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PRESERVATION

A Disabled Child Is Seen More Likely to Be Abused

WASHINGTON, Oct. 6 (AP) — Disabled children are abused and neglected far more frequently than other children, according to a Federal study.

The report, by the National Center on Child Abuse and Neglect, is the first nationwide look at the extent of maltreatment among children with a physical, mental or emotional disability.

Researchers found that disabled children are physically abused at twice the rate of other children, sexually abused at nearly twice the rate and emotionally neglected at almost three times the rate.

Overall, children with disabilities are maltreated at 1.7 times the rate of

other children. And in nearly half of those abuse cases, the child's disability was at the root of the abuse or neglect, according to the report by the agency, a part of the Health and Human Services Department.

In all but 14 percent of the cases studied, the maltreatment was either committed or permitted by a child's primary caretaker, who is generally the mother, the study said.

The study was based on reports of maltreatment, substantiated by child welfare agencies, involving 1,834 children.

The report underscores both the "tremendous economic and social

pressures that are crushing" many families with a disabled child as well as the need to help them, said Senator Christopher J. Dodd, Democrat of Connecticut, who sponsored the 1988 legislation requiring the study.

"Children are vulnerable," Mr. Dodd said in an interview. "But children with disabilities are the most vulnerable. It's terribly disturbing to realize that children with disabilities are being maltreated to such a high degree."

The researchers' findings are based on data collected from 35 child protective services agencies. Each agency provided information on all cases of substantiated maltreatment over a pe-

riod of four to six weeks in early 1991.

Dr. Edward Schor, associate professor of pediatrics at Tufts Medical School, and Dr. James M. Perrin, associate professor of pediatrics at Harvard Medical School, noted that caring for a disabled child can be expensive, stressful and physically exhausting.

Parents may also become isolated from friends, family and their community. "It just makes their situation and their ability to parent a little bit more fragile, a little bit more likely to take a direction that is not good for the child or good for their relationship with the child," Dr. Schor said.

For the study, children were considered disabled if they had one or more of a variety of mental or physical ailments and, because of the ailments, they were limited in mobility, self-care or expression.

THE WHITE HOUSE

WASHINGTON

July 26, 1994

MEMORANDUM FOR THE PRESIDENT

FROM: STANLEY S. HERR

SUBJECT: The Status of the Americans with Disabilities Act

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- II. The President's commitments to full ADA implementation
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The Americans with Disabilities Act is the leading civil rights law for the 49 million persons with disabilities. The gap between its promise and its practice is wide, but narrowing in some significant respects. The Federal government can take a number of steps independently, and in conjunction with private sector actors, to improve ADA implementation in fact and in appearance. Those steps include:

- 1) the staging of a significant White House event to celebrate the anniversary of ADA's enactment and appropriate followup;
- 2) a positive campaign to publicize the importance of the ADA and the values it represents;
- 3) renewed efforts to bring the ADA to fruition through technical assistance, targeted public education, alternative dispute resolution, enforcement, and other means to improve compliance;

July 22, 1994

MEMORANDUM FOR CAROL H. RASCO

FROM: STANLEY S. HERR

SUBJECT: The Status of the Americans with Disabilities Act

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Executive Summary

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- 1) the staging of a significant White House event to celebrate the anniversary of ADA's enactment and appropriate followup;
- 2) a positive campaign to publicize the importance of the ADA and the values it represents;
- 3) renewed efforts to bring the ADA to fruition through technical assistance, targeted public education, alternative dispute resolution, enforcement, and other means to improve compliance;
- 4) putting the Federal government's "disability rights" house in order so that we can lead by example.

INTRODUCTION

The ADA represents both the symbol and the practical means of ensuring equal rights and full inclusion for the 49 million Americans with disabilities. It is truly a Magna Charta for persons with disabilities.¹ As such it is both a central symbol and a practical means of redress to achieve the aspirations of this huge constituency of Americans with disabilities and their families and friends.

Although Congress adopted a finding in 1990 that there were 43 million such Americans, the Census Bureau now concludes that at least 49 million persons -- nearly one in five Americans -- has a disability. This December 1993 report defined disability as a limitation in a functional activity or a socially defined task.² Other significant demographic facts are that 1) persons with disabilities are the single largest minority in America, 2) their numbers will increase dramatically as the population ages and as medical and rehabilitation advances extend life expectancies, and 3) their ranks will also expand as disability status loses some of its historic stigma and instead affords more positive legal protection and benefits. Already we are witnessing the emergence of so-called "new disabilities," such as chemical and environmental sensitivities, cancer, AIDS, and other health or congenital conditions not traditionally associated with a disability label.³

The Clinton Administration has repeatedly affirmed its commitment to full and aggressive enforcement of the ADA. In Putting People First: How We Can All Change America, the campaign articulated our now famous disability credo, linking it first and foremost to ADA implementation. The Clinton-Gore Administration pledged not to "rest until America has a national disability policy based on three simple creeds: inclusion, not exclusion; independence, not dependence; and empowerment, not paternalism." The first of four action steps then proclaimed that we would:

"Work to ensure that the Americans with Disabilities Act (ADA) is fully implemented and aggressively enforced to empower people with disabilities to make their own choices and to create a framework for independence and self-determination. The ADA is not about handouts -- and it is not a giveaway -- it guarantees the civil rights of American citizens with disabilities."⁴

In his first major address to a disability audience (the May 13th commencement address at Gallaudet University), President Clinton stressed the centrality of the ADA to the rights and aspirations of persons with disabilities, both here and abroad. Per his

prepared text, he stated: "For the now more than 49 million Americans who are deaf or disabled, the signing of the ADA was the most important legal event in history. For almost a billion persons with disabilities around the world, it stands as a symbol of simple justice and inalienable human rights. " Viewing the ADA, as part of the "seamless web of civil rights" protection, President Clinton emphatically proclaimed that "as your President, I pledge to see it is fully implemented and aggressively enforced across America -- in schools, in the workplace, in Government, in public places. It is time to move from exclusion to inclusion, from dependence to independence, from paternalism to empowerment."⁵

For the variations on that theme repeatedly enunciated by President Clinton, see Part II, infra at page 8.

Despite the strong rhetoric, the implementation history of the Act is uneven. Due in part to the complexity of the statute and its regulations, as well as the relative novelty of some of its outcomes, the ADA inspires mixed reviews. There are the "cheerleading reports" such as ADA Watch -- Year One, transmitted to the President by the National Council on Disability on April 5, 1993. This report concluded that the federal government had, "overall, performed well in its ADA implementation responsibilities," that there was substantial progress in the early stages of implementing the ADA, and that no amendments to the law were needed at that time."⁶ In contrast, ideologists from the right, such as the Wall Street Journal, have produced opinion pieces that have sought to erroneously portray the ADA as a threat to public health⁷ or an assault on a profit-minded business.⁸ Although Administration spokespersons have sometimes risen to defend the ADA in the media (such as Kristine Gebbie's unpublished letter to the editor refuting the above charges of public health hazards or Assistant Attorney General Deval Patrick's published and spirited defense of the settlement of the public accommodations case in question⁹), there is a need for consistent responsive as well as affirmative messages to the various interested communities. The White House could continue to encourage such a proactive public relations campaign.

Joseph P. Shapiro, the distinguished author, has identified one of the rationales for such a campaign: unlike African-Americans, disabled people won their rights without a prolonged period of significant consciousness-raising, and now fear that society could roll-back those gains. The general public now needs that consciousness-raising and public education to support progress rather than retrenchment. But what the ADA has indisputably done, according to Shapiro, is to convince millions of disabled people to "see themselves as a class, united in discrimination and empowered by law. Their expanding ranks would give the disability rights movement soaring power, educate others to their issues, and in the end, create a society more hospitable

to all. They are full players now in a civil rights struggle, complete with progress and backlash."¹⁰

Notwithstanding the ideologically charged battle to define the ADA as a success or a hindrance, public and private actors are making real progress in putting ADA's principles into practice. Millions of Americans with disabilities, as well as their families and friends, are now benefitting from the ADA in numerous ways. Here are a few examples:

- . Ramps, curb cuts in sidewalks, and other signs of architectural accessibility are increasingly commonplace.
- . Telephone relay systems now operate in all 50 states and the District of Columbia and TTY machines in offices and airports now aid deaf and hard-of-hearing individuals.
- . Telephone relay systems now operate in all 50 states and the District of Columbia and TTY machines in offices and airports now aid deaf and hard-of-hearing individuals.
- . Picture menus and illustrated signboards in fast-food restaurants offer practical help for persons with cognitive or speech limitations.
- . In institutions that range from museums to doctors' offices, and from Fortune 500 corporations to small businesses, the issues of inclusion, reasonable accommodations, and barrier removal have become pressing matters for self-evaluation, planning and action steps to meet the needs of employees, customers, and members of the general public.
- . Leaders in business, nonprofit and governmental circles increasingly recognize that compliance with the ADA is not only a legal duty and the ethically right thing to do, but an opportunity to tap the patronage, talents, and loyalties of persons with disabilities as customers, clients, voters, and employees.
- . Employment practices are becoming fairer as the ADA's employment provisions reach a larger proportion of American businesses. As of July 26th of this year, President Clinton will have the opportunity to mark not only the 4th anniversary of ADA's enactment, but the last major milestone in the extension of its employment provisions to businesses with as few as 15 employees. [The current threshold for the Act's coverage under Title I is 25 employees or more. For discussion of a White House event to mark this dual occasion and followup to that event, see recommendations below].

The disability community can take pride in these gains and the recognition of their community marked by the White House event. This community, however, also has real concerns that the

bright triumph of the law's enactment may be eclipsed by drift and backlash. They complain of a backlash directed at the ADA that weakens respect for the law and draws no forceful Administration response.¹¹ They see a civil rights enforcement effort that has been hampered by lengthy vacancies at the top at EEOC and Justice and insufficient staffing at the investigative and enforcement ground levels. Their leaders point to needs to better coordinate technical assistance by various agencies, monitor progress, and conduct outreach in terms of public education to under-represented groups of people with disabilities such as the members of minority communities, rural communities and people with mental disabilities. These leaders are distressed that the ADA that they prize as a civil rights law is misconstrued in the NPR report as a prime example of an "unfunded mandate" that should be subject to limiting Presidential directive.¹² They argue, with legitimacy, that civil rights laws such as the ADA advance constitutional imperatives of equal protection that should not be undermined by being cast as merely another underfinanced federal mandate.

We can take a series of steps to reassure this community now. The factors of this constituency's size, important role in mustering support for health care reform, and general harmony with our "people first" agenda all support this recommendation. Thus, we can bolster the Administration's capabilities for immediate and longer-term strategies of vigorous but balanced enforcement. We also need to produce some type of booklet and messages to convey what we have accomplished to date and our plans for the future.

This status report has six parts. Part I identifies the main goals of the ADA. Part II recounts President Clinton's statements to date on the ADA. Part III summarizes the statutory duties of the various Federal departments and agencies under the ADA and their main activities so far. Part IV highlights ways that the private sector can and has assisted in training, technical assistance, public education, compliance and enforcement aspects of the ADA's implementation. Part V offers recommendations for us to consider in the narrow context of ADA as well as the broader context of our disability rights objectives. Part VI concludes with some observations on how the ADA can serve as one of the centerpieces of a national disability policy that largely remains to be articulated. Endnotes and appendices are provided as documentation for these conclusions.

I. MAIN GOALS OF THE AMERICANS WITH DISABILITIES ACT OF 1990

Congress articulated four national goals through findings and legislative history to the ADA. In outline form, these goals seek to:

1. provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities;

. The history and ongoing effects of segregation and isolation of individuals with disabilities constitutes a serious social and legal problem.

. This discrimination continues in fields such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

. This discrimination takes the forms of:

a. Intentional exclusion -- this includes refusal to serve persons with a disability in restaurants, refusal to accommodate the users of wheelchairs in theaters, exclusion of children with disabilities from parks and zoos, and exclusion of students from educational opportunities;

b. Exclusionary effects of architectural and design barriers -- this includes the design of larger buildings currently under construction that make no accommodation for the needs of persons with disabilities, such as Braille indicators in elevators and automatic doors, as well as the failure to modify older buildings to make such accommodations;

c. Exclusionary qualifications and standards that bear no relationship to the individual's abilities -- this includes job requirements of height or abilities that bear no relation to the needs of the job, or failure to hire or promote persons with disabilities simply because it would require reasonable modifications of the job.

2. Bring persons with disabilities into the economic, cultural, and social mainstream of American life;

. People with disabilities, as a class, are severely disadvantaged socially, economically, and educationally.

. Men and women with severe disabilities are far less likely to be employed than persons with no disabilities (28% versus 81% employment rate), while those with a non-severe disability lag about 5% below their peers in employment (females 73% versus 67%; males 89% versus 84%).¹³

. Many more persons with disabilities, however, are physically and mentally able to work and are motivated to improve their economic and social conditions, but face the barriers of intentional exclusion, exclusionary effects, and exclusionary requirements, as well as disincentives to work under the existing

unreformed systems of health care, welfare and disability benefits.

. The existence of these disincentives and discriminatory barriers denies people with disabilities the opportunity to function in society on an equal basis with other persons.

. The cumulative effects of these barriers and disincentives often lead to dependency, despair and inactivity.

3. Provide enforceable standards capable of remedying discrimination against individuals with disabilities;

. The 49 million Americans with disabilities, notwithstanding their numbers and many allies among families and friends, are often politically powerless to remove the barriers of discrimination or to exert pressure commensurate with the magnitude of their problems.

. The ADA is designed to add the force of the Federal government to their cause and is consistent with the equality imperative -- the Jeffersonian ideal of providing all Americans with equal opportunities to participate in the Nation's government, economy and civic life.

. The ADA has struck an appropriate balance by providing people with disabilities with the necessary legal support to achieve equal opportunity, while not overly burdening the employers, public entities and providers of goods and services of whom the ADA requires reasonable accommodation to the needs of persons with disabilities.

4. Ensure that the Federal government plays a central role in applying and enforcing these antidiscrimination standards;

. The Civil Rights Division of the Department of Justice and the Equal Employment Opportunity Commission have key enforcement obligations under the ADA.

. Federal law enforcers negotiate, mediate and, if necessary, go to court to seek compliance with the Act. Voluntary compliance is the preferred solution, but the ADA does permit the imposition of a range of sanctions, including injunctions, fines, fees, costs, and damages on recalcitrant individuals or entities who continue to discriminate against people with disabilities.

. The Federal government's enforcement powers flow from the broad authority of the Fourteenth Amendment and the Commerce Clause of the U.S. Constitution.

. The ADA is thus emphatically a civil rights law grounded in the constitutional requirement of equal protection, and like other civil rights laws barring discrimination on the basis of race, gender or religion is not to be construed as an "unfunded mandate" in the terminology of current political debates. Just as the costs of dismantling "Jim Crow" segregation based on race were routinely borne by state and local governments, so should the costs of ending illegitimate segregation based on disability, a status which is an innocent condition of birth, injury or illness.

For the full text of the Act and commentary on its provisions, see pages 265-313 of Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans (L. Gostin & H. Beyer, eds. 1993), the book which I presented to you.

II. THE PRESIDENT'S COMMITMENT TO FULL IMPLEMENTATION OF THE ADA

Last year President Clinton marked the anniversary of the ADA by meeting with key disability leaders on July 27, 1993. According to his talking points, he emphatically stated that "our Administration is committed to [the ADA] from top to bottom, as the activities of Attorney-General Reno and many other government agencies yesterday showed."

In October 1993, President Clinton announced "National Disability Employment Awareness Month." In so doing, he emphasized key elements that form the underpinnings of the ADA. President Clinton equated the ADA with previous Civil Rights legislation, stating, "[we will not be satisfied as a Nation until we have fully implemented the laws that offer equal opportunity for Americans with disabilities."

The President also mentioned the enormous social costs of not granting equal rights and equal responsibilities to people with disabilities: a smaller pool of talent from the nation to draw upon; the \$300 billion annual cost of keeping productive citizens dependent upon welfare and forcing them into non-productivity; and lower tax revenues resulting from fewer people in the workforce.

President Clinton emphasized the need for dignity that these Americans want and deserve, but that is too often denied them. In proclaiming October 1993 as National Disability Employment Awareness Month, the President reminded the nation of his commitment to full implementation of the ADA.

As recently as May 13th the President reiterated that commitment -- to aggressively implement and enforce the ADA. Speaking at the Gallaudet commencement, he referred to the ADA as symbolizing the threshold of a new era "for all Americans, those

of us with disabilities and those of us without." ¹⁴ The ADA represented a triumph "over partisanship and prejudice" and proved "once again that the right cause can unite us."

III. THE AGENCIES' STATUTORY RESPONSIBILITIES AND ACCOMPLISHMENTS

The Act divides implementation responsibilities among five agencies: the Department of Justice, the Equal Employment Opportunity Commission, the Federal Communications Commission, the Department of Transportation, and the U.S. Architectural and Transportation Barriers Compliance Board [hereinafter the Access Board]. This section highlights the respective duties, accomplishments, and limitations of these five agencies in respect of the President's directive to "fully implement and aggressively enforce" the ADA.

1. Department of Justice.

Duties. DOJ has responsibility for enforcement of Title III (public accommodations) of the ADA, and shared jurisdiction over complaints concerning State and local government actions under Title II. The Attorney General has also promulgated regulations on Title II (other than transportation matters reserved for the Secretary of Transportation). Such regulations are to be consistent and coordinated with Section 504 regulations under the Rehabilitation Act.¹⁵

Accomplishments. DOJ currently allocates Title III work to its Public Access Section in the Civil Rights Division and Title II to its Coordination and Review Section. DOJ now assigns 50 professional staff to ADA matters, but acknowledges that this is too small a complement for the load of complaints they receive. They recently added 10 people to a telephone hotline for advice and technical assistance (circa February 1994), and added 5 attorneys to the Public Access section (circa October 1993). They have entered over 150 Title III and 100 title II formal and informal settlement agreements. Some of their notable successes include:

- . the availability of sign-language interpreters and other auxiliary aids to permit deaf students in review courses for professional licensure to learn and communicate effectively.¹⁶

- . settlement without litigation of a complaint that emergency medical technicians had refused to assist an individual with HIV, with the settlement requiring the training of the technicians and the issuance of a new policy that persons with HIV/AIDS are entitled to benefit fully from emergency medical services.¹⁷

. settlement of physical accessibility complaints related to ensuring access to public areas of the Empire State Building, including the lobby, observation decks, restrooms and telephones.¹⁸ (A DOJ official quite aptly referred to this as "a high-profile case.").

Improvements. The past lack of leadership due to the vacant Assistant Attorney General for Civil Rights and deputy posts exposed the Administration to some criticism of our ADA implementation. The appointment of respected ex-NAACP litigator, Deval Patrick, has done a great deal to overcome the appearance of time lost. The initial public reaction to his nomination was quite favorable, with the Washington Post front page of Feb. 2, 1994 trumpeted his interest in "aggressively enforcing civil rights laws against lending and housing discrimination, as well as the protection and expansion of voting rights and enforcement of the Americans With Disabilities Act"¹⁹ Another sign of appropriately vigorous implementation of the ADA is the Wall Street Journal's critique of one recent settlement, and Mr. Patrick's published reply. Most complaints are settled without a lawsuit becoming necessary. However, the Department has shown its willingness to file appropriate lawsuits (such as claims against a police and firefighters pension fund that excluded officers on the basis of disability, or against dentists who refused to provide dental treatment to individuals who test positive for AIDS). As these cases are adjudicated or settled, the Department will have a stronger track record of well-publicized enforcement.

The DOJ is drastically understaffed for its mission and informal role as lead agency for ADA action. For instance, as of October 1993, a staff of 20 professionals (14 attorneys, 3 architects, and 3 paralegals) were responsible for over 950 Title III investigations. The staffing numbers are equally daunting for DOJ's Title II enforcement. Better coordination with EEOC over Title II employment claims may alleviate some of the stress but more staff at Justice in this burgeoning and novel area of civil rights enforcement seems vital. However, recent reports about Congressional action on such appropriation requests are not encouraging.

Public confidence in ADA enforcement is critical for continued progress. Sometimes the ADA achieves dramatic results such as Oregon's decision to revisit its medical rationing plan when it was challenged as imposing discrimination based on disability.²⁰ Most times it does not. Indeed, some critics believe that businesses and other covered entities choose not to comply because the likelihood of enforcement is relatively low. They argue that those entities take corrective actions only when a complainant appears with the backing of a legal advocate. Paradoxically, despite a relatively small number of litigated cases, leaders in the disability community express apprehension

that the "other shoe will drop" as business and state and local government react to the ADA in terms of an unfunded mandate and then lobby for some future rollback of the law's requirements through statutory or regulatory amendments.

2. The Equal Employment Opportunity Commission.

Duties. EEOC is charged with the enforcement of the employment sections (Title I) of the ADA, which prohibits discrimination against people with disabilities in private sector employment and in public sector jobs in state and local governments.

Accomplishments. Although the underlying law is a bit murky, the EEOC has had some early successes in obtaining consent agreements or preliminary rulings in ADA-based AIDS bias claims against health insurers.²¹

. The EEOC's new Alternate Dispute Resolution (ADR) program seeks to settle ADA and other civil rights disputes in a timely and cost-effective manner, without resort to litigation.

. This pilot mediation program in the private sector involving 398 charging parties resulted in 82% of them accepting the offer, but only 62% of the respondents resulting in 201 sets of parties willing to undertake mediation.

. Despite a seeming hesitancy to litigate, the EEOC scored a notable success in their first ADA court battle.²² That case involved a jury award of back pay, compensatory damages, and punitive damages to an executive in a security investigations firm who was fired because he had cancer notwithstanding his ability to perform the essential functions of his job.²³ The court's judgement also barred retaliation for bringing an ADA claim or assisting another as a witness in a claim, gave notice to other employees of their ADA rights and the employer's violation of this particular executive's rights, and required such notice in the company's employee handbook or training manual.²⁴

. EEOC also filed suit in September 1993 on behalf of a foreman who returned from an approved 13 week disability leave for his back condition, but was not reinstated because of the employer's that would experience difficulty with its insurance coverage. The EEOC alleges that the employee was fired despite his willingness to demonstrate that he could perform the essential functions of his job, and that is considering filing a similar suit against another Michigan employer.²⁵

Improvements. The EEOC, as enforcer of Title I, must vigorously challenge Title I violations. If it is doing so (through ADR, other mediation, or the courts), it must be more effective in getting the word out to employers and the concerned public. If

it is not, the EEOC must be reinvigorated. Backlogs in complaint processing are long and said to be growing longer. Such backlogs were mentioned in the course of the confirmation hearings of our EEOC nominees on July 21, 1994. One of their responses was to embrace ADR concepts, but to note that trends may be exacerbated in the ADA area due to their new expanded jurisdiction over smaller businesses.

3. Department of Transportation.

Federal activities to improve transportation accessibility are one of the least heralded aspects of ADA implementation. The ADA is only one source of statutory authority for such accessibility. The Air Carrier Access Act of 1986 and the Rehabilitation Act of 1973 (Section 504) also undergird efforts to create a barrier-free environment and ensure that travelers with disabilities will be treated without discrimination in mass transit, intercity rail service, inter-city buses, federally aided streets and highways, maritime transport, and aviation. Without access to the nation's transportation system, Americans with disabilities are unable to reach their jobs and places of educational, cultural, and social opportunities.

Accomplishments.

DOT can point to many solid gains, such as:

- . every Federally-subsidized mass transit system provides some type of accessible services usable by passengers with disabilities.

- . about half of the nation's 52,500 fixed route buses in urbanized areas, i.e., 26,000 buses are now lift- or ramp-equipped (versus 35% pre-ADA).

- . all 8,106 rapid railcars are accessible to wheelchair users.

- . over 104 of the 540 ADA paratransit areas planned to be in compliance by the end of 1993, with some 440 expecting to be in full compliance by the end of 1996 (only two areas have so far requested a waiver due to financial burden).

- . Amtrak service is becoming accessible, with 47 accessible Superliner cars received as of May 1994 and anticipated statutory compliance of the one accessible car per train per the ADA's July 1995 deadline.

- . Steps are being taken to improve street and highway accessibility features such as curb cuts, ramps, or other sloped areas, and regulations on signage, emergency road-side call boxes, and other items in public rights-of-way.

Improvements.

Several significant transportation issues remain to be resolved. They include:

- . Rule-making on over-the-road bus (OTRB) accessibility that affects some 25,000 buses and 3,500 private companies, sparking controversy over the extent of costs to be incurred in installing lifts and wheelchair storage space and concern in the disability community that their interests were being unduly compromised.

4. The Federal Communications Commission.

the FCC is responsible for assuring that telephone companies provide relay services for communicating by and with people who use TDDs. It is also charged with oversight of television stations that are required to transmit certain public service announcements with closed captioning.

Accomplishments.

- . Telephone relay systems now operate in all 50 states and the District of Columbia.
- . TTD machines are increasingly found in transit facilities and other places to aid deaf and hard-of-hearing individuals.

Improvements.

- . A common 800 number for access to relay systems is being sought by consumers.
- . On the horizon are broad issues of universal design for telecommunications equipment as the National Information Infrastructure is designed.

5. The Access Board.

This Board describes the ADA as its number one priority. Under the ADA, the Access Board has multiple responsibilities: implementing a technical assistance plan on Board guidelines for the transportation and public accommodations ADA titles; developing accessibility guidelines for transit facilities and vehicles, commercial facilities and public accommodations, children's environments, and recreation facilities; and producing technical assistance manuals and guidelines for accessibility of State and local government facilities, and public accommodations.

Accomplishments.

. developing accessibility guidelines (ADAAG) for buildings and facilities, for transportation vehicles, and for automated teller machines at banks.

. technical assistance and training program targeted for architects, designers, the construction industry, and state and local government officials through approximately 75 training sessions, the distribution of 12,600 information packets, and responses to some 18,000 telephone calls.

Improvements.

. The ADAAG for Over-the-Road Buses will provoke considerable debate before it is finally settled.

. ADAAG for recreation facilities, outdoor developed areas, children's environments, water transportation, and other issues may require years before rulemaking is final.

. The Board recognizes the need to revise accessibility guidelines for Federally financed buildings and facilities covered by the Architectural Barriers Act, the so-called UFAS standards (Uniform Federal Accessibility Standards), to make them consistent with the more complete and often high accessibility standards under ADAAG.

IV. THE PRIVATE SECTOR'S ROLES IN TRAINING AND ENFORCEMENT

The Federal government has subsidized significant training activities that are undertaken by independent living centers, disability organizations, university-based programs, business-based programs and other agencies. For instance, the National Institute on Disability and Rehabilitation Research (NIDRR) has a network of regional Disability and Business Technical Assistance Centers and other training projects that annually train some 60,000 persons, respond to 80,000 technical assistance requests, and distribute 540,000 documents, materials either produced or reviewed by DOJ or EEOC.²⁶ Annual costs of this NIDRR project are about \$6.3 million.

The private sector is also producing a wide variety of educational materials that may hasten ADA compliance. Some of these commercially produced guidebooks and scholarly commentaries are quite useful.²⁷ Others are little more than poor paraphrasing of technical assistance materials available through the Federal government at little or no cost. There is also an outpouring of literature in trade association magazine on how or to comply, or least how to avoid penalty under the ADA. My

favorite item: "Avoid Fines: Adjust Hiring Policies to Meet ADA Requirements: Making Reasonable Accommodations" for Disabled Employees is now required under the Americans with Disabilities Act, 9 Night Club and Bar Magazine 40 (Aug. 1993).

In terms of enforcement activity, private parties have brought many of the most significant ADA cases. These victories include:

- . the right of a Little League baseball coach who uses a wheelchair to coach from the coach's box and otherwise participate fully in the responsibilities of a coach as he had been doing quite successfully for the past three years. As the court noted, coach Lawrence Anderson's "significant contributions of time, energy, enthusiasm, and personal example" not only benefitted numerous children, but his work with young people taught them "the importance of focusing on the strengths of others and helping them rise to overcome their personal challenges."²⁸

- . the right of a blind person not to be categorically excluded from jury service. Judge Joyce Hens Green correctly reasoned that archaic attitudes and unsubstantiated prejudices should not permit a per se rule of exclusion since the very same court had the service of a blind judge as sole trier of fact, a juror could be excused from a particular trial where documentary evidence would be extensive, a juror could assess credibility based on the auditory correlates to nervousness, and a juror could benefit from reasonable accommodations such as a reader's help. The court also ordered arbitration as method of encouraging the speedy resolution of the case's remaining issues.²⁹

- . the right of law school graduates with severe disabilities such as a severe visual disability³⁰ or severe dyslexia to extra days to take the bar examination (DOJ filed an amicus curiae brief in the latter case that led to a settlement).³¹

- . the duty of municipalities to install curb cuts or slopes at intersections with curbs when resurfacing city streets. The Third Circuit has upheld the ruling in Philadelphia that such resurfacing constitutes an "alteration" under Title II of the ADA.³²

- . inquiries into past mental health problems for professional licensure have been limited, such as The DC Court of Appeal's 5-year limit on questions about drug or alcohol treatment or hospitalization for mental illness.³³

V. RECOMMENDATIONS

1. Coordination

There is a need for policy coordination, and coordination of overlapping public information, technical assistance, enforcement functions if the ADA is to be part of the truly "seamless web of civil rights" that the President sketched in his Gallaudet speech.

2. Public Education

Although there have been considerable efforts to educate the American public to their rights and responsibilities under ADA, that must be renewed and intensified. Misperceptions still abound. Ignorance of the law is still a common response to complaints. Outright distortions of its costs and purposes are sometimes encountered. Unless those misperceptions and distortions are countered, unless knowledge replaces ignorance, the risks of backlash, delays and intransigence are great.

3. Training and Technical Assistance

Training and technical assistance seems somewhat coordinated at an interagency level. As previously noted, Congress funded NIDRR to create a network of technical assistance centers, materials development projects, national training projects, and even a NIDRR ADA Technical Assistance Coordinator. Other voices on training and technical assistance emanate from DOJ and EEOC which provide their own technical assistance and training materials and guides. In addition, a robust, if uneven private sector response spews out a constant array of publications, handbooks, conferences, and consulting services. The result is that good, bad, and mediocre information vies with each other, and the free government-supplied material is often superior to exorbitantly priced, "knock-offs" put out by the unscrupulous. As a result the business and disability communities is understandably confused as to where to turn for the "gold-standard" in reliable information and training.

4. Federal Government as model employer and model of public accommodation

Unless the Federal Government raises its sights and performance as a workplace for persons with disabilities, as a source of accessible recreation, information and other public accommodations, we will be prone to charges of a double standard from the private sector. This may require executive orders and other leadership from senior White House officials.

4. Enforcement

A review of 151 federal cases that make some reference to the ADA suggests a random, even haphazard effort at judicial enforcement of the act. Some type of summit meeting between federal law enforcement officials, public interest law firms, and major disability organizations could assist in the development of more strategic approaches to case selection and case sequencing. Whether such meetings are ongoing or one-time, high-profile or low, the point is that scarce enforcement resources need to be pooled, coordinated, and animated by some broader vision than a case-by-case approach based on who is the first or loudest to clamor for attention.

5. Alternative Dispute Resolution (ADR)

While the ADA encourages and everyone agrees that alternative means of dispute resolution are desirable (such as negotiations, factfinding, facilitation, conciliation, mediation and other ADR modes), systematic mapping and reporting on the use of ADR could increase their use in this field.³⁴ At present there seems to be some uncertainty as to the utility of ADR techniques in this field.³⁵

6. White House Event

On July 27th, the planned White House event offers the President the chance to put a Democratic face on the ADA and to energize the entire Federal Government and the disability rights movement to implement it. It will also offer us a good mailing list for publications and follow-up activities at the state and regional level.

7. ADA-Section 501 person in the White House

A GSA audit due to reach us on July 21, 1994 will reveal the extent to the White House Complex needs changes to meet appropriate accessibility standards. Not only is someone or some group needed to oversee timely corrections, but some individual is needed with some permanent status here who can serve as a point of contact with the disability community on their manifold political, public liaison, policy, ADA-Rehabilitation Act enforcement, and communications concerns.

8. Communications about the ADA

ADA should be a short-hand for not only the Act's implementation, but the linked concerns with the Rehabilitation Act's antidiscrimination provisions that cover the federal government, federal contractors, and federally assisted entities. Seen in this wider context, the President, Vice-President, the First Lady, and Ms. Gore can find many opportunities to call for across

the board advances in nondiscrimination and a fair playing field for persons with disabilities and their families.

9. Complaint handling

Anecdotal information suggests that the Administration has a long distance to go in improving the ways we handle disability complaints received at EEOC and DOJ. Complainants at EEOC report lack of interest, and lack of responsiveness on the part of investigators. A high proportion of Title III complaints at DOJ receive a form letter that due to the high volume of cases and not the merits of the particular claim, DOJ cannot assist. In the Justice Department's Title II work -- where there is not the same discretion to turn aside complaints without investigation -- it is said that there is a six-year backlog of cases and the Act has only been in force for two years! These problems will only grow more acute as a) the ADA reaches smaller businesses (15-24 employees in size) as of July 26th; b) more and more members of the disability community learn of their ADA rights and become disenchanted with recalcitrant responses to them; and c) a generation of more assertive and self-confident graduates of IDEA rights-based special education problems confront barriers and discrimination. This is a recipe for political fallout. The solutions to avert that include not only more ADR staff, investigators, and advocates, but better engineered and customer-friendly complaint handling processes.

10. International activities

The United States has a marvelous chance to be the world-leader in achieving rights and dignity for its citizens with disabilities. When visitors come to this country, they can also take back the message that here the ADA and other disability rights are taken seriously and deep changes are on the way. What I wrote a year ago remains equally apt in this context:

The outcome of [the struggle to implement the ADA fully] will be closely watched in countries with far fewer resources and less developed civil rights infrastructure than the United States. If the ADA succeeds, other countries may choose to reevaluate the adequacy of their own laws and nonlegal approaches to combatting discrimination. If the ADA falters, the lessons drawn from that experience also may have international reverberations. In the United States, the ADA can be a catalyst to actions at the state and local levels to enable persons with disabilities regardless of the nature and seriousness of those disabilities, to have the "right to enjoy a decent life, as normal as full as possible" (UN Declaration on the Rights of Disabled Persons, 1975). The ADA is a necessary but not

sufficient step toward realizing those values and human rights.³⁶

VI. CONCLUDING OBSERVATIONS

Our celebration of the ADA reminds us that this landmark legislation does not constitute the whole of a disability policy we intend to craft. As we recall the 25th anniversary of the moon landing, there is something sobering about a Nation great enough to put a man on lunar ground but not yet able to help each child with a disability to get into a school, or transport such an adult by accessible means to an accessible workplace.

And despite passage of the ADA, jobless levels have not changed over the past eight years. Only 31% of Americans with disabilities aged 16 to 64 are working, though the overwhelming majority are eager to find work. The Harris poll released yesterday also shows that Americans with disabilities are more than twice as likely to have incomes below \$15,000 than other Americans (40% versus 18%) and to fail to graduate from high school (25% versus 12%). It is no wonder that only 35% of those surveyed are satisfied with their lives in general, and that only 47% believe that others treat them as equals rather than reacting to them with pity or embarrassment. The good news: compared to eight years ago more people with disabilities are graduating from high school and they are enjoying better access to restaurants, stores and other public places. But much remains to be done to eliminate discrimination and to advance this Administration's disability goals.³⁷

The ADA embodies the themes of greater independence, empowerment, and inclusion that we have articulated. A national disability policy would see that those themes are carried forward in Social Security Administration disability programs, vocational rehabilitation activities, and the various stages of education from pre-school to higher education and in school to work programs. In health care reform and welfare reform, we are on the right track in including people with disabilities in our reform initiatives. However as we press to make generic programs truly inclusive, ADA and the Rehabilitation Act's Section 504 issues will loom larger. And we will also have to take into account programs that cater to persons with severe disabilities, deaf persons or other groups that for one reason or another need, or prefer to have, their own distinctive programs. ADA as the product of a coalition of 133 national organizations offers a good place from which to extend that consensus to the next generation of service and accommodation issues. One of those issues, for instance, is how the National Information Infrastructure will help to ensure the full participation of Americans with disabilities in the commercial, cultural, and social life of the nation.

Compared to the hard work of its implementation, the ADA's enactment was the easy part. The Clinton Administration is now well-positioned to make that authentic implementation its own shining accomplishment. I would be pleased to offer any further advice or elaboration on any of these points.

Endnotes

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.
2. John M McNeil, Americans with Disabilities: 1991-92 Data From the Survey of Income and Program Participation [Current Population Reports, Household Economic Studies P70-33, issued Dec. 1993](US Dept. of Commerce, Bureau of the Census, Economics and Statistics Administration).
3. Irving Zola, "The Sleeping Giant in our Midst: Redefining 'Persons with Disabilities'," in Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans (Lawrence Gostin & Henry Beyer, eds., 1993) (hereinafter Implementing the ADA).
4. Governor Clinton & Senator Gore, Putting People First: How We Can All Change America 82 (1992).
5. Remarks at the Gallaudet University Commencement Ceremony, 30 Weekly Compilation of Presidential Documents 1061, 1063 (May 16, 1994).

6. National Council on Disability, ADA Watch -- Year One: A Report to the President and Congress on Progress in Implementing the Americans with Disabilities Act 1, 4 (April 5, 1993).

7. E.g., James Bovard, "Disabilities Law, Health Hazard: Regulatory Chokehold," Wall Street Journal, March 23, 1994, at A-14.

8. "Disabilities Dissenter Crushed," (editorial), Wall Street Journal, May 18, 1994, A-17.

9. Letter to the Editor, Deval Patrick, "In Aiding the Disabled, Our Policy is Clear," Wall Street Journal, May 23, 1994, A15. (editorial ignores "our extensive efforts to educate businesses about their obligations under the act in order to help them avoid costly litigation and settlement expenses.

.... I am proud of the work we are doing to aggressively seek full and equal access to our society for individuals with disabilities, and the division will continue its efforts.").

10. Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 332 (Times Books, Random House, 1993).

11. See National Council on Disability, Summary: ADA Watch Planning Meeting at 1 (Feb. 10, 1994, Dirksen Senate Office Building, Washington, DC).

12. Vice President Al Gore, From Red Tape to Results: Creating A Government that Works Better & Costs Less: Report of the National Performance Review 37-38 (Sept. 7, 1993):

"Action: The President should issue a directive limiting the use of unfunded mandates by the Administration.

As the federal deficit mounted in the 1980s, Congress found it more and more difficult to spend new money. Instead, it often turned to "unfunded mandates" -- passing laws for the states and localities to follow, but giving them little or no money to implement those policies. As of December 1992, there were at least 172 separate pieces of federal legislation in force that impose requirements on state and local governments. Many of these, such as clean water standards and increased public access for disabled citizens, are unquestionably noble goals." [emphasis added; the recommendation went on to question how local governments would manage to pay for such mandates].

13. Census Bureau 1993 Disabilities Study, supra note 2, at 11-13.

14. 30 Weekly Compilation of Presidential Documents 1061, 1062 (quoting President I. King Jordan).
15. 42 U.S.C. § 12134(a)-(b) (cross-referencing 29 U.S.C. § 794).
16. U.S. v. Becker C.P.A. Review, 1993 WL 632257 (D.D.C. Dec. 22, 1993) (cross motions for summary judgment denied), CA No. 92-2879 settlement decree (May 13, 1994).
17. Formal settlement with Philadelphia, Pennsylvania, in US Department of Justice, Enforcing the ADA: A Status Report from the Department of Justice 5 (April 4, 1994).
18. Empire State Building, New York City. Id. at 7.
19. Washington Post, Feb. 2, 1994, at 1. (emphasis added).
20. See Shapiro, supra note ____, at 324-28.
21. Milt Freudenheim, "In Minnesota, Settlement is First for AIDS Bias by Health Insurer," N.Y. Times, Dec. 22, 1993, A19. (noting settlement with damages awarded where employer reduced AIDS health insurance coverage from \$300,000 to \$5,000).
22. There are many potential reasons for a reticence to prosecute. EEOC has many competing claims on its prosecution resources and may be waiting to see how committed to the ADA is its incoming leadership. It may wish to keep out of court because of the backlog of complaints it faces and the need to demonstrate ADR restraint and flexibility. A third possibility is that, while eager to prosecute, the EEOC strategically believes it must wait for clear "winners" so as to appear the effective enforcer and deter others into compliance.
23. U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, 820 F. Supp. 1060 (N.D. Ill. 1993) (summary judgment for plaintiff denied), 823 F. Supp. 571 (N.D. Ill. 1993) (jury award of \$500,000 reduced to \$150,000; \$50,000 in compensatory damages and \$22,000 in back pay also awarded).
24. Id. 823 F. Supp. at 581.
25. US EEOC, News Release, "EEOC Files Disability Lawsuit Against H. Hirschfield Sons Co.," Sept. 3, 1993.
26. NIDRR's Americans with Disabilities Act (ADA) Technical Assistance Initiative (briefing paper distributed on July 19, 1994, and attached as Appendix C).

27. E.g., Don Ferish and Peter W. Thomas, Complying with the Americans with Disabilities Act: A Guidebook for Management and People with disabilities (Quorum Books, 1993); Implementing the ADA, supra note 3; ABA Mental disabilities and the Americans with Disabilities Act: A Practitioner's Guide to Employment, Insurance, Treatment, Public Access, and housing (Commission on Mental and Physical disability Law, J. Parry, ed., 1994).
28. *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Arz. 1992).
29. *Galloway v. The Superior Court of the District of Columbia*, 816 F. Supp. 12, 17 (D.D.C. 1993).
30. *D'Amico v. N. Y. State Board of Law Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993).
31. *Rosenthal v. N.Y. State Board of Law Examiners*, No. 92-CIV-1100 (S.D.N.Y. 199).
32. *Kinney v. Yerusalem*, 812 F. Supp. 547 (E.D. Pa. 1993), aff'd. 9 F.3d 1067 (3rd Cir. 1993).
33. "Bar examiners respond to the ADA: Spurred by suits or the law, officials grant more test time to disabled applicants," ABAJ 20 (Nov. 1992).
34. 42 U.S.C. § 12212 states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes under this Act."
35. See Loren Allison & Eric Stahlhut, "Arbitration and the ADA: Do the Two Make Strange Bedfellows?," 37 Res Gestae 168 (Oct. 1993).
36. Herr, "The ADA in International and Developmental Disabilities Perspectives," Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans 229, 247 (L. Gostin & H. Beyer, eds., 1993).
37. The 1994 Louis Harris & Associates Survey of People with Disabilities, summarized in Spayd, "Poll Finds Harsh Life for Disabled: Employment, Income Well Below Average," Washington Post, July 22, 1994, A21.