that previously were not designed for the handicapped will be affected, such as administrative areas and their support facilities. For example, rest room facilities for handicapped employees must be provided at each major area of any facility. Although no specific distance between nonpublic rest room facilities for the handicapped is required by law, a handicapped person should not have to travel farther than 150 feet to reach an accessible rest room.

All public rest rooms must have at least one toilet stall designed for wheelchair use. The required dimensions are a minimum of 3-feet wide by 4-feet, 8-inches deep with a minimum of 32-inches clearance at the door opening with the door swinging out. Grab bars are required on each side of the water closet, mounted at 33 inches above the floor. The water closet seat must be 20 inches above the floor. Maneuvering space for the wheelchair in the general rest room space must be considered along with the stall requirements.

Water fountains designed for use by the handicapped must be provided at every major public water fountain location. Most manufacturers' standard designs include pre-engineered water fountains that comply with section 504.

Programs for new construction also will need to include additional square footage for stairs and landings, because regulations limit risers to seven inches. The regulations also determine the design of steps. Step design may not include an "abrupt, square nosing," and the nosing may extend no farther than one- and one-half inches out from a vertical drawn from the base of the riser. Contractors may have to construct new forms for concrete staircases, because the standard forms used in the past might not comply with the step design required by section 504. For the Dean A. McGee Eye Institute, a new steel pan form had to be designed and constructed with a curved, integral metal nosing that would comply with section 504. In addition, handrails must extend onto the landing 18 inches beyond the last step.

In the past, waiting areas often were designed without consideration for the handicapped. All waiting areas, such as the one designed for Presbyterian Hospital, should





(Above) Water fountains especially designed for wheelchair users were provided at Presbyterian Hospital, Oklahoma City. (Left) At Oklahoma Health Center, all curb cuts were "raked" before the cement dried in order to provide a rough textured surface that would alert the blind to streets or other hazardous areas. (Below) Waiting areas should be designed with space for wheelchairs within the conversation centers and out of the circulation paths, as pictured in the waiting area at Presbyterian Hospital.

have space for wheelchairs within the conversation centers and out of circulation paths.

Conclusion

Generally, as can be determined from the previous examples, designing under the section 504 regulations will result in the allocation of more square footage per person in public areas as well as in public rest rooms and parking facilities. Nonpublic areas such as offices and laboratories should be designed for use by all employees, handicapped or otherwise, by planning for future modifications that may become necessary as handicapped staff members are hired. The additional square footage, in conjunction with a reoriented design process necessary to establish a barrier-free environment, does not significantly increase the cost of standard construction techniques. The result—an environment that can be used and enjoyed by everyone, handicapped or not—is well worth the proportionally small expenditure. ■



CONSUMER LAWS

for the

PHYSICALLY HANDICAPPED

SECTION IV

CONSUMER WARRANTY LAW: YOUR RIGHTS AND HOW TO ENFORCE THEM

A Guide for Users of Medical Devices

BY: Belinda Bean and Susan Schapiro

PREFACE

This guide has been written to provide consumers of medical devices and equipment with information about their legal rights as consumers. Far too many disabled individuals, who must rely on such products, have not identified themselves as "consumers", in terms of the Consumer Rights Movement. Although rehabilitation professionals have labeled the disabled as consumers of rehabilitation services, very few disabled people have taken on the more common use of the term to afford themselves the benefits of consumer protection legislation.

Since we began operating the Disability Rights Center a year ago, we have received numerous complaints from the consumers that make one thing clear; unless they become aware and begin to make use of existing consumer protection laws, they will be taken advantage of by manufacturers and retailers who either do not understand their legal obligations to consumers or choose to avoid them.

In addition, the disabled consumer is at a great disadvantage because of his or her dependency on the medical equipment involved and because the industry is marked by lack of competition and by large profit margins. To assume that manufacturers or retailers who sell to the disabled are charitable or generous in nature is indeed naive. One solution is for consumers to become more sophisticated in their use of law to protect their rights.

Of course, this guide is not going to solve all the problems of the consumers of medical devices and equipment. As long as the manufacturers and retailers of medical devices remain virtually unregulated, the industry will continue to reap huge profits at the expense of disabled consumers and the laws will continue to ignore the exasperating degree of dependency that many disabled people have on such products. Unless disabled consumers take an active part in enforcing their current rights and promoting new consumer legislation, we are not likely to see any changes.

I do hope that those who read this guide will find it useful the next time they buy a piece of medical equipment or have problems with one they already purchased. The key to the protection of disabled consumers is that they as individuals must be willing to use the guide, to use the law and to use the courts, in order to avoid injustice. For too long we, as disabled people, have allowed others to handle our problems for us. We must be willing and able to help ourselves. The disability rights movement is based on the premise that we can and must stand up for our rights. In this respect, it parallels the consumer rights movement. With this guide, I hope that both movements can join together and benefit.

This guide does not cover issues such as safety, quality control, insurance or anti-monopolization law. We have decided to provide information on warranty law since this is an area in which consumers can protect their rights themselves in many instances.

I would like to thank Neil Thomas and Margot Gold for their work in developing this guideline. I would also like to thank Lowell Dodge, Glenn Goldberg, Jill Robinson and Laurie Summers for contributing their critical and editorial review and comments.

Deborah Kaplan
August, 1977

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INTRODUCTION

All consumers have rights. Anyone who buys something has the right to expect that it will work properly, will not break the first time it is used, and will last for a certain period of time. If what is bought does not work properly, in most instances, you, the consumer, have the right to have it fixed free of charge.

Although buyers used to be at the mercy of sellers who offered shoddy merchandise and poor service, the growing consumer movement and the realization by lawmakers and courts that consumers deserve protection, have strengthened their position. Your rights as a buyer-consumer are protected, in part, by warranties and guarantees. There is no difference between a warranty and a guarantee; they are both promises made by manufacturers and sellers that assure you, the buyer, that their products work properly and that, if they don't they will be repaired or replaced. Because the terms warranty and guarantee mean the same thing, they are used interchangeably in this guide.

Sometimes warranties come in written form on paper and say they are a warranty. In some cases, the terms of the warranty are spelled out in detail; in others, the terms are very general. When there is no written warranty, you may be told that the product is guaranteed or warranted. Even if you are not told this, the product is still guaranteed in most cases. The law requires manufacturers and sellers to sell products that work.

Warranties especially written warranties, are important factors for many people when they buy expensive equipment such as electrical applicances. A warranty indicates that the manufacturer trusts the performance of the product and is willing to back this up in writing. When shopping for appliances, there are many brands to choose from and often the existence of a long-term warranty is the deciding factor in whether or not a particular brand is chosen. Most people know that they can shop for warranties and that they have a right to complain if what they buy doesn't work properly; they know that their rights as consumers are protected.

You are in a somewhat different position when you buy a medical device. You may not think of yourself as the same type of consumer as those buying standard appliances. Frequently a doctor has recommended a particular manufacturer or the device is ordered through a hospital or therapist and is paid for by medical insurance. Many medical devices are fitted individually for the user and are not purchased at regular retail stores. However, none of this makes you any less a consumer, nor does it mean that you have fewer consumer rights. You have the same warranty protection as anyone else.

You encounter more problems than the average consumer because the medical devices that you buy are necessities and not luxury items. Often you cannot comparison shop, nor can you afford to wait until a product you like, or one carrying a good warranty comes on the market, the way the buyer of a television set or a dishwasher can. When you need a new prosethesis, hearing aid, or leg brace, you need it right away. The manufacturers and sellers of medical devices have very little incentive to live up to their warranty promises or to provide you with better products because they may have very little competition and they often make a good profit. You can help to correct this situation by realizing that you have an absolute right to have the manufacturer and seller stand behind their promises and that you can force them to do so.

This guide will acquaint you with your rights: what you can and cannot expect from manufacturers and sellers in specific situations, what you shold look for when buying, and how to get satisfaction when something goes wrong with a product you bought.

We have received many complaints from frustrated consumers who do not know where to turn or how to make manufacturers and sellers give them products that work or repair products that do not. The following examples are taken from letters that we have received. The responses to them will give you an idea of what can happen when you know your rights and exercise them. In some cases, there is no immediate legal solution even though what happened was unfair. When that happens, complaints sent to the proper authorities can at least help to increase awareness of the problems and perhaps pave the way for future solutions.

SAMPLE COMPLAINTS AND SOLUTIONS
(From actual letters from consumers)

Complaint #1

When I was a resident of Denver, Colorado, I discovered that I had suffered a severe hearing loss resulting from irreparable nerve damage. Since my employment requires that I move frequently, and since an ear, nose, and throat specialist advised me to get a hearing aid, I went to the hearing aid department of a large retail store with branches in every major city. I bought a behind-the-ear type of hearing aid.

The salesman told me that this aid was one of the best that could be obtained at the time and that it should guarantee me a lifetime of trouble-free services assuming that I maintained it on a regular maintenance plan, i.e. periodic cleaning, etc.

I received a six-month warranty with the aid. The aid from the very beginning had excessive scratching sounds, grating sounds etc. The salesman told me that my problem was probably due to the fact that I had not gotten used to wearing a hearing aid. I accepted this and continued to wear the aid although I did, on several occasions, complain about the increasing problems with background noise.

For the next two years I had problems with the aid. I moved several times but continued to complain to and get servicing from different branches of the same store. One year after my initial purchase I bought an aid for my other ear on the advice of an audiologist at the Detroit outlet. Once again I was informed that the aid I was buying was the very best that could be obtained and that it should also give me a lifetime of good service. At this point I had spent over $600 on my hearing aids.

My problems continued and so did my complaining. I still did not have an aid that worked satisfactorily. I was finally informed by a salesman that I would have to submit my first hearing aid to the manufacturer for cleaning and repair. I did this and paid $30 for the service. Three months after the aid was returned to me, once again I began to experience a lot of the background noise which had appeared to be corrected when I first got the aid back from the manufacturer. I complained to the audiologist at yet another branch of the same store. He thought that it was due to moisture in the ear and dried out the aid, replaced the tubing and cleaned the molding. That took care of the problem temporarily but two months later the hearing went completely dead. I returned the aid to the store audiologist who forwarded it to the manufacturer. It was returned to me in good working order with a bill for $30. I did not feel that I should have been made to pay the bill even though the warranty for the previous repair had expired two months earlier because the aid hadn't worked properly after the first repair.

Six months later, I began to have the same old problems with the same aid. At that time, I was in Richmond, Virginia, and I took the aid to the audiologist at the branch of the store there and told him about the continuing problems I had with it. I was told that the particular model of hearing aid that I had had been discontinued one year after I bought it. I found out that I had bought an aid, which, according to the experts I have consulted, has a life expectancy of no more than five years. I was sold an obsolete aid under the pretense that it would give me a lifetime of useful service.

The audiologist at the Richmond store forwarded the aid to the manufacturer for repairs. When it returned two weeks later, it was functioning no better than before. It was returned to them twice more because the repairs were not adequate. I was provided with a loaner aid, and, at the time of this writing, my own hearing aid is still at the manufacturer's location for a "final" repair.

I have spent countless hours and a great deal of money in an attempt to get a properly functioning hearing aid and I do not believe that it is the type of expense that someone who has invested over $600 should be subjected to.

Dissatisfied,
John Doe

Solution #1

Mr. Doe has every reason to be dissatisfied. He initially received an expensive aid that was not what it was represented to be. He had problems with the aid for years, paid for useless repairs and never received satisfactory service.

Misrepresentation

The salesman told Mr. Doe that this was one of the best hearing aids available that should give a lifetime of trouble-free service when the salesman apparently knew or should have known that the aid was being discontinued and had a life expectancy of only five years. This type of statement deliberately misrepresents the situation, but the law expects consumers to be wary and take generalized sales statements with a grain of salt. You should never rely on overblown and generalized claims like the ones made by the salesman to Mr. Doe. (See page 10 for a discussion of what kinds of promises you may rely on and those you are not expected to believe.)

Defective Product

Because Mr. Doe complained about problems with his aid from the very start, he was not required to pay for the repairs even though the written warranty had expired. If his aid was defective from the time he bought it, as it seems to have been, he had the right to have it repaired free of charge, as long as he complained about the defect immediately, as he did. (This is required under the concept of express warranty: see page 10.)

The law requires that products work and, if they do not, that they be repaired or replaced without cost to the buyer. Mr. Doe's hearing aid did not work properly from the start, and the repairs to correct the initial defects cannot legally be charged to him. If this happens to you, demand that the product be repaired and, if you are charged for the repair, inform the salesperson and the manufacturer that they are the ones required to pay for the repair of initial defects.

If the aid had worked from the start and Mr. Doe's problem had occured only after the written warranty had expired, he would not be entitled to free repair but would be able to demand that any repairs made be effective or refuse to pay for them.

Because Mr. Doe went through so many unsuccessful attempts to have the hearing aid repaired, he might have been better off to take the hearing aid back to demand his money back as soon as he felt that the repairs were not working out. In fact, he might have lost the right to get his money back because he kept on using the hearing aid after numerous attempts to repair it failed. (see p.13)

Complaint #2

I have polio, arthritis, and heart trouble. I am in a wheelchair and need two long-leg braces. My problem is the prices I am forced to pay for orthopedic equipment and for the poor service that I have received.

1. Defective product, delay in repair, and inadequate repair

Last summer I bought two long-leg braces for $600. My old braces were very worn so I saved money to buy new ones. When I got the braces there were a number of defects in them. One buckle had been put on so that it wouldn't fasten the right way and the metal bands were lined with leather that tore after I had worn the braces for only a few days .

The brace-maker took two months to repair these defects. After the braces were returned to me, I wore them for a short time. Then, one day, when I tried to get from the chair to the bed, my right leg brace turned completely around so that my right foot was facing in one direction and I was facing in another. I fell. Since then, I have been afraid to wear the braces and I use my old pair.

2. Product that broke

I have purchased wheelchairs from a company that assured me that they didn't put metal sides on wheelchairs any more. The chair I bought had plastic sides that cracked in a few weeks. The store refused to repair them or replace them; they said that the sides cracked because I was obese.

3. Wrong model delivered

I have ordered a particular model of wheelchair and have been sent a different model after being promised I would get the model I ordered. Once I had to get a lawyer to make the company take back a wheelchair that was not the model it was represented to be. The company still made me pay rental charges for the few days I had the wheelchair.

These are only a few of the ways that disabled people are victimized. I could give you other examples, but I think you already have some idea of what I am facing. I have suggested to my doctor that we use another brace-maker but he tells me that, in spite of all my problems, this is the best one around. Can't something be done about conditions like these? Do disabled people have to continue to pay high prices for cheap defective products or so-called service?

Mary Jones

Solution #2

Something can be done. No one has to pay for defective products on inadequate service.

1. Defective product, delay in repair, and inadequate repair

Ms. Jones' braces were defective when she bought them. She had the legal right to make the seller repair them at no cost to her. (See p.12.) The two month delay in repairing the braces was not reasonable; the fact that the brace-maker took so long could have given her the right to have her money refunded. In any event, she did not have to keep the "repaired" braces after they were returned to her in an unwearable condition. She could have followed the steps outlined on page 19.

2. Product that broke

The cracked sides on her wheelchair present a more complicated problem. If they were covered by a written or oral promise that they would last, the seller was legally bound to replace them. If no such promise was made, it is important to know whether they were just slightly cracked or whether the problem was a more serious one. If there were

small cracks in the sides and no specific promise, Ms. Jones has no legal remedy and should write the same type of letters suggested for Mrs. Smith. (See complaint #3). If the cracks interferred with her use of the wheelchair in any way, the chair was defective and she could have gotten repair, replacement or a refund of her money. (See page 19 for the steps to follow.)

Her size makes no difference if it didn't cause the cracks or if the seller saw her and did not warn her that that particular chair might cause her problems because of her obesity. Whenever a salesperson lets you believe that a product is good for a special purpose or right for you in your circumstances when he or she knows about them, he or she has effectively promised that the product will work for that purpose or in those circumstances. (See page 11 for a further discussion of implied warranties.)

3. Wrong model delivered

Ms. Jones did not have to accept the wrong model of wheelchair. You never have to accept something that is different from what you ordered. Once you know your rights, you should be able to handle this type of problem without having to pay a lawyer to help you. You should promptly inform the company that you will not pay for the product and that they may come to pick it up. You may not have to return it to them. You do have to allow them to replace it with the model you ordered if they can do so quickly. You do not have to pay rental charges for the time you had the wrong product unless you waited to tell the company about their mistake.

If Ms. Jones had to rent another chair while she waited for the company to give her the correct model, she could charge them for the rental because their mistake caused her extra expense, although she may need to go to court to collect. If this happens to you, you should tell the company that you must have a chair (or any other device) and that you will rent one if they do not supply a loaner or allow you to use the one they sent until they provide a replacement. You can deduct the rental from the price of the correct product when they deliver it, or when you pick it up. (See section on consequential and incidental damages, page 14.)

Complaint #3

I contracted polio at the age of five in 1949 and have been wearing a brace or braces ever since.

Last summer, I was in need of a new brace due to the fact that an ace bandage was holding my last one together so that I could continue to work. The Easter Seal Society referred me to the Vocational Rehabilitation Services for help in purchasing a new brace.

I went through all of the requirements for Vocational Rehabilitation Services including going to an orthopedic doctor because a person cannot have a brace made for them without a prescription. The doctor wrote the prescription for a brace identical to the one I had because I had experienced few problems with it.

I went to an orthopedic company in the nearest city and was told that my old brace (5-1/2 years old) must have been made long ago and that type of brace was no longer available. I bought my brace in my home town and couldn't return there to buy a new one so I ended up with a brace that was riveted together and had screws in the ankle that needed an Allen wrench to be removed instead of a welded brace with a lever lock which was what I wanted.

Six months later, one of the Allen screws stripped and I had to go to the brace shop where they charged me $5 for taking one screw out and putting a new one in. This brace cost Vocational Rehabilitation Services $430 and they have informed me that they will probably not be able to help me in the future. What am I going to do when my next brace is needed? I cannot afford to buy another brace that gives

me problems and rips my clothing nor can I afford to constantly pay high prices for minor repairs such as having buckles and straps replaced.

Mrs. J. Smith

Solution #3

Mrs. Smith's letter illustrates some of the annoying and costly problems that users of medical devices often encounter. Unfortunately, none of her complaints have any specific legal remedy. It is not against the law for a company to provide only riveted braces. What can Mrs. Smith do?

-She can write a letter to the manufacturer of the brace that she bought explaining the problems with the brace and why she thinks a welded brace with a lever lock is better.

-She can send a copy of this letter to the president of the orthopedic company with a request that they carry more than one type of brace or make arrangements for special ordering.

-She can also send copies of the letter to Vocational Rehabilitation Services, to the consumer groups in her state, and to some of the magazines for the disabled. (See lists in appendix.)

Her letters probably will not solve her immediate problems but she will be heard, and, if others join her in expressing their dissatisfaction, something will eventually be done.

WHAT IS WARRANTY?

Warranty means protection. A manufacturer's warranty is the promise they make to you as a buyer and user of their product, and is your protection in case something goes wrong. Because of the importance of this protection, almost every product is covered by a warranty, whether the manufacturer or seller specifically says so or not.

As a consumer you have a right to:
--buy something that works.
--buy something that doesn't break immediately.
--buy something without any defects in it.
--get the exact model of something you ordered.

If any of these rights are violated, you have the right to:
--have your purchase repaired in a reasonable amount of time, at no cost to you.
--have your purchase replaced if you received the wrong model, or if a defect or breakdown can't be repaired.
--get your money back if your purchase can't be repaired satisfactorily or replaced.

These are rights that are protected by warranties.

You can get warranties in various ways, which means that there are various ways in which your rights are protected. Some products come with written warranties, some are covered by express warranties which are non-written warranties, and all are covered by implied warranties. It is not particularly important that you know these terms. What is important is that you learn how to recognize which kind of warranty any purchase is covered by, and how each warranty protects you, so you will know what to do to enforce your rights.

We will first explain each kind of warranty, and then we will explain how to get your rights enforced.

WRITTEN WARRANTIES

Some manufacturers provide written warranties with the products they sell. For a warranty to be written, it must be on a piece of paper or other surface that is given to you along with the product you buy, and must be labeled as a warranty. It must explain what the

manufacturer will do in case the product is defective or breaks down, and must explain what your responsibilities are.

It is important to note that although a manufacturer may use the words warranty or guarantee in its advertising, this does not create a written warranty. It does create a warranty, but what the manufacturer says in its advertising is not covered by the same laws that cover written warranties.

Written warranties are covered by a recently enacted Federal law, the Magnuson-Moss Act. This law only covers articles manufactured after July 4, 1975. If you have bought something manufactured earlier than that, the sections on express and implied warranties will apply to that article.

The law says that all written warranties must now be designated as either full or limited warranties. Under the law, any warranty designated as a full warranty must offer certain protections. If a warranty is labeled a full warranty, but does not set down those protections in writing, you get those protections anyway.

All full warranties must offer these protections:

1. Any defect must be repaired or any defective part must be replaced for free. "Free" means you don't have to pay for labor or parts.
2. Any defective part must be fixed within a reasonable time after you complain.
3. You don't have to do anything unreasonable to get a repair or replacement, such as ship a large, heavy object (like a wheelchair) back to the factory. (If you are dependent on your medical device for mobility, it would probably be considered unreasonable for you to have to transport it anywhere, even across town, for servicing.)
4. The warranty must cover anyone who owns the article during the warranty period.
5. If the article can't be fixed at all, or can't be fixed within a reasonable number of attempts, you get a choice of having the article replaced, or getting the entire cost of the article refunded to you.

A full warranty can cover an entire product, or it can cover only certain parts. If the warranty doesn't designate clearly that only certain parts are covered, and identify those parts, then the entire product is covered.

If a written warranty is designated as a limited warranty, then it does not offer as much protection as a full warranty. It can limit the kind of protection you get from the warranty in various ways.

For example, a limited warranty may:

1. Cover parts only, not labor. This means that if a defective part has to be replaced, the manufacturer will pay for the part, but you will have to pay for the labor.
2. Only allow you a partial refund for an article that can't be replaced or repaired. The longer you have actually used the product before it is returned, the smaller your refund may be.
3. Require you to return a heavy article to the store for servicing.
4. Cover only the person who actually bought the item, not other users.
5. Allow the manufacturer to charge for handling.

Some products are sold with more than one written warranty. Part of a product may be covered by a full warranty, and part of it by a limited warranty, or different parts of a product may be covered by different limited warranties.

All written warranties must include certain information. If a written warranty does not include this information, then it is not in compliance with the Federal law. (See page 19 for a list of the information a written warranty must include.)

All provisions in a written warranty must be clear and conspicuous. It is illegal to use fine print in a written warranty. No statements made by a manufacturer in fine print may be used against you.

When you are buying something, always ask if it comes with a written warranty. If it does, ask to see the warranty, the law requires that it be available for you to read before you buy.

Sometimes the seller may try to sell you an "extended warranty" which costs extra and extends the period of time during which you can receive free repairs, replacement parts, or other service. This may be a good or bad deal, depending on the cost of the extended warranty, the value of the service offered, and the amount of time the extra coverage lasts. Be careful you understand all of the terms of the extended warranty and be sure to carefully evaluate whether it is worth it to you. And remember, you never must purchase this type of extra warranty coverage; it is optional.

Warranty Registration Cards are sometimes included with the product. Sometimes you are given the impression that you must send the card back in order to keep your warranty protection. This is not true. It is only a marketing device for the company's own purposes. Although it's not a bad idea to send the card back, you do not lose your warranty rights if you don't.

EXPRESS, OR NON-WRITTEN WARRANTIES

Many products do not come with written warranties. We have discovered that most medical devices do not. But written warranties are not the only protections that consumers have. All states have laws protecting consumers who buy products without written warranties. These laws create warranties that are known as express warranties. The laws are similar for most states, and we will present here an explanation of how they work. We have also included an information sheet discussing any ways your state's laws differ from our explanation.

Promises

If you go to be fitted for a breast prosthesis, and the saleswoman tells you that the prosthesis you plan to buy will last through 25 machine washings, the saleswoman has created an express warranty. The breast prosthesis must actually last that long, or you will have a right to get it replaced, or have your money refunded.

In other words, any specific promise made to you by a sales person creates an express warranty. If the device you buy does not live up to a promise, the seller must either repair it, replace it, or refund your money. An important thing to remember though, it that this is only true for specific promises, such as promises about how long something will last, with a specific length of time given. It is not true for generalized statements such as "This is the best brand on the market today." If, in your opinion, it does not turn out to be the best brand, there is nothing you can do about it.

The law expects you to recognize such statements as merely being sales talk which can't be relied on.

If you are told that the product is guaranteed, "Satisfaction or your money back", you may take that quite literally. If you are not satisfied with the product for any reason you may return it for a full refund of the purchase price.

If you are given a "written lifetime guarantee," or if the advertisement uses words like "life" or"lifetime", the guarantee lasts for the life of the purchaser unless it is clearly and conspicuously limited to the lifetime of someone or something else.

Description

Another thing that creates an express warranty is a description of the device. If a wheelchair is described to you as having removeable armrests, and you order that wheelchair, the wheelchair that is delivered must have removeable armrests.

The seller must deliver to you exactly what was described to you. If what he or she delivers is not what was described to you, the seller must replace it for you at no cost to you. If the seller tells you that the model described to you is not, in fact, available, you have a right to have your money refunded if you do not want to buy a substitute model.

Samples

A sample of the device you are buying creates an express warranty the same way a description does. If you are shown a sample crutch with adjustable height, and order it the crutch you receive must also have adjustable height, and must be adjustable to the same heights that the sample was. If the crutch you receive differs from the sample you were shown, the seller must replace it with a crutch exactly like the sample, at no cost to you.

Advertising

Any claim made in advertising also creates an express warranty. These include claims made in advertisements in magazines, and claims made in advertising brochures you read in a store. Even though these claims are written down, they are not considered written warranties. They create the same protections as other non-written (express) warranties. This means that if the advertising claims that the device you buy will last for a certain amount of time, or will be good for heavy-duty use, this must be true.

Thus, there are several different ways in which a warranty is created even if a product does not come with a written warranty. These are:

1. Through any specific promises made by a seller.
2. Through a description of the device.
3. Through a sample of the device.
4. Through any claims made in advertising.

Promises, descriptions, samples, and advertisements are all called express warranties because they arise from something that has been said or done on the part of the seller.

IMPLIED WARRANTIES

You are also protected by other non-written warranties, called implied warranties. There are two kinds of implied warranties; an implied warranty of merchantability, and an

implied warranty of fitness for a particular purpose.

Every product is covered by an implied warranty of merchantability. (This is a technical term, but it is important to know it, since it is often mentioned in written warranties.) What this implied warranty means is that any product sold must be useable for the ordinary purposes to which such a product is normally put. In other words, anything sold must work the way an average person would expect it to. A wheelchair must have wheels that turn; a crutch built for an adult's height must be capable of supporting an adult's weight.

Remember, every product sold is covered by this warranty, regardless of whether you discuss it with the salesperson, and even when the salesperson or advertising make no mention of it. In most transactions, this warranty is never discussed, since it is taken for granted. The only time you are not covered by this warranty is when you buy an item "as is" or "with all faults" and when you have the opportunity to inspect it before buying it. Very few medical devices are sold "as is".

(It is very important to note that some written warranties place limitations on implied warranties. If so, the written warranty must say so, clearly, Some states do not allow any limitations of implied warranties. If you live in such a state, you can disregard any statements that try to limit your implied warranty rights. Look on the information sheet included for your state to see if it allows any limitations.)

Because of your implied warranty protection, you have a right to get free repair, replacement, or refund if anything you buy does not work in the ordinary way such a product is expected to.

Sometimes you are also covered by an implied warranty of fitness for a particular purpose. This occurs when you are going to use a product in an unusual way, and the salesperson knows it, and tells you that the particular brand or item you are buying will be good for that kind of use.

Suppose you are very heavy, and are buying a leg brace, The salesperson assures that it will be strong enough for your weight, but the leather straps start to rip loose after very little use. The salesperson knew that you were going to put more strain on the brace than a thinner person would, and assured you that the straps would be strong enough. Therefore, he or she cannot blame your weight for causing the ripping, and must repair the brace for you at no cost. (It would have been all right to charge you more for the brace originally, if it took extra work to make sure the straps were strong enough, it will be the salesperson's responsibility to make sure that they are.)

Remember, you only have the implied warranty of fitness for a particular purpose if you have an out of the ordinary use for the product and the salesperson knows it and recommends a certain brand or type of device as being suitable.

HOW TO ENFORCE YOUR WARRANTY RIGHTS

For Products with Written Warranties

If you buy a product that is defective, that doesn't work at all or doesn't work properly, or that breaks, and if it comes with a written warranty, you should do the following things:

1. Contact the address or telephone number given on the written warranty. (All written warranties are required to provide one or the other.)

Explain what happened. If you have a full warranty, you are entitled to repair or replacement at no cost to you. This also means that the warrantor is responsible for transportation and shipment of any article it is unreasonable for you to transport yourself. If you have a limited warranty you are entitled to repair or replacement, but you may have to bear the responsibility of transporting the article yourself, and at your own expense. Check the terms of the warranty. The repair or replacement must be within a reasonable time. It is hard to define what "reasonable" means. It will depend on you and the manufacturer's or seller's circumstances, and on what the defect is. Taking two months to repair straps on a leg brace is not reasonable, but taking a month or more to repair a complicated object like a stair elevator might be considered reasonable, even though a month's delay is highly inconvenient for you. The law rarely considers any length of time under 30 days unreasonable for repairs.

2. If they can't or won't repair within a reasonable amount of time, or can't or won't repair at all, and if they won't replace it, you are entitled to a refund. If you want to return the product and revoke ownership you must be prepared to:
   *show that the defect substantially impairs the value of the product to you;
   *make the revocation within a reasonable period of time;
   *give the dealer a reasonable number of chances to fix the defect if repairable;
   *notify the dealer that you are revoking ownership, with a list of the problems that render it unsatisfactory;
   * show that the product is being returned without "substantial change". (Normal wear and tear does not count.)

3. If they don't repair your device adequately, and won't replace it or refund your money, you can sue them. We recommend that you sue them in Small Claims Court, if possible. (See page 15 for a discussion of Small Claims Court.) (See page 14 for a discussion of what you can sue for.)

4. If you want to return the product because it is not the model you ordered or because of an obvious defect, be careful that you do not use the product once you have discovered the problem or defect. There are some laws and cases that say that once you know of the problem or defect, and continue to use the product, you no longer have the right to return it to get your money back.

   You may use the product long enough to determine whether there is a problem, but once you do decide it's the wrong model or it's defective, you must notify the seller that you are not satisfied with the product and you intend to return it for your money back. At that point, you may no longer continue to use it. If you do, a court could decide that the continued use constitutes acceptance of the defects. There are two exceptions to this rule. You may use a defective product after you buy it, if:
   a. you bought it with a reasonable expectation that an obvious defect would be repaired, and then the repairs were not made; or,
   b. you did not discover the defect until after you had already been using the product.

For Products Without Written Warranties

If you do not have a written warranty, you still have your implied warranty of merchantability rights. You may also have an implied warranty of fitness for a particular purpose. You also have the right to have the product conform to seller's promises, descriptions, samples, or advertising, if any. You also have the right to any repairs promised by the seller or promised in advertising.

If the product is defective, if it breaks or doesn't work, if it is not what it was represented to be, if it is the wrong model, or if it doesn't turn out to be good for the special purpose you needed it for, you have a right to have the situation remedied.

You should follow the same steps we suggested for products with written warranties.

WHAT YOU CAN SUE FOR

You should only sue as a last resort. However, if you can't get your product satisfactorily repaired, and you can't get a replacement or a refund, you definitely should consider a suit.

These are the kinds of losses you can sue for:

1. You can sue for actual damages. These are any losses you incur directly through the device itself. This means that if the product is totally unusable by you and unrepairable, you can sue for the cost of buying a new one. If you had to repair the product independently, you can sue for repair costs.

2. You can sue for consequential and incidental damages. These are costs incurred by you as a result of the defect, including costs incurred through unreasonable delay in repair or replacement.

This means that even if your device was repaired, but it took an unreasonable amount of time, you can get back any expenses you incurred because of this. Once again, "unreasonableness" is a difficult word to define. It will always depend on the circumstances. The kind of expenses you can sue for include:

1. The cost of renting a replacement while your own device is unusable;

2. Any costs incurred in transporting your device to an independent repairperson;

3. Any extra costs incurred by you because your regular lifestyle was disrupted through lack of the device during repair. e.g. Suppose you need a special brace to drive your car, and needed to use taxis while your brace was being repaired. You could sue for the added expense of taking taxis.

4. Any money lost by you through disruption of your life due to lack of the device. If you are unable to get to work or function properly on your job because of the absence of your wheelchair or special prosthesis, you can sue for the loss of salary due to lost work time.

You can only sue for actual monetary loses. These cannot be speculatory losses. You cannot sue for failure to get a job because of your inability to get to the job interview because your wheelchair was being repaired.

You also cannot get any money if you are upset or emotionally distressed because of disruption of your lifestyle if you did not also incur any extra expenses or losses.

When you compute the amount of your damages, if it is within the Small Claims Court limit for your state, we recommend you take the case to Small Claims Court. (See the enclosed information sheet for the Small Claims Court limit for your state.) If your losses exceed the Small Claims Court limit, you have two options. You can either sue only for the maximum small claims amount, or you can consult a lawyer.

If you think you need to see a lawyer, you can call your local bar association's lawyer referral service listed in the Yellow Pages under either Attorneys or Lawyers. In some areas free legal services are available; check with the lawyer referral service about this. Also be aware that if you have a written warranty, and you win your case, you are entitled to recover attorney's fees and court costs.

SMALL CLAIMS COURTS

Small claims court is a "people's court" designed to settle everyday consumer disputes where the amount of money involved is relatively low. Designed especially for people with limited incomes, small claims court is intended to be an informal and inexpensive forum where the average citizen can present his or her dispute and receive a fast and fair hearing.

An essential feature of small claims court is its simple and flexible procedure. The informality of the small claims court procedure allows the Judge to hear cases without being strictly bound by the more formal and technical legal procedures found in other courts.

Because small claims courts are designed to be as accessible as possible, you are not required to have a lawyer in order to sue in small claims court. Some states do not even allow you to be represented by a lawyer in their small claims courts. You may speak for yourself and present your own evidence. No technical legal knowledge is necessary, and in most instances the Judge will help you bring out the important facts in the case.

There is a maximum monetary claim permitted in small claims court. This varies from state to state from a low of about $300 to a high of $5000. In most states the limit is about $500. (See the enclosed information sheet for information about your state's small claims court rules.)

To take a case to small claims court, you must first file a complaint. The small claims court in your area will be listed in the phone book under Courts for either your city or county government, or else there will be a general information number for Courts. Ask to speak to the clerk of the small claims court. Tell the clerk that you wish to file a complaint. If the clerk tells you to come to the building to pick up a form, and if this would be a hardship to you, explain that you are disabled and ask the clerk to mail it to you. At this time it would be helpful to find out if the courtrooms are accessible, if architectural barriers create problems for you. If they are not accessible, the court still has a legal obligation to accommodate you. Inform the clerk of the problem.

After you fill out the complaint, you must file it along with a small filing fee. These vary from state to state, from a low of $2 to a high of $25. (Check the enclosed information sheet for your state). This fee will be returned to you if you win (the losing party pays it.) You will be notified by mail of your hearing date.

In order to prepare for your hearing you should gather all the evidence you have. This would include sales slips, correspondence between yourself and the other party (always keep copies of any letters you send), bills you have paid that relate to your claim, copies of advertising or of a written warranty. If the dispute is about a defect in a product, you should take the product to the hearing, if you possibly can. If you have incurred extra expenses for things such as taxi fare, you should take receipts for these to the hearing. You may also be allowed to bring witnesses. Check with the clerk about this. Also check to see if you can require witnesses to appear, and how to do so. It also might help you to write down precisely what happened. This will make clearer to you what you want to tell the Judge.

Be sure to be at your hearing on time. At the hearing the Judge will ask you to tell your side of the story. You can also give him or her a brief written statement, and copies of any written evidence you have. The hearing will be conducted very informally. The Judge will not expect you to have any legal knowledge; he or she will merely want you to state the facts as clearly and concisely as you can. He or she will ask you questions to clarify anything he or she doesn't understand. The other party will then have an opportunity to present his or her side.

The Judge will either declare his or her decision at the end of the hearing, or you will be notified of the decision by mail. If you lose, you may have the right to appeal; check with the clerk of the court about the appeal procedure.

INJURIES

If you are physically injured due to a defect in your product, you should see a lawyer. This is not a matter that you should handle by yourself in small claims court.

To find a lawyer, call your local bar association's lawyer referral service, listed in the Yellow Pages under either attorneys or lawyers. If the lawyer thinks that you have a case, she or he will probably agree to handle it on a contingency basis. This means that the lawyer takes a certain percentage of the court award if you win, but you pay the lawyer nothing if you lose.

BAIT AND SWITCH

Another practice which you should watch out for is called "Bait and Switch". This occurs when a seller advertises a product at a very attractive price or with attractive "extras". However, once you go to the store or walk through the door to ask to see that product, you are discouraged from buying the product that is advertised and are directed to a more expensive model or product.

Under Federal law, this is illegal, and it's also illegal in many states.

Usually the seller will engage in any of the following practices if there is a bait and switch scheme involved:

1. Refuse to show you the advertised product;

2. Disparage the advertised product or its guarantee, servicing, or credit terms;

3. Fail to have a sufficient quantity of the advertised products available at all outlets;

4. Refuse to take orders for it; or

5. Show you a defective model of it.

If you recognize a bait and switch scheme, notify your State's Consumer Affairs Division of the Attorney General's office and/or the Federal Trade Commission's Division of Consumer Protection, Washington, D.C. 20580

WHAT TO DO BEFORE YOU BUY

The first thing to do is to ask the salesperson to show you any written warranties that cover the kind of product you wish to buy.

If one manufacturer offers a full warranty and another offers a limited warranty, check the limited warranty to see what it does not cover.

Take page 9, covering the mandatory items included in full warranties with you. If the warranty is designated as a full warranty, it includes these protections even if it does not say so, if the product was manufactured after July 4, 1975.

If a limited warranty doesn't cover specific items that are important to you in connection with the product that you are buying, you might consider buying the full warranty product even though it is more expensive.

Consider:

1. What could go wrong with the product? Is it a complicated medical device or a simple one with less potential for defects or malfunctioning?

2. How dependent will you be on the device? Will it be your only wheelchair? A leg brace you cannot do without?

3. How expensive will repairs be? Does the limited warranty cover labor as well as parts? (A full warranty must cover both.)

4. Can you transport the product to the designated service person? How expensive would shipping be? Does the limited warranty cover shipping charges? (Under full warranties you cannot be required to do anything unreasonable to get service; this would include having to ship a large heavy object.)

Whether or not the product carries a written warranty, you should tell the salesperson exactly what your needs are and how you will be using the device. If you want it for rugged outdoor use, make sure the salesperson know it. If the salesperson is aware of your particular needs and the way that you will use the product, you will have the implied warranty rights discussed on page 11 in the event that the product or service is unsatisfactory to you. It would be helpful to have someone with you to be a witness to any discussion between you and the salesperson in case a dispute arises later.

It may also be a good idea to write down the specific details of the transaction and/or product that are important to you and then have the salesperson sign the written statement and date it.

If there is no warranty, ask the salesperson what you should do if anything goes wrong with the device you are buying and get promises from him or her in writing.

Keep a file of your warranties or written promises, as well as sales slips.

CONSUMER ACTION: WHAT YOU CAN DO

Unfortunately, these warranty laws do not adequately cover some of the problems you may have. We know that you are dependent on your medical device in ways that you are not dependent on something like a toaster. For you, having to wait for a repair for what the law considers a reasonable time (often no less than a month) is just too long a period to wait, because your mobility or ability to carry out your normal daily activities may be cut off or severely limited in the meantime.

However, so far, there are no special protections in warranty law for users of medical devices. At present, the law treats these products the same way it treats all other consumer products. If you feel, as we do, that this should be changed, you shoud write to your Congressperson and Senator, and to the Bureau of Consumer Affairs. (Part of the Federal Trade Commission.) Also write to your representative in state government, and to your state's Attorney General, who will send your letter to the state's Consumer Protection Division, if there is one. Explain any particular problems you have had, and point out the need for special protection for consumers who use medical devices. It is important for you to make your opinion known; do not suffer in silence. The only way for change to come about is for lawmakers to understand that change is needed.

One thing we have discovered is that many manufacturers of medical devices do not give written warranties. Some never have, and some have stopped giving written warranties since the passage of the Federal law covering written warranties, possibly in order to avoid having to comply with the law.

The rationale behind the Federal law is that in a competitive market, consumers will prefer to buy products with written warranties over products without them, and will prefer to buy a product with a full written warranty. This might be true when a consumer has many brands to choose from. However, the realities of your situation are that there may be only one manufacturer's product available in your area. Consumers of other kinds of products can usually take the time to shop around or can choose not to buy the product at all. You cannot do this. In most cases, if you are buying a medical device, it is because you need it, and you may not have the ease of mobility to go to several different places before you buy it. Therefore, you will probably have to buy a product whether or not you like the warranty.

If you buy a product with a written warranty that doesn't comply with the Federal law, send a copy to the Division of Special Statutes at the Federal Trade Commission. (See page 20 for the address.) If you buy a product without a written warranty, you might also write a letter about that to the Federal Trade Commission.

Though the Federal Trade Commission cannot force the manufacturer to supply a written warranty, it can't hurt for them to know that this kind of product is being sold without a written warranty. You might also include in your letter some of the points we covered in the previous paragraph.

APPENDIX # 1: STEPS TO FOLLOW WHEN YOU HAVE A PROBLEM

1. Telephone in (or inform in person) your complaints to the retailer.

2. Written complaint (keep a copy):

   a. to the manufacturer, if the problem with the product is covered by a written warranty;

   b. to the seller, if the problem is not covered by a written warranty;

   c. promptly!

3. If you don't get satisfaction (i.e. repair, replacement, or refund) and a written or unwritten promise has been breached, you can sue in small claims court or see a lawyer. (See pages 12 through 14 for information about suing.)

4. Whether of not there is a warranty or warranty-type promise, you can complain to the Better Business Bureau, Chamber of Commerce, etc. (See page 20 for a list of addresses.)

5. You can enlist the help of the media - write a letter to your local "action line"; call media consumer advocates at your local television station, etc.

APPENDIX # 2: WHAT A WRITTEN WARRANTY MUST INCLUDE

Under federal law, the Magnuson-Moss Act, all written warranties must include the following information. If they do not, the Federal Trade Commission should be informed. (See Appendix #3 for address.)

A warranty must say:

1. Who may enforce it; purchaser only or other users as well.

2. Which parts of the product the warranty does and does not cover.

3. What the seller or manufacturer will and will not do in the case of a defect or breakdown.

4. When the warranty period begins and ends.

5. What you must do in order to get the manufacturer to meet its obligations. This information must include the name of the warrantor and an address or toll-free phone number to use to contact the manufacturer or service person.

6. Any limitations on implied warranties. (Implied warranties are explained on page 11.) This must also include the statement that these limitations may not apply to you, because some states do not allow limitations of implied warranties. (The enclosed information sheet on your state will tell you if your state does not allow such limitations.)

7. Any limitations on your right to recover consequential or incidental damages. (See pages 12 and 13 for an explanation of these damages.) Again, this must include a statement that this may not apply in certain states. (Check the information sheet for your state.)

8. A statement in the following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."

If the warranty does not include all of the above information, you should complain to the manufacturer and to the Federal Trade Commission.

APPENDIX # 3: ADDRESSES

For complaints about written warranties that do not include all of the information in Appendix #2 or when there is no written warranty and you feel that warranty protection should be offered, write to:

Federal Trade Commission
Division of Special Statutes:
Warranty Program
Room 520
Indiana Building
Washington, D .C. 20580

For complaints about defective products and/or poor service, you can complain to the Federal Trade Commission and to:

Better Business Bureau (listed in local phone book.)

Chamber of Commerce (listed in local phone book.)

You can also write to your senator or congressperson.

In Washington:

Congressman or Senator,
"John Doe"
Washington, D.C.

In your own state:

Assemblywoman, Senator, or
Congresswoman "Jane Doe"
"Your State Capital"

You can write to:

Consumer Affairs Division
Attorney General's Office
"Your State Capital"

You can write to consumer groups. Some are listed on the separate sheet for your state.

You can call a law school in your area to see if they have a student clinic that can help you.

You can write to us:

Disability Rights Center
1346 Connecticut Avenue, N.W.
Suite 1124
Washington, D.C. 20036

We do not handle indivudual complaints and would not be able to help you solve your particular problem but we are compiling letters to see which areas involve the greatest number of problems and we would appreciate hearing from you.

APPENDIX # 4

THINGS YOU SHOULD CHECK

I. BEFORE YOU BUY A PRODUCT

1. Does it come with a written warranty?
   - If it does, you must be shown the warranty - see page 8 .
   - The written warranty must include certain information if the product was manufactured after July 4, 1975 - see list on page 9.
   - If the warranty is not specifically labeled as a limited warranty and the product was manufactured after July 4, 1975, you have full warranty protection - see page 9 for a list of your protections under full written warranties.

2. If the product does not come with a written warranty:
   - Did the salesperson make any promises to you concerning the product? - See page 9.
   - Were any advertising claims made? - see page 11.
   - You are protected by what are called implied warranties of merchantability and fitness for a particular purpose - see page 11 and the solution to Complaint #2 on page 6.

3. In general - see section on what to do before buying - page 17.

II. WHEN THE WRONG PRODUCT IS DELIVERED TO YOU

1. You do not have to accept it, if it is not the same as a sample shown to you or does not conform to a description given to you - see page 11 and the solution to Complaint #2 on pages 6 & 7.

2. Enforce your rights by following the steps on pages 12 & 13.

III. IF THE PRODUCT YOU BOUGHT IS DEFECTIVE FROM THE START

1. You are protected whether or not there is a written warranty - see section on express warranties on pages 10 & 11- see solution to Complaint # 1 on page 5 and solution to Complaint # 2 on page 6.

2. Enforce your rights - see pages 10 & 11.

IV. IF THE PRODUCT BREAKS AFTER YOU RECEIVE IT

1. If it is covered by a written warranty - see pages 8 through 10.

2. If there is no written warranty:
   - Were there any promises made concerning the product? see page 10.
   - Were there any advertising claims? see page 11.
   - In general - see solution to Complaint # 2 on page 6.

THINGS YOU SHOULD CHECK (CON'T)

V. IF THE PRODUCT IS USELESS FOR THE SPECIFIC PURPOSE FOR WHICH YOU BOUGHT IT

1. Your rights depend upon the situation:
   - Read the warranty. Does it limit your implied warranty rights? How?
   - See section on implied warranties on pages 11 & 12 and the solution to Complaint #2 on page 6.

2. Enforce your rights - see pages 10 & 11.