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Subseries:

OA/ID Number: 20326

FolderID:

Folder Title:

Disabilities--ADA [Americans with Disabilities Act]

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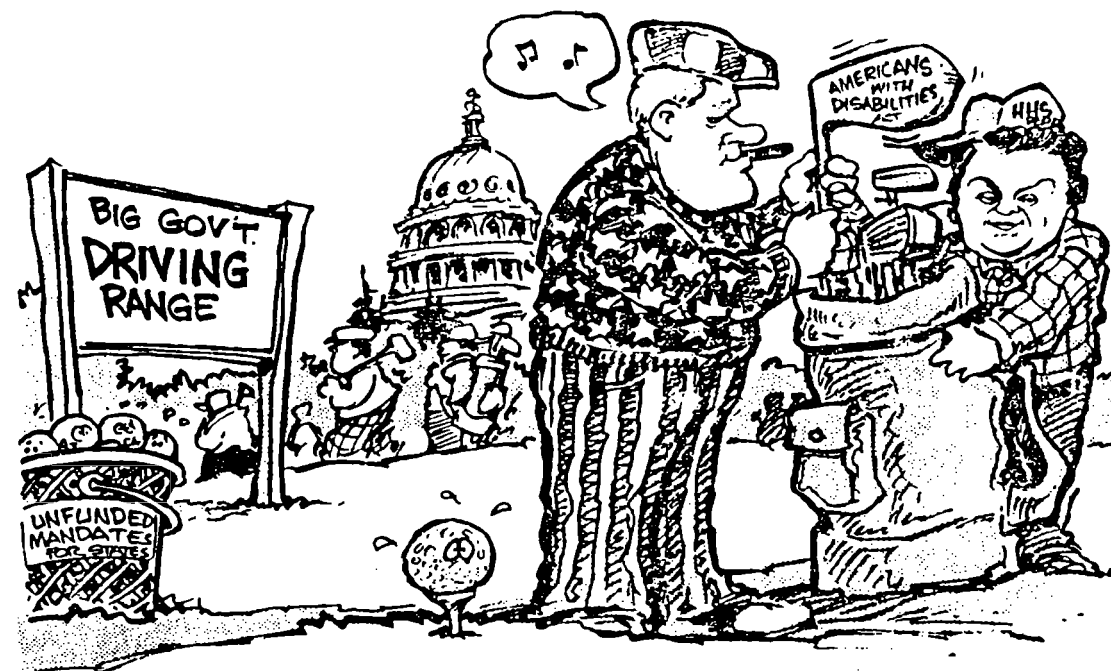
JAMES TAYLOR

Disability aid for the able-bodied

Beyond its function as a retirement program, Social Security provides income to people so severely disabled they can't perform any "substantial gainful work which exists in the national economy." Or at least that is how the law is written. In reality, the Social Security Administration is facilitating massive fraud by awarding disability benefits to people who admit they can work and have no legitimate claim to benefits.

Payments under the Social Security Disability Insurance program account for 14 percent of all the money Social Security dispenses every year. In 1999 alone, the program handed out a staggering \$57 billion meant for recipients with the most severe disabilities. That sum is in addition to the more than \$50 billion SSDI gives annually to people with various disabilities under other federal programs. The first hint that SSDI benefits are being wasted is the fact that between 1991 and 1997 the American population grew by 7 percent, while the number of SSDI recipients grew by 47 percent. Have that many more Americans really become disabled?

The answer is clearly no. Fortunately, a raft of recent lawsuits is shedding light on this fraud. Under the Americans with Disabilities Act, employees can sue if they think they have been dismissed because of their disability. Employees must



prove they are perfectly capable of doing their jobs, perhaps with some form of reasonable accommodation provided by the employer.

But, as it turns out, many people who get fired are filing both ADA claims seeking reinstatement and

SSDI claims maintaining they are too disabled to hold a job. In many ADA cases, a federal judge rules that the plaintiff is not disabled and was dismissed for legitimate reasons, such as misconduct. Logic tells us someone cannot be both

perfectly capable of working and totally unable to work, but logic has not stopped the government from dispensing benefits to people clearly capable of working. Consider a few examples:

- A Kansas City bus driver was

fired for sleeping on the job. She claimed two disabilities under the ADA: hypertension, which she had controlled for 10 years with medication, and a bruised knee. Even though these disabilities hardly rendered her incapable of working, she was awarded SSDI benefits anyway. Now she can sleep at home while receiving taxpayers' money.

- A Disney Store employee was fired for stealing from the cash register to buy cigarettes. He confessed but also revealed that he was HIV positive. When he was fired, he claimed the firing was for being HIV positive, not for stealing. Yet even though he was perfectly able to work up to the very day he was dismissed, he won SSDI benefits.

- A textile worker for Stowe-Pharr Mills was refused permission to transfer back to a job site where she had previously exposed herself to other workers. In the ensuing ADA case, she claimed a disability that made it hard for her to work on concrete as opposed to wooden floors. The federal judge ruled she was not disabled under ADA, but the SSA awarded her full disability benefits anyway.

An examination of just a small percentage of awards has uncovered literally dozens of fraudulent

cases, surely the tip of the iceberg. Because SSDI awards are confidential and come to light only when someone files an ADA complaint resulting in court transcript, it is difficult to get information. But one thing is clear: It is not through mere negligence that SSA hands out disability benefits to people who don't deserve them. On the contrary, in numerous court cases SSA has loudly defended its right to ignore evidence that applicants are able to work — even explicit admissions by applicants that they are able-bodied. With typical bureaucratic distortion, SSA says "able to work" is a term of art that can mean "unable to work."

Although the SSDI program is subject to internal checks, they are not being diligently executed, with the result that funds reserved for the truly disabled are being awarded to individuals with minor impairments who can hold full-time jobs.

To stop this fraudulent waste of Social Security funds, policy-makers must rein in the profligate SSDI program and restore integrity to the allocation of money that originates from the paychecks of honest workers.

James M. Taylor, managing editor of the Accommodating Disabilities Business Management Guide, is author of a new Cato Institute study, "Facilitating Fraud: How SSDI Gives Benefits to the Able Bodied," available at www.cato.org.

Disability - ADA

Deal would give disabled more access

10 communities promise to improve public facilities

By Kevin Johnson
USA TODAY

WASHINGTON — Attorney General Janet Reno was expected to announce settlements with 10 communities today that would provide disabled Americans greater access to civic life, from voting booths to baseball stadiums.

In some cases, communities promised to provide 911 systems accessible to the deaf, curbside balloting for the physically disabled and assisted-listening systems for courtrooms and public auditoriums.

The agreements are the result of negotiations between the Justice Department and communities in Arkansas, Connecticut, Minnesota, Missouri, Montana, Tennessee, West Virginia, Washington and Wisconsin.

The department's settlement negotiations are underway in 15 other states.

Reno was to make the announcement today in Warm Springs, Ark., one of the 10 communities named in the initiative that ensures compliance with the Americans with Disabilities Act.

The settlements were timed to coincide with the upcoming 10th anniversary of the act on July 26.

As part of the initiative, federal investigators have been surveying cities, towns and villages across the nation to gauge access to public places of all kinds.

The survey of facilities included public swimming pools, senior-citizen activity centers, libraries, courthouses, public parks, athletic fields and even bandstands.

"These agreements are models for towns and cities across the country to comply with the ADA," said Bill Lann Lee, who is acting assistant attorney general for civil rights.

It was not immediately clear how much the improvements would cost the communities involved.

The public-facilities initiative, named "Project Civic Access," was launched after the Justice Department reached a similar settlement with the city of Toledo, Ohio, last August.

As part of that deal, the city agreed to remove barriers and relocate activities throughout the city government to allow greater access.



Agence France-Presse

Reno: Announcement likely today.

Law has changed landscape

Many say there's still much to do

By Frank Santiago
USA TODAY

Baton twirling comes naturally to Theresa Uchytel, who has a long list of championships back to her teen years.

So when the 24-year-old woman got on stage for the Miss Iowa contest June 10, the audience scarcely noticed something different in the blur of her flawless performance. She has no left hand.

"Really, it's the attitude you have," says Uchytel who was born without the hand. "If you work hard and really believe in what you're doing you have mind over matter."

Uchytel, of Urbandale, Iowa, wowed the audience and was crowned Miss Iowa and is headed for the Miss America Pageant on Oct. 14. But in many ways, her win was a victory for the Americans with Disabilities Act.

The ADA, which is 10 years old this month, has helped change the lives of thousands like Uchytel. And it has literally changed the landscape of the USA.

At work, thousands of disabled people have jobs, which were long denied them, as a result of the law. And much more is now accessible to them: Public buildings have access ramps, curbs have cuts for wheelchairs and elevators have Braille markings for the blind.

For Uchytel, who sells computers, the ADA has been an inspiration and important touchstone of hope to tackle "the challenges" of life.

"It's a great relief to know that there's something out there," she says. "It's so important to have the support, the level playing field."

The ADA, says Sen. Tom Harkin, D-Iowa, a sponsor of the legislation, "has resulted in tremendous progress."

"The biggest challenge hasn't been the physical challenges but the attitude barriers that people had erected in their own minds about the disabled," he says.

To mark the anniversary, the American Association of People with Disabilities is sponsoring a 24-city torch relay. The torch was lit June 7 at the

grave of Martin Luther King Jr. in Atlanta, but began June 11 in Houston. The torch's flame, the organization says, "portrays the connection between the civil rights and disability rights movement."

Not all doors have been opened by the civil rights law, however.

Since the act took effect, almost 126,000 complaints have been filed with the federal Equal Employment Opportunity Commission claiming discrimination because of an impairment. Victims of discrimination have received \$261 million in negotiated settlements and \$12 million in court verdicts.

Advocates for the disabled say that while the ADA has prompted impressive change, there still is much to do.

Cynthia Jones, director of the Center for an Accessible Society, says 70% of disabled people in the USA remain unemployed. That's the same percentage that existed in pre-ADA days. And, she says, court rulings have made disability discrimination cases tougher to win by narrowing the definitions of disabilities.

But, the toughest problem has been an entrenched prejudice against people with disabilities, says Helena Berger of the American Association of People with Disabilities.

"These stereotypes die hard and the legislation hasn't changed the attitudes," she says. "Changes will come over time."

Colo. considers urging schools to post motto

Supporters want to display 'In God we trust' as guide

By Steven K. Paulson
The Associated Press

DENVER — In another dispute over the role of religion in public schools, the Colorado Board of Education plans to consider whether to display "In God we trust" in schools.

Supporters say they want students to be reminded of moral standards. They also say they believe the courts cannot object to a phrase that appears on U.S. currency.

Opponents, however, say the phrase is a veiled attempt to reintroduce religion in schools in the wake of past failures. Earlier this year, the Colorado Legislature refused to require schools to post the Ten Commandments. And last month, the U.S. Supreme Court banned prayers at high school football games.

"I see this as part of a plan by the religious right," said Rabbi Steven Foster, a member of The Interfaith Alliance in Denver. "If they can't get the Ten Commandments, this year they will settle for 'In God we trust.'"

The measure, to be debated by the board today, is a nonbinding resolution that would encourage but not require schools to post "In God we trust."

Supporters of the plan say they want only to provide a moral compass for students. "We're not waving our Bibles at anyone," said Don Swarthout, a non-denominational pastor. "We just see a trend toward something we think is perhaps dangerous."

Kentucky, Ohio and South Dakota have approved posting the Ten Commandments in schools. But in April, a federal appeals court found that Ohio's motto, "With God, all things are possible" — a quote from the New Testament — is school-sponsored religious speech and thus unconstitutional.

Kenneth Johnson, a Methodist minister who is leading the fight to keep Ohio's motto, said he finds it difficult to believe anyone would object to "In God we trust," the motto that Congress approved for the nation's currency in 1864.

But according to the U.S. Mint, the high court cast doubt on the constitutionality of the phrase in 1962. Justice Potter Stewart said that under the court's decision barring prayer in schools, "In God we trust" would presumably be deemed unconstitutional.

In the past three decades, most recently in 1996, three federal appeals courts have allowed the use of "In God we trust" on coins. The courts said it does not amount to government sponsorship or endorsement of religion.

The Supreme Court has never ruled on a direct challenge to the motto.

f: disabilities -
ADA

ADA complaints full of pain in the backs

Some say disability law being abused

By Frank Santiago
USA TODAY

When President Bush signed the Americans with Disabilities Act 10 years ago, the goal was to protect people who are blind, deaf or in wheelchairs from discrimination for simply having a disability.

What many employers, state civil rights commissions and the federal Equal Employment Opportunity Commission (EEOC) have found is that the law also has become a pain in, well, the back.

Back trouble claims have become the largest single impairment alleged by people who file on-the-job discrimination cases. More than 20,000 complaints have been filed during the past decade by people who say they were discriminated against because of back trouble.

That's nearly one in six of all disability complaints. Back trouble cases outnumber complaints by the blind, hearing impaired, the paralyzed and those with heart trouble — combined.

Back-related discrimination complaints are so numerous, they outstrip on-the-job complaints of religious discrimination.

"This is laughable," says Pat Cleary, a vice president for the National Association of Manufacturers, whose organization members say that filings for back pains violate the spirit of a law aimed at ending discrimination.

"It's a far cry from all the things that Martin Luther King stood for," Cleary says.

Inspired by the Civil Rights Act of 1964 that identified race, color, national origin, gender and religion as classes of people protected against discrimination, the Americans with Disabilities Act (ADA) added the disabled to the list.

Supporters said that many with disabilities had a right to a job but were kept from the workplace because of myths and prejudice.

However, exactly who and what the ADA should cover has been a tough call for the government, says Thomas D'Agostino, editor of the National Disability Law Reporter newsletter.

"The ADA is not supposed to apply to people with run-of-the-mill problems," he says. "It wasn't meant to open the courthouse door to every Tom,

Dick and Harry who had an ingrown toenail."

Many employers say that by allowing people to file for back pain, that is exactly what has happened. But Peggy Mastrione, spokeswoman for the EEOC, which handles ADA employment cases, says that though some back impairment claims have been bogus, many involve real discrimination issues. "The attention that it has gotten is that these are bad cases," she says. "Our overwhelming impression is that these are people who want to work."

The case of Terri Prock is one in point. Prock, who was an "instrument man" calibrating equipment at a Phillips Petroleum plant in Borger, Texas, injured her back on the job. Afterward, she couldn't climb ladders and needed help to lift more than 30 pounds.

However, Prock said, she did essential tasks for several months after the injury.

Phillips let her go. She filed an EEOC complaint claiming that she lost her job because the company "regarded her as an individual with a disability."

Phillips said it had eliminated her position in a reorganization.

Prock and the company reached a \$104,143 settlement in 1998 that included back pay and money for educational expenses.

About 15% of back cases are settled, according to the EEOC.

Back impairment cases surfaced in 1992, when the ADA law was first enforced. There were 208 cases that year.

By 1993, the number had leaped to 3,600 new cases, a peak.

Recently, the claims have drifted to about 2,300 a year, a drop linked, in part, to tougher court decisions.

The downward trend is likely to continue. Last year, the Supreme Court narrowed the definition of a disability. It said that if an impairment can be controlled with medication, it wasn't a disability.

Mastrione of the EEOC says that filing discrimination complaints claiming a disability is not a path to riches.

"If you want a chance at getting rich, you have a better chance if you go to Atlantic City," she says.

Records show that when disability cases have reached the courts, they overwhelmingly have failed.

A study by the American Bar Association last year revealed that employers win in 92% of the court decisions involving all ADA claims.

"These findings clearly belie the myth that the statutory language and regulations of the act create an undue burden for employers," the report said.

Discrimination cases

There were 125,946 cases claiming disability discrimination filed with the Equal Employment Opportunity Commission in 1992-99. Back-trouble cases led all others. Among the other most frequent complaints:

Back trouble	20,324
Depression	7,820
Heart problems	5,003
Diabetes	4,602
Hearing	3,601
Sight	3,192
Cancer	3,011
Anxiety	2,748
HIV	2,143
Paralysis	1,316
Speech impairment	696

1 - Excludes non-paralytic bone cases

Back trouble accounted for 12% of the disabilities cases filed last year. Civil-rights employment cases in 1999:

Race	28,819
Sex	23,907
Disabilities	17,007
Age	14,141
National origin	7,108
Religion	1,811
Equal pay	1,071

Source: Equal Employment Opportunity Commission

By Marcy E. Mullins, USA TODAY

WEDNESDAY, JUNE 23, 1999

HIGH COURT LIMITS WHO IS PROTECTED BY DISABILITY LAW

7-2 VOTES IN 3 BIAS CASES

Employees With Remediable Handicaps Cannot Claim Discrimination in Jobs

A By LINDA GREENHOUSE

WASHINGTON, June 22 — Resolving one of the most pressing questions of Federal disability law, the Supreme Court ruled today that people with physical impairments who can function normally when they wear their glasses or take their medicine generally cannot be considered disabled, and therefore do not come within the law's protection against employment discrimination.

By a 7-to-2 vote, the Court took a restrictive view of the definition of disability under the Americans With Disabilities Act of 1990. Employers greeted the decision with relief, saying it would prevent an uncontrollable expansion of the law, while advocates for the disabled said the Court's definition of disability would remove the law's protection from millions of people who needed it.

The Court ruled in three separate cases, rejecting the discrimination claims in each one by the same 7-to-2 vote. The dissenters in each case were Justices John Paul Stevens and Stephen G. Breyer; Justice Sandra Day O'Connor wrote two of the majority opinions and Justice David H. Souter wrote one.

In his dissent, Justice Stevens said in part that it was "especially ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully able and employable."

The losing plaintiffs were: two nearsighted women, twins with vision correctable to 20/20, whom United Airlines turned down for jobs as pilots; a truck driver with functional vision in only one eye, who saw normally for most purposes but who was dismissed for not meeting the Federal vision standard for driving commercial vehicles, and a hypertensive automobile mechanic whose blood pressure kept him from meeting Federal standards for driving a truck but, when kept under control by medication, left him able to hold mechanics' jobs.

In a separate case today, the Court interpreted another provision of the Americans With Disabilities Act as obliging states to care for people with mental and other disabilities in group homes or other non-institutionalized settings when medically appropriate and not an unreasonable burden on the state's resources. [Article, page A16.]

In the three employment discrimi-

nation cases there were several secondary issues but one central question: should a "disability" be measured in its untreated state or in light of any corrective measures, such as medication, glasses or other devices that enable a person to function normally?

Justice O'Connor answered the question in the leading case of the three, the suit by the twin sisters against United Airlines, a subsidiary of the UAL Corporation. The sisters flew as pilots for regional airlines and met Federal vision standards for airline pilots, but were turned down by United because they did not meet its standard for uncorrected vision of 20/40.

Justice O'Connor said three provisions of the disability law led to the conclusion that people with remediable conditions were not disabled.

First, she said, was the law's definition of disability as an impairment that "substantially limits one or more of the major life activities," a definition that she noted was expressed in the "present indicative verb form."

"We think the language is properly read as requiring that a person be presently — not potentially or hypothetically — substantially limited in order to demonstrate a disability," Justice O'Connor said, adding that "a 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."

A person with a corrected impairment still has the impairment, she added, "but if the impairment is corrected it does not 'substantially limit' a major life activity."

Second, she said, the law requires that people be assessed on the basis of their individual conditions, not as members of a group that is usually

affected in a particular way by an uncorrected impairment.

Finally, Justice O'Connor said, the findings that Congress incorporated in the text of the law included the statement that "some 43 million Americans have one or more physical or mental disabilities." She said that while the source of this figure was uncertain, Congress could not possibly have meant to include all the people who wear glasses or have some other correctable problem because the number in that case would be closer to 160 million.

"The 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not

'disabled' within the meaning" of the disability act, she said.

In the dissenting opinion in this case, Sutton v. United Airlines, No. 97-1943, Justice Stevens, joined by Justice Breyer, said that "in order to be faithful to the remedial purpose of the act, we should give it a generous, rather than a miserly, construction." Congress's use of the 43 million figure may have been a form of "legislative myopia," Justice Stevens said, that should not be invoked to determine the scope of the law.

"Since the purpose of the A.D.A. is to dismantle the employment barri-

ers based on society's accumulated myths and fears," Justice Stevens continued, "it is especially ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully able and employable."

The criticism from advocates for people with disabilities mirrored Justice Stevens's dissent. Prof. Chai Feldblum of Georgetown Law School, who was one of the law's drafters, said the decisions "create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing."

Senator Tom Harkin, an Iowa Democrat who was one of the chief Senate sponsors, said the decision "undermined one of the most basic principles" of the law, which he said was to "eliminate discrimination against every individual with a disability."

But Stephen Bokas, general counsel of the United States Chamber of Commerce, praised the Court's interpretation for avoiding a "huge growth in the number of cases."

Mr. Bokas said the most important aspect of the rulings from an employer's perspective was the Court's conclusion that "creating physical criteria for a job ordinarily does not violate" the disability act. He added, "The statute protects you from discrimination in a class of jobs, but it does not guarantee you a particular job."

David Fram, director of the National Employment Law Institute, an organization here that trains corporate managers and others on how to apply the disabilities law, called the decisions "a great victory for management," adding that he was "shocked" by the Court's "very hard line."

In her opinion in the United Airlines case, Justice O'Connor said that "an employer is free to decide that physical characteristics or medical conditions that do not rise to level of an impairment — such as one's height, build or singing voice — are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."

Justice O'Connor rejected a suggestion in the dissenting opinion that even people with artificial limbs would not be considered disabled under the majority's analysis. People may be highly functional with prosthetic devices but still be "substantially limited" in such activities as walking or running, she said.

She noted that under another provision of the law, people with correctable impairments may still be covered as disabled if their employer "regards" them as disabled. However, the majority's analysis of the law's "regarded as disabled" prong appeared to be somewhat limiting; to come within this section, Justice O'Connor said, a person would have to be regarded as "unable to work in a broad class of jobs," not just the job in question.

The other two cases were *Murphy v. United Parcel Service*, No. 97-1992, and *Albertson's v. Kirkingburg*, No. 98-591. Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Ruth Bader Ginsburg joined the majority opinions by Justices O'Connor and Souter.

States Limited on Institutionalization

U.S. Disabilities Act Requires Medical Justification, Court Says

By LINDA GREENHOUSE

WASHINGTON, June 22 — Isolating people with disabilities in big state institutions when there is no medical reason for their confinement is a form of discrimination that violates Federal disabilities law, the Supreme Court ruled today.

The 6-to-3 decision, in a case brought against the State of Georgia by two women with mental impairment, was a substantial victory for a disabilities rights movement that has looked to the Americans With Disabilities Act of 1990 as a tool for breaking down institutional walls that separate people with serious mental and physical problems from the larger community.

The ruling affirmed, in most respects, a decision last year by the Federal appeals court in Atlanta, which held that states have a duty under the 1990 law to provide care in group homes when medically appropriate. In 1994, the Federal appeals court in Philadelphia, in the only other appellate decision on the subject, reached the same result.

The Supreme Court's decision six months ago to hear Georgia's appeal in this case alarmed advocates for people with disabilities, who feared that the Court might steer the law in the opposite direction and reverse the nationwide trend toward deinstitutionalization. An unusually vigorous grass-roots campaign sprang up around the case, leading 15 of the 22 states that had originally supported Georgia to disavow the state's position in the Supreme Court.

The case involved a 1995 lawsuit filed on behalf of Lois Curtis and Elaine Wilson, both of them mentally retarded and mentally ill, who sought state care outside the Georgia Regional Hospital, where they had lived off and on for years. Both remained in the hospital for several years after state doctors had concluded that they could be more appropriately cared for in small group homes.

In some respects, the decision today was the Court's first rather than last word on the subject, and it may require more cases to clarify the full dimensions of the ruling. Justice Ruth Bader Ginsburg's majority opinion held that states' obligation to care for people in small, neighborhood-based settings was limited to some degree by available resources. States are not required to close their big hospitals — which, the Court emphasized, may still be appropriate for some people — or to create group home programs that they do not now have. (In fact, though, every state now has such a program.)

The decision interpreted a regulation that requires states to make "reasonable modifications" in their programs to avoid discriminating against people with disabilities, while at the same time providing that states need not make "fundamental" alterations.

Justice Ginsburg said that if a state "were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the state's endeavors to keep its institutions



Associated Press

The Court heard the case of Elaine Wilson, left, and Lois Curtis, mentally impaired women who sought care outside a state hospital.

fully populated, the reasonable-modifications standard would be met."

That interpretation did not give the states enough leeway to satisfy the three dissenting Justices. Justice Clarence Thomas, joined in a dissenting opinion by Chief Justice William H. Rehnquist and Justice Antonin Scalia, said the decision imposed "significant federalism costs" and failed to "respect the states' historical role as the dominant authority responsible for providing services to individuals with disabilities."

Justice Thomas predicted that states would "now be forced to defend themselves in Federal court every time resources prevent the im-

the disabilities act, which prohibits state and local governments from discriminating against people or excluding them from programs "by reason of" their disabilities. A regulation issued by the Attorney General at Congress's direction, after the law's adoption, provides that "a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," with "integrated setting" defined as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."

Georgia argued that the two mentally impaired women involved in the case did not come within the disabilities law's protection because they had not been subjected to discrimination, which the state defined as unequal treatment. Justice Ginsburg said today that in the context of the Federal law, "unjustified isolation, we hold, is properly regarded as discrimination based on disability."

"Institutional placement of persons who can handle and benefit from community setting perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," Justice Ginsburg continued. She added that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment."

One of the two plaintiffs lives today in a three-person group home, and the other lives in her own apartment, with supportive services.

Ira Burnim, the legal director of the Bazelon Center for Mental Health Law, an organization here that coordinated Supreme Court briefs on the women's behalf, praised the decision. "This is the first time the Court has announced that needless institutionalization is a form of discrimination," he said in an interview, adding that the disabilities rights movement had been working toward this goal for 30 years.

States must provide care in group homes when appropriate.

mediate placement of a qualified individual." He said that rather than addressing discrimination in any conventional sense, the majority was imposing its own "standard of care."

The majority opinion was joined by Justices Sandra Day O'Connor, David H. Souter, John Paul Stevens and Stephen G. Breyer. Justice Anthony M. Kennedy concurred in a separate opinion, noting that "the depopulation of state mental hospitals has its dark side" and warning that the decision should not be interpreted "to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." Justice Breyer also signed that part of Justice Kennedy's opinion.

While the decision, *Olmstead v. L.C.*, No. 98-536, referred throughout to mental disabilities, the ruling also applies to the states' obligations to people with serious physical disabilities.

The decision interpreted Title II of

Supreme Court Limits Meaning Of Disability

By JOAN BISKUPIC
Washington Post Staff Writer

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The Supreme Court significantly curtailed the scope of a federal law designed to protect disabled workers from discrimination yesterday. By a 7 to 2 vote, the justices ruled that the Americans With Disabilities Act does not cover people whose disabilities can be sufficiently corrected with medicine, eyeglasses or other measures.

In their broadest look at the ADA to date, the justices decided four disabilities cases, the most important being a pair of rulings that would prevent millions of people from seeking coverage under the landmark 1990 law. The highly anticipated rulings could profoundly affect individuals with a range of impairments—from diabetes and hypertension to severe nearsightedness and hearing loss—who are able to function in society with the help of medicines or aids but whose impairments may still make employers consider them ineligible for certain jobs.

"These decisions create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing," asserted Georgetown University law professor Chai Feldblum, who helped draft the statute and who was one of several advocates who said they would ask Congress to change the law.

The rulings represent a substantial win for employers, who praised the court's decision to limit those covered by the statute. "Employers make reasonable accommodations for employees who are truly disabled," said Steve Bokar, general counsel at the U.S. Chamber of Commerce, "but they should not have to relax necessary standards for employees who have common and easily correctable ailments."

The disability cases were closely followed by workers, businesses, civil rights advocates and the Clinton administration, which had urged the justices to interpret the law in a broad manner.

■ By identical votes of 7 to 2 in a pair of cases—one involving two nearsighted pilots and the other a mechanic with high blood pressure—the court ruled that when judges assess whether a worker pressing a disability-bias suit qualifies as "disabled" under the law, they must take into account any measures that lessen the worker's impairment.

■ By a unanimous vote in *Albertson's v. Kirkingburg*, the justices ruled that employers who set job qualifications based on federal safety standards are not required to dispense with those standards when a worker—in this case, a truck driver blind in one eye—obtains a waiver from the federal agency.

■ By a 6 to 3 vote, the court ruled that states must place certain mentally disabled people in community homes rather than hospitals. In a case focused on a provision of the ADA that prohibits discrimination by public entities, the court generally sided with two Georgia women with mental illnesses who had sued state officials for keeping them in a psychiatric hospital long after their doctors said they were ready to live in a community residence.

Enacted after years of effort, the Americans With Disabilities Act was meant to open jobs and public spaces to the nation's then-estimated 43 million disabled people. The law defines a "disability" as a "physical or mental impairment that substantially limits one or more . . . major life activities." Yesterday, the court addressed the most fundamental question of how to determine who is and is not "disabled."

The main ruling dealt with twin sisters from Spokane, Karen Sutton and Kimberly Hinton, who were turned down for pilot jobs at United Air Lines because of their extreme nearsightedness, failing the airline's minimum requirement for uncorrected visual acuity of 20/100. When they sued under the ADA, judges said the law did not cover people who can correct their disabilities—in this case, with glasses—and get along as well as most other people.

Yesterday, the Supreme Court agreed, rejecting the position of the U.S. Equal Employment Opportunity Commission and the majority of federal appeals courts.

king at the Act as a whole," Justice Sandra Day O'Connor wrote for the majority, "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity." She said the language of the law requires a person to be limited "presently—not potentially or hypothetically."

O'Connor noted that Congress had written in the law that "some 43 million Americans have one or more physical or mental disabilities" and argued that if the law were intended to cover all those with common, correctable impairments such as nearsightedness, that figure would have been far larger.

But the majority also emphasized that whether a person has a disability is an individual question and that some people who have prosthetic limbs or other corrective devices could still be considered "disabled" because of

a substantial limitation of their life activities.

O'Connor was joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg in *Sutton v. United*

Air Lines, as well as a related ruling involving a mechanic with hypertension, *Quigg v. United Parcel Service*.

issenting in both cases were Justices John Paul Stevens and Stephen G. Breyer. In a statement written by Stevens, they said, "[T]o be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction."

Roy C. Englert Jr., who represented United, said he was pleased with the court's ruling, which was cheered by other employers as well. Human resources lawyer Ted Gies said the court provided important "clarification" about who is covered by the ADA and its decision will help to reduce ADA lawsuits. "Most people would say," Gies said, "that the biggest human resource and legal challenge is the ADA."

But Michael A. Greene, a lawyer for the American Diabetes Association, said the ruling puts people who take medicine to function in society in a difficult position. "You're damned if you don't medicate, but you're damned if you do, because you lose your legal rights," Greene said, adding that sometimes impaired persons who can do the job might nonetheless seek special accommodations or extra time off for medical care.

The case on community placement, *Olmstead v. L.C.*, spoke to increased efforts to move mentally ill people from institutions into communities in an effort to end their isolation. A key provision of the ADA says disabled persons shall not be discriminated against "by reason of their disability" by a government program or service, and the Justice Department has said that means programs must be offered "in the most integrated setting appropriate to the needs" of people with disabilities.

Georgia officials, backed by numerous other state and local governments, had argued that a state does not discriminate under the ADA when it keeps the mentally ill in hospitals, even though a community setting might be more desirable.

But in an opinion by Ginsburg, the court ruled that it is indeed illegal discrimination "when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the state."

Concurring justices stressed that states should have "wide discretion in adopting its own systems of cost analysis."

Dissenting were Rehnquist, Scalia and Thomas. In a statement for the trio, Thomas said it is not "discrimination" when mentally ill persons are temporarily excluded from community placement centers.

Staff writer Kirsten Downey Grimsley contributed to this report.

The Washington

WEDNESDAY, JUNE 25

Court narrows disability act

But expands rights of the mentally ill

By Tony Mauro
USA TODAY

A1

In a quartet of decisions Tuesday that could profoundly affect the disabled in society, the Supreme Court narrowed protections against workplace discrimination but expanded the right of the mentally disabled to leave state institutions.

Acting on the next-to-last day of its current term, the court sent mixed messages about the rights of more than 40 million disabled Americans in the workplace and the 70,000 mentally ill people in state hospitals.

All four cases interpreted the landmark Americans with Disabilities Act of 1990.

On the issue of mental hospitals, the court said for the first time that "unjustified isolation" of the mentally disabled is a form of illegal discrimination.

The ruling was hailed as a major legal advance for the disabled.

"This is the *Brown vs. Board of Education* for the disabilities movement," said Ira Burnim of the Bazelon Center for Mental Health Law. "It is enormously significant for the Supreme Court to say, as the disabled have said, that keeping us separate is keeping us down."

The ruling is likely to speed the movement away from institutionalizing the mentally ill and toward integrating them into the community.

But the 6-3 decision went out of its way to say that for some patients, hospitalization will remain necessary. And it gives states the leeway to take into account costs, the wishes of the patient and the availability of community placements.

"This gives states the flexibility they need," said Georgia Attorney General Thurbert Baker, who challenged forced community placement.

But the ruling on workplace discrimination was attacked as a major setback for those trying to enter the workplace.

In that decision, the court said people who can correct their disabilities through medication or otherwise are not protected by the law.

The rulings went against two nearsighted sisters rejected as pilots, a truck mechanic fired because he has high blood pressure and a truck driver who is almost blind in one eye.

"Today's decisions are a profound setback," said William Stothers of The Center for an Accessible Society.

But employers were pleased with the decision, which ends a split among lower courts about companies' obligations toward workers with conditions such as high blood pressure.

"Employers make reasonable accommodations for employees who are truly disabled, but they should not have to relax standards for employees who have common and easily correctable ailments," said Stephen Bokor of the U.S. Chamber of Commerce.

Rubin says inflation likely will remain low

By Rich Miller
USA TODAY

A1

WASHINGTON — Outgoing Treasury Secretary Robert Rubin downplayed fears Tuesday in financial markets that inflation is poised to pick up.

In one of his last interviews before stepping down July 4, Rubin called the economic outlook "favorable" and said inflation probably would stay low.

"You always have to be watchful with respect to inflation," he told USA TODAY. "(But) it seems to me that the most likely scenario will be low inflation."

Financial markets have been rattled recently by fears that the economy is overheating and that the inflation-wary Federal Reserve will raise interest rates next week to cool it down. Those fears have helped push mortgage rates to their highest level in two years.

But Rubin said inflation would stay low because tough competition is preventing companies from raising prices.

He did see other risks for the U.S. economy. Prime among them: a lopsided world economy that is heavily dependent on the United States for growth.

That imbalance in global growth has led to a sharp rise in the U.S. trade deficit as foreign firms have exported products to the United States because of a lack of demand at home.

Rubin said the jump in the deficit, which has risen 56% this year, could pose a problem for the economy over time because it increases U.S. indebtedness to foreign nations.

It also has fanned protectionist pressure in the United States for action to shelter companies from foreign competition.

Rubin hailed the Senate's decision Tuesday to turn down steelworkers' request for quotas on steel imports.

"This was very important," he said. "If you had a reversal of the trend to open markets around the world, that would be a big risk to our economy."

He urged Japan and Europe to boost demand in their economies to help bring global growth into better balance.

Japan said this month that its economy snapped out of recession and grew at a 7.9% annual rate in the first quarter. But Rubin said Japan has a long way to go before its economy returns to health.

Widely hailed for his work as Treasury chief, Rubin, 60, says he's not sure what he's going to do next.

President Clinton has nominated Rubin's deputy, Lawrence Summers, to succeed him. The Senate Finance Committee endorsed the nomination Tuesday. Full Senate approval is expected soon.

● J. Eric Gould

05/24/2000 01:51:33 PM

Record Type: Record

To: Andrea Kane/OPD/EOP, Eugenia Chough/OPD/EOP

cc:

Subject: Re: Supreme Court / ADA case

fyi

----- Forwarded by J. Eric Gould/OPD/EOP on 05/24/2000 01:51 PM -----



Michelle M. Aronowitz
05/24/2000 12:23:52 PM

Record Type: Record

To: J. Eric Gould/OPD/EOP@EOP

cc:

Subject: Re: Supreme Court / ADA case [...](#)

there was an ADA case that would have been decided this term, but it recently settled. the court then took another case for next term raising the same issue -- whether the ADA can be enforced in federal court against states in light of their 11th amendment immunity from suit. the court just struck down the ADEA (age discrimination in employment act) as applied to states, and could easily do the same to the ADA (although there is a stronger argument in support of the ADA). The case is called Univ. of Ala. v. Garrett, and it will be heard in the fall.

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LEVEL 1 - 1 OF 1 STORY

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Los Angeles Times

May 29, 2000, Monday, Home Edition

SECTION: Metro; Part B; Page 7; Op Ed Desk

LENGTH: 630 words

HEADLINE: COMMENTARY;

LEGISLATION WOULD UNDERMINE THE RIGHTS OF THE DISABLED TO HAVE FULL ACCESS;
JUSTICE: THERE ARE OTHER WAYS TO DEAL WITH FRIVOLOUS LAWSUITS THAN TO GIVE
BUSINESSES 90 DAYS TO COMPLY AFTER BEING SUED.

BYLINE: MATT TAGGART, Matt Taggart is communications director for the
California, Foundation for Independent Living Centers, a trade association,
representing 24 disability resource centers in California

BODY:

Earlier this year, two conservative members of Congress introduced a bill that would undermine enforcement of the accessibility provisions of the Americans with Disabilities Act. The bill, HR 3590, would require that people with disabilities bringing a civil suit over an inaccessible business allow a 90-day grace period, during which businesses will purportedly have a chance to rectify the problem.

The bill's co-authors, Reps. Clay Shaw (R-Fla.) and Mark Foley (R-Fla.) argue that the measure will prevent frivolous lawsuits brought by lawyers seeking to enrich themselves instead of helping the disabled. By pulling the frivolous lawsuit card, as many other special interests so often do when faced with increased public accountability via civil liability, these lawmakers are really covering up the true purpose of the bill: It is intended to help businesses circumvent the ADA at the expense of the disabled population in the U.S.

Generally misunderstood, the ADA was passed in 1990 in recognition of widespread discrimination against the disabled, with particular emphasis on the lack of physical access to public facilities. The Title III provisions, which affect private enterprises such as bars and retail stores, made it clear that all businesses that can do so without "undue hardship" must provide access to the disabled population. Failure to comply would expose them to civil liability.

Unlike Title I, which requires people with disabilities to exhaust their "administrative remedies" before bringing a lawsuit, failure to satisfy Title III triggers virtually immediate liability. Congress created the provision knowing it would ensure that access became the rule, not the exception.

From this point on, American businesses would be presumed to know their doors



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Los Angeles Times May 29, 2000, Monday,

must be open to the disabled. If businesses didn't have to respond until challenged, they would wait until the first lawsuit was filed before doing anything. And, of course, only a small minority of people with disabilities would ever learn they had a right to access.

Congress wisely applied the venerated legal principle of ignorance of the law not being an excuse to relieve the marginalized disability population of the burden of educating businesses on access laws.

This proposed measure would remove the teeth from the ADA. It would place the yoke of yesterday on the weary shoulders of Americans with disabilities, forcing them to ask businesses politely to give them rights they now have.

Cumbersome notification requirements only will further impede the national trend toward accessibility, encouraging businesses to drag their feet and dicker over the specifics of access. This is unnecessary. Businesses already have endless options available to them to help them with ADA compliance if they really want to be accessible. They can contact the U.S. Department of Justice, their state vocational rehabilitation agency or any number of local disability resources centers.

It is not surprising that there are lawyers out there trying to make a buck on the ADA, just as there are unscrupulous lawyers filing meritless claims in other legal contexts. But the sheer volume of ADA claims doesn't prove anything.

Lawyers may be "taking advantage" of people with disabilities in certain specific instances, and that is unfortunate. But lawyers also have done a great deal to help people with disabilities when nobody in Congress seemed to care much about them.

Businesses know today that they must be accessible or face serious consequences. While a high volume of litigation may mean we need to explore new reforms or perhaps censure frivolous claims, this bill isn't the answer. Full participation in society is a right, not a privilege subject to 90-day notification.

LANGUAGE: English

LOAD-DATE: May 29, 2000



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Helping Employers Comply with the ADA

**An Assessment of How the United States
Equal Employment Opportunity Commission
Is Enforcing Title I of the
Americans with Disabilities Act**

**A Report of the United States
Commission on Civil Rights**
September 1998

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Helping Employers Comply with the ADA*, pursuant to Public Law 103-419. The report, along with a companion report, *Helping State and Local Governments Comply with the ADA* (on enforcement of title II, subtitle A, by the Department of Justice), reflects the Commission's commitment to ensuring that Americans with disabilities are afforded equal opportunity and that the Nation's civil rights laws prohibiting discrimination on the basis of disability are vigorously enforced. In accordance with this commitment, the Commission releases its first evaluation of the enforcement of the Americans with Disabilities Act, 8 years after enactment of the statute.

In this report, the Commission focused specifically on the efforts of the U.S. Equal Employment Opportunity Commission (EEOC) to enforce title I of the Americans with Disabilities Act, which prohibits discrimination based on disability in employment. The report evaluates and analyzes EEOC's regulations and policies clarifying the language of the statute, processing of charges of discrimination based on disability; litigation activities under title I of the Americans with Disabilities Act; and outreach, education, and technical assistance efforts relating to the act.

The report offers findings and recommendations on EEOC's implementation and enforcement of title I of the Americans with Disabilities Act. The Commission finds that, in general, EEOC has developed a highly credible implementation and enforcement program for the Americans with Disabilities Act and that implementing the act has been a major focus of the agency since the law was passed. EEOC has accomplished this while simultaneously taking a number of creative and innovative steps to attempt to deal with the reality it faces: an overwhelming workload with insufficient resources to carry out its mission. However, the Commission identified areas where EEOC's civil rights implementation and enforcement efforts for the Americans with Disabilities Act have fallen short and offers specific findings and recommendations to assist EEOC in enhancing its effectiveness in carrying out its mission to enforce title I of the act vigorously and efficiently.

In general, the Commission found that EEOC is not fully responsive to the needs and views of its stakeholders, including individuals with disabilities, employers, disability professionals, and disability experts. To ensure that all stakeholders have a voice in EEOC's policy development and decisionmaking related to the Americans with Disabilities Act, the Commission recommends that EEOC institute formal mechanisms to obtain input from interested parties, such as an Americans with Disabilities Act Advisory Board comprised of persons representative of the broad range of EEOC's stakeholders.

EEOC also has failed to be sufficiently aggressive in reaching small businesses and the minority community. The Commission calls upon EEOC to provide enhanced technical assistance, outreach, and education to ensure that employers, especially small businesses, understand their obligations under the law and that individuals with disabilities, particularly minorities, understand and are able to exercise their rights under the act.

Furthermore, although EEOC has made effective use of Commissioner-led task forces to evaluate and improve its operations in other areas, to date, EEOC has not taken steps to as-

sess and improve its enforcement of the Americans with Disabilities Act. The Commission urges EEOC to create a task force to evaluate the effectiveness of its Americans with Disabilities charge processing and enforcement activities, particularly with respect to whether EEOC staff have sufficient training on the Americans with Disabilities Act and whether charges of discrimination based on disability are being accepted, investigated, and resolved appropriately.

The report contains numerous other findings and recommendations that the Commission believes will enhance EEOC's enforcement of the Americans with Disabilities Act. However, more important than the specific failings of EEOC's Americans with Disabilities Act implementation and enforcement program, the Commission found that EEOC's passivity in galvanizing public support for and understanding of the law has undermined the law's effectiveness. One of the Commission's principal findings is that EEOC has not been effective in counteracting negative portrayals of the act in the media and promoting understanding of and support for the Americans with Disabilities Act. The media often have portrayed the act negatively, exaggerating the potential for frivolous lawsuits under the law, rather than focusing on the law's promise to provide equal opportunity for individuals with disabilities. Similarly, judicial decisions misinterpreting the intent of the ADA threaten to weaken the law.

The ADA will never truly become an effective civil rights statute if it continues to be misunderstood and viewed negatively by the American public. Therefore, the Commission calls upon EEOC to work with the other Federal agencies charged with enforcing the ADA or protecting the interests of individuals with disabilities (such as the U.S. Department of Justice, the National Council on Disability, and the President's Committee on Employment of People with Disabilities) to promote greater understanding of and support for the ADA.

Finally, the Commission calls upon Congress to provide the resources needed for EEOC to carry out its responsibilities under the Americans with Disabilities Act and other civil rights laws prohibiting discrimination in employment. The Commission also urges the President and Congress to work together to reform the Nation's disability policy as a whole to ensure that it supports the goals of the Americans with Disabilities Act. In particular, Congress and the President should act on legislation currently pending in Congress, the "Ticket to Work and Self Sufficiency Act of 1998" and "The Work Incentive Improvement Act of 1998," designed to improve work opportunities for individuals with disabilities.

Equality of opportunity, full participation, independent living, and economic self-sufficiency are truly important goals that, if achieved, will enable all Americans with disabilities to realize the full measure of their potential and human dignity. A renewed national commitment to vigorous enforcement of the Americans with Disabilities Act is crucial to the achievement of these goals.

Respectfully,
For the Commissioners,



MARY FRANCES BERRY
Chairperson

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1 Introduction

On July 26, 1990, 26 years after the passage of the Civil Rights Act of 1964,¹ President George Bush signed the Americans with Disabilities Act (ADA) into law.² With enactment of this law, Congress provided a panoply of Federal civil rights protections for persons with disabilities. The law seeks to ensure for people with disabilities such rights as equal opportunity in education and employment; full accessibility to public accommodations, telecommunications, and health insurance; and a total commitment by Federal, State, and local governments to ensuring the rights of individuals with disabilities.³

The statement of findings for the ADA is compelling. Congress found that 43 million Americans had physical or mental disabilities and described in direct, powerful language the widespread discrimination faced by people with disabilities throughout our history.⁴ Congress found that individuals with disabilities faced discrimination in "such critical areas, as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"⁵ and that the discrimination took various forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to

existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."⁶

Congress noted that "historically, society has tended to isolate and segregate individuals with disabilities,"⁷ that individuals with disabilities "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"⁸ and finally that:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁹

Furthermore, individuals with disabilities, unlike others experiencing discrimination, had "no legal recourse to redress such discrimination."¹⁰

Congress stated that the Nation's proper goals with respect to individuals with disabilities are: "equality of opportunity, full participation, independent living, and economic self-sufficiency"¹¹ and that ongoing discrimination against individuals with disabilities prevented the accomplishment of these goals:

¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

² Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)).

³ See *id.*

⁴ 42 U.S.C. § 12101(a) (1994).

⁵ *Id.* § 12101(a)(3) (1994).

⁶ *Id.* § 12101(a)(5) (1994).

⁷ *Id.* § 12101(a)(2) (1994).

⁸ *Id.* § 12101(a)(6) (1994).

⁹ *Id.* § 12101(a)(7) (1994).

¹⁰ *Id.* § 12101(a)(4) (1994).

¹¹ *Id.* § 12101(a)(8) (1994).

[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.¹²

To eliminate this invidious discrimination, Congress stated in the ADA's statement of purpose that it intends the statute:

- to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹³

To meet the goal of a universal ban on discrimination against persons with disabilities, Congress created four separate titles in the act to prohibit the discrimination enumerated in the act's statement of findings. Title I of the act bans discrimination against persons with disabilities in employment.¹⁴ Title II prohibits discrimination by State and local governments and requires that they ensure that all facilities, services, and information they provide are accessible to persons with disabilities.¹⁵ Title III provides for nondiscrimination against persons with disabilities in public accommodations.¹⁶ Finally, title IV of the act bans discrimination in telecommunications.¹⁷ A fifth title in the statute contains miscellaneous provisions clarifying ADA's relationship to other laws and addressing such issues as health insurance.¹⁸

¹² *Id.* § 12101(a)(9) (1994).

¹³ *Id.* § 12101(b)(1)-(4) (1994).

¹⁴ *Id.* §§ 12111-12117 (1994).

¹⁵ *Id.* §§ 12131-12,165 (1994).

¹⁶ *Id.* §§ 12181-12189 (1994).

¹⁷ Pub. L. No. 101-336, § 401, 104 Stat. 327, 366 (codified in scattered sections of 47 U.S.C.).

¹⁸ 42 U.S.C. §§ 12201-12213 (1994).

Although more than 6 years have passed since the ADA first took effect, its goals of ensuring equal employment opportunities and full accessibility to State and local government services and public accommodations are far from being met. For example, in a 1996 report, the National Council on Disability provided some disheartening statistics from a survey conducted for the National Organization on Disability. The report noted that:

about 67% of individuals with disabilities aged 15 to 64 in the United States are unemployed but want to work and that 60% of Americans with disabilities are still not aware of ADA. Additionally, the survey shows that (a) only 47% of people with disabilities believe that others treat them as equals; (b) only 35% are satisfied with their lives in general, compared with 55% of people without disabilities; (c) that percentage of working-age Americans with disabilities who are unemployed (67%) is unchanged since 1986, although 79% say that they want to work; (d) 49% of students and employment trainees with disabilities expect to encounter job discrimination; and (e) 66% of students believe that their disability will have—or has had—a strong negative effect on their job opportunities.¹⁹

Although maintaining that without the ADA, "the chances of employing people with disabilities is remote," the executive director of the Oklahoma Disability Law Center wrote that even with the ADA, "the process of opening areas for employment is a long, slow one."²⁰ A media critic of the ADA has noted that "[t]he ADA's intended beneficiaries—blind, deaf, or wheelchair-bound Americans now on public assistance—are no more likely to be in the mainstream workplace now than in 1991. Most of the law's benefits have accrued to the already-employed. . . ."²¹ The associate director of the

¹⁹ National Council on Disability, *Cognitive Impairments and the Application of Title I of the ADA* (Washington, DC: National Council on Disability, Jan. 26, 1996), p. 3, citing Lou Harris and Associates, Inc., NOD/Harris Survey of Americans with Disabilities (New York, NY: Author, 1994).

²⁰ Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, Inc., letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), Apr. 6, 1998, attachment, p. 1 (hereafter cited as Bower letter).

²¹ Brian Doherty, "Unreasonable Accommodation: The Case Against the Americans with Disabilities Act," *Reason* (August/September 1995), p. 20 (hereafter cited as Doherty, "Unreasonable Accommodation").

State of Illinois' Office of Rehabilitation Services also noted that "the biggest impact that the ADA has had in regards to employment is for persons who are already hired and need assistance, be it accommodations or job retention."²² He wrote that employers continue to be afraid to hire persons with disabilities because of the possibility that they might file lawsuits under the ADA, and employers also have "unwarranted fear" that the costs of accommodating individuals with disabilities will be high.²³

The general counsel of the State of Connecticut's Office of Protection and Advocacy for Persons with Disabilities indicated that the ADA had opened up dialogues between employers and employees, but that it "remains unclear whether the employee obtained a job as the direct result of the ADA."²⁴ The executive director of the Georgia Advocacy Office wrote that "many businesses are willing to provide accommodations for persons with disabilities," but that her office had noted "some resistance to hiring persons with disabilities and the fabrication of a record of poor performance in order to terminate persons with disabilities."²⁵ A representative of the State of California Department of Rehabilitation noted that many companies "have incorporated ADA into their operational policy and have gone out of their way to recruit persons with disabilities," but that small businesses, in particular, have had a poor record with respect to recruitment and accommodation of individuals with disabilities.²⁶ A representative of the Paralyzed Veter-

ans of America wrote that inaccessible public transportation remains a major barrier that makes it "impossible for [individuals with disabilities] to take advantage of employment opportunities."²⁷ The executive director of the Oklahoma Disability Law Center indicated that many of her agencies' clients do not even qualify for protection under the ADA, because they cannot perform the essential functions of a job, even with reasonable accommodation.²⁸

However, some research evidence suggests that the ADA may have had a positive effect on employment of people with disabilities. Data from the Survey of Income and Program Participation show that the percentage of persons with severe disabilities who were employed grew from 23.3 percent in 1991 to 26.1 percent in 1994, an increase of 27 percent. According to these data, 800,000 more people with severe disabilities were employed in 1994 than in 1991.²⁹ The extent to which the ADA, as opposed to the improving economy, was responsible for the increase is unknown.³⁰

According to the National Organization on Disability, which held conference calls with thousands of its community partners, despite these increases in the number of people with disabilities who are employed, a general consensus among members of the disability community is that the ADA has not done much to open up employment opportunities for people with disabilities who are unemployed.³¹ The unemployment rate for people with disabilities remains much higher than for the population as a whole,

²² Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 1 (hereafter cited as Suter letter).

²³ Ibid.

²⁴ Lawrence Berliner, General Counsel, Office of Protection and Advocacy for Persons with Disabilities, State of Connecticut, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, p. 2 (hereafter cited as Berliner letter).

²⁵ Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 1 (hereafter cited as Ringer letter).

²⁶ Michelle Martin, Staff Services Analyst, Department of Rehabilitation, Health and Welfare Agency, State of California, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, pp. 1-2 (hereafter cited as Martin letter).

²⁷ Susan Prokop, Associate Advocacy Director, Paralyzed Veterans of America, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 1.

²⁸ Bower letter, attachment, p. 1.

²⁹ President's Committee on Employment of People with Disabilities, News Release, "Employment Rate of People with Disabilities Increases Under the Americans with Disabilities Act," July 22, 1996 (hereafter cited as President's Committee, "Employment of People with Disabilities Increases Under the ADA").

³⁰ John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, interview in Washington, DC, Oct. 14, 1997 (hereafter cited as Lancaster interview).

³¹ Jim Dickson, Director of Community Affairs, National Organization on Disability, interview in Washington, DC, Mar. 3, 1998, p. 2 (hereafter cited as Dickson interview).

and only slightly over one-quarter of persons with severe disabilities are working.³² Furthermore, negative attitudes towards people with disabilities continue to pervade society. One disability leader told the Commission that fear of disability leads persons without disabilities either to avoid people with disabilities altogether, or to be overly helpful to them.³³ The need for a public relations campaign to change societal attitudes was a theme voiced by many of the people Commission staff spoke to during the course of the investigation.

Although the ADA may not have substantially improved job opportunities for people with disabilities, it may have produced intangible benefits. One disability leader told the Commission that the ADA was "priceless" because it had captured the imagination of people with disabilities. Although it has not been the "magic bullet" some in the disability community originally thought it might be, the ADA has raised the expectations of people with disabilities.³⁴ Furthermore, the mere existence of the ADA appears to have affected a change in the way employers, State and local government agencies, and the general public perceive and treat people with disabilities. According to a National Institute on Disability and Rehabilitation Research grantee who provides technical assistance on the ADA, "Overall, we feel that there have been significant changes in the attitudes of employers, businesses and government officials since the implementation of the ADA."³⁵ An employer representative also has pointed out that the ADA has encouraged the development of assistive equipment and technology. As a result, she told the Commission, such devices have become more sophisticated and less expensive than they were previously; thus, "the 'reasonableness' of imple-

menting such devices as reasonable accommodations increases, and the degree of hardship lessens substantially."³⁶

Some media commentators have charged that the ADA has been too effective and its reach has extended far beyond what Congress intended. For instance, one commentator has written: "Physically incapable, mentally unstable, and alcoholic or addicted employees have again and again used new laws [the ADA and similar statutes at the State and local level] to hold onto safety-sensitive positions."³⁷ He provided several examples of cases where employers had been forced to employ or retain employees with disabilities in jobs where they posed a clear safety threat. Critics of the ADA also argue that it has been abused by people who do not have disabilities. For instance, a 1996 editorial piece in the *Washington Times*, citing a disability advocate, said, "The most frequent employment complaint under the ADA is from those already employed who only discover that they are disabled when facing dismissal or passed over for promotion."³⁸ The prevalence of back ailments among the charges of discrimination received by the Equal Employment Opportunity Commission often is cited as further evidence that the law is being used to benefit people who do not truly have a disability.

The costs that the ADA has imposed on employers have also been a subject of much of the criticism.³⁹ Data exist suggesting that most accommodations under the statute have been inexpensive. For instance, the Job Accommodation Network, a federally funded program that pro-

³² President's Committee, "Employment Rate of People with Disabilities Increases Under the ADA"; see also Lancaster interview, p. 5.

³³ Dickson interview, p. 3.

³⁴ Ibid., p. 5.

³⁵ Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by David Esquith, National Institute on Disability and Rehabilitation Research (OCRE files), p. 3 (hereafter cited as NIDRR, ADA Project Directors' responses).

³⁶ Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 2, 1998, p. 3 (hereafter cited as Reesman letter).

³⁷ Walter Olson, "Disabling America: Some Provisions of the Americans with Disabilities Act Threaten Public Safety," *National Review*, vol. 49, no. 9 (May 5, 1997), p. 40 (hereafter cited as Olson, "Disabling America").

³⁸ James Bovard, "Disability Intentions Astray," *Washington Times*, May 20, 1996, p. A6.

³⁹ See, e.g., Doherty, "Unreasonable Accommodation," p. 20, stating: "Many presumed benefits [of the ADA] haven't yet blossomed, but the costs are all too real. Businesses as tiny as family-owned diners and corner dry cleaners are dodging regulators, in some cases paying tens of thousands in legal costs. Cash-strapped local governments are spending billions to comply with public-accommodation requirements."

vides technical assistance to employers in providing reasonable accommodation under the ADA, has found that, among employers it has assisted, 70 percent report that the accommodations they made either cost nothing or less than \$500.⁴⁰ A 1995 poll of corporations conducted by Louis Harris found that 80 percent of employers indicated that the ADA had not increased the costs of accommodating people with disabilities, and 82 percent felt that the ADA was worth the cost of implementation.⁴¹ In addition, one legal scholar noted that there are tax and other benefits associated with hiring and accommodating individuals with disabilities.⁴²

However, others point out that the greatest cost associated with the ADA is litigation, not reasonable accommodation. One employers' representative has stated that many frivolous lawsuits have been filed under the ADA, and that these lawsuits cost an average of \$12,000 each to defend.⁴³ Critics argue that these data fail to include nonpecuniary costs, such as managerial time and attention.⁴⁴ At least one newspaper column has indicated that unnecessary expenses may be incurred by State and local government entities under the guise of ADA compliance.⁴⁵ Others point out that discussions of the costs of the ADA should not ignore the benefits.⁴⁶ How-

ever, to date, no definitive scholarly research has been done that would permit an unbiased assessment of either the costs or the benefits of the ADA.⁴⁷

Another major controversy that has arisen under the ADA is disagreement about whether the definition of disability under the ADA is too liberal or too restrictive. Many disability experts and advocates maintain that too often the Federal courts have made fundamental errors in interpreting the ADA, with the result that they have held wrongly that a plaintiff does not meet the ADA's definition of a qualified person with a disability and misguidedly throw out legitimate cases brought by people the law was designed to protect. For example, one disability advocate recently gave examples of cases she said were meritorious, but which the plaintiffs lost, because the courts held that they were not disabled under the ADA.⁴⁸ For example, in one case, a woman with breast cancer was able to maintain her work schedule during her radiation treatment. After she was fired, the court held that she was not disabled because her impairment had not substantially limited the major life activity of working.⁴⁹

On the other side of this controversy are critics who argue that the vague language of the ADA has allowed people without disabilities to "game the system" and bring frivolous lawsuits. For example, one author has said that the statute has spawned "opportunism" that has led to cases that are "patently absurd," such as the

⁴⁰ President's Committee on Employment of People with Disabilities, Job Accommodation Network, *Accommodation Benefit/Cost Data*, Mar. 30, 1997 (hereafter cited as President's Committee, *Accommodation Benefit/Cost Data*). However, 8 percent of employers reported that the accommodations they made cost between \$2,001 and \$5,000, and 4 percent reported that the cost of the accommodations they made was above \$5,000. *Ibid.*

⁴¹ President's Committee on Employment of People with Disabilities, Job Accommodation Network, "New Harris Poll Shows Business Supports ADA," undated.

⁴² See Michael C. Collins, "Introduction—The ADA and Employment: How It Really Affects People with Disabilities," *Gonzaga Law Review*, vol. 28, no. 2 (1992/93), pp. 209–18.

⁴³ Mary Reed, National Federation of Independent Businesses, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997.

⁴⁴ Walter K. Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997), pp. 109–10.

⁴⁵ See Max Boot, "How George Bush is Still Raising My Taxes," *Wall Street Journal*, Mar. 16, 1998.

⁴⁶ The Job Accommodation Network also asked employers to report on benefits they realized from making accommoda-

tions. The median benefits reported were valued at \$10,000. President's Committee, *Accommodation Benefit/Cost Data*.

⁴⁷ According to one critic of the ADA: "The ADA's total costs are impossible to estimate with certainty. All we can know about are individual cases, and even there most people don't want to talk. . . . The law rewards 'good faith' compliance, so it behooves any business owner or manager not to say anything publicly that might betray a lack of good faith toward the ADA or its application. Lawyers, pundits, consultants, city officials, trade group reps, even people forced to pay tens of thousands trying to obey the law, all emphasize they have no problem with the concept of the ADA, just the uncertainty and stringency of its application." Doherty, "Unreasonable Accommodation," p. 20.

⁴⁸ Arlene Mayerson, Disability Rights Education and Defense Fund, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17–18, 1997, p. 12.

⁴⁹ *Ellison v. Software Spectrum, Inc.*, 85 F. 3d 187, 191 (5th Cir. 1996).

case of "the overweight fellow who sues for bigger seats in theaters, the guy who claims he brought a gun to work because of a psychiatric difficulty, . . . and the woman who claims her offensive smell is a protected disability."⁵⁰ However, statistics suggest that employers are more likely to prevail in ADA cases, and an article in the *Daily Labor Report* suggests that difficulties in satisfying legislative definitions and procedural provisions limit the ability of individuals to successfully show that they have experienced discrimination.⁵¹ The article concluded that:

employees are treated unfairly under the Act due to myriad legal technicalities that more often than not prevent the issue of employment discrimination from ever being considered on the merits by an administrative or judicial tribunal. Moreover, when the merits are considered, the law still favors the employer.⁵²

Critics of the ADA also argue that the Federal Government has been overzealous in its enforcement of the law and pushed it far beyond Congressional intent. Even supporters of the ADA, such as the Equal Employment Advisory Council, contend that the Equal Employment Opportunity Commission has "pushed the boundaries of [the ADA] in every conceivable direction" and taken positions that "defy common sense."⁵³ The firestorm that ensued recently when the Equal Employment Opportunity Commission issued enforcement guidance on people with psychiatric disabilities and the ADA is an example of the criticism of the agency's ADA enforcement. A 1997 editorial piece in the *Wall Street Journal* stated that under the guidelines, "[h]alf of Corporate America now qualifies as mentally disabled, and most of Wall Street."⁵⁴ Similarly, a nationally syndicated columnist criticized the guidance for including "a

whole panoply of anti-social and/or uncooperative behaviors" as mental disorders and for "undermin[ing] our traditional understanding of character, behavior and personal responsibility."⁵⁵

Although much has been said about overzealous enforcement of the ADA by the Equal Employment Opportunity Commission, other observers have told the Commission that they do not believe that the agency has been sufficiently aggressive in enforcing the law, although they often give the agency credit for trying. For instance, a person who provides technical assistance on the ADA to members of the disability community and others under a grant from the National Institute for Disability and Rehabilitation Research (NIDRR) told Commission staff that the basic perception in the disability community is that there is no enforcement of the ADA.⁵⁶ Another NIDRR grantee wrote, "The perception among people with disabilities and others in our region is that there is very little enforcement going on, yet we know that with the staffing available, there is a tremendous amount being accomplished. People are not seeing implementation at the community level."⁵⁷ Another NIDRR grantee wrote, "Basically, no federal agency with [ADA] enforcement responsibility is doing a great job."⁵⁸

The news media have played an important role in shaping the debate over the ADA. However, some experts contend that coverage of the ADA in the news media has not always been balanced and accurate. They criticize the news media coverage for giving the impression that nothing but frivolous lawsuits are being filed under the ADA, while largely ignoring the poor judicial decisions that have unduly restricted coverage of the ADA contrary to congressional intent. Several individuals indicated that the news media "has occasionally painted an accurate picture of the requirements of the law" or pointed to instances of good media coverage of

⁵⁰ Doherty, "Reasonable Accommodation," p. 20.

⁵¹ See John Parry, "American Bar Association Survey on Court Rulings Under Title I of the Americans with Disabilities Act," *Daily Labor Report*, June 22, 1998, p. E-1—E-2 (hereafter cited as Parry, "ABA Survey." A study conducted by the American Bar Association suggests that, on average, in 92.1 percent of ADA cases in which a decision was made in favor of one side or the other, employers have prevailed. *Ibid.*

⁵² *Ibid.*, p. E-3

⁵³ Reesman letter, p. 5.

⁵⁴ Holman W. Jenkins, Jr., "Think Your Co-Workers Are Crazy? They Are," *Wall Street Journal*, May 13, 1997, p. A23.

⁵⁵ Mona Charen, "Frenetic Guidelines Straight From EEOC," *Washington Times*, July 31, 1997, p. A14.

⁵⁶ National Institute on Disability and Rehabilitation and Research, ADA Technical Assistance Program Project Directors' Meeting, Arlington, VA, Feb. 24-25, 1998, summary, p. 6.

⁵⁷ NIDRR, ADA Project Directors' responses, p. 2.

⁵⁸ *Ibid.*, p. 5.

the ADA.⁵⁹ Several individuals praised, in particular, a segment on the ADA done by John Hockenberry of "Dateline" in the fall of 1997.⁶⁰ However, they were concerned that ADA coverage often is "sensationalistic and inaccurate,"⁶¹ "inconsistent,"⁶² "one-sided and distorted,"⁶³ and contains "extreme examples"⁶⁴ "negative 'scare' stories,"⁶⁵ and "lampoons."⁶⁶ The executive director of the Georgia Advocacy Office wrote:

The news media has occasionally painted an accurate picture of the requirements of the [ADA]. However, many sensationalistic and inaccurate stories are more indelibly etched on our consciences. The stories of people who try to misuse or misapply the employment provisions of the ADA to hang onto a job or people who make federal cases out of petty matters seem to

receive more coverage than the day-to-day stories of how the ADA works.⁶⁷

The general counsel of the State of Connecticut's Office of Protection and Advocacy for Persons with Disabilities singled out newspaper editorials as being "especially biased with their negative portrayals of the ADA."⁶⁸ Unfortunately, to date, the public debate over the impact and enforcement of the ADA largely has been carried out in the media. Sufficient time has elapsed, however, since passage of the ADA for a more dispassionate and careful study of the ADA to be conducted.

Under the Commission's mandate to evaluate Federal civil rights enforcement, the Commission turns its attention to the ADA implementation and enforcement activities of the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice. In this report, the Commission examines how well the U.S. Equal Employment Opportunity Commission is fulfilling its mandate to implement and enforce the ADA's nondiscrimination prohibitions in employment under title I of the act. A companion report evaluates the title II, subtitle A, implementation and enforcement activities of the U.S. Department of Justice.⁶⁹ The reports evaluate each agency's regulations and policy guidance, participation in litigation, processing of complaints, and provision of technical assistance.⁷⁰

The Commission previously examined civil rights protections for individuals with disabilities in a 1983 report, *Accommodating the Spectrum of Individual Abilities*.⁷¹ The report, issued 7 years before enactment of the ADA, sought to answer questions about the purpose and content

⁵⁹ Prokop letter, p. 1; Suter letter, p. 2 (noting that "[d]epending on the nature of the event, the media has been an ally and a detriment to the ADA movement. The media is to be commended for their touching portrayals of [persons with disabilities] and their struggles. . . . In the State of Illinois many local media outlets have done a superb job of covering events and developing stories pertaining to the ADA and [persons with disabilities].").

⁶⁰ See, e.g., Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, Department of Human Services, State of Tennessee, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 1 (hereafter cited as Brown letter); Martin letter, attachment, p. 7.

⁶¹ Ringer letter, attachment, p. 1.

⁶² Berliner letter, p. 2.

⁶³ Prokop letter, attachment, p. 1 ("Too frequently, newspapers, magazines, radio and television offer one-sided or distorted pictures about the ADA and what it requires. There is a lack of understanding about terms such as 'reasonable accommodation' and misuse of certain terminology in the context of stories about the ADA. . . . Clearly, the media needs to do a better job of presenting balanced, accurate stories about the ADA").

⁶⁴ Brown letter, attachment, p. 1.

⁶⁵ David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, U.S. Commission on Civil Rights, June 4, 1998, p. 1 ("The ADA . . . has received very poor press. Even a majority of persons with disabilities do not understand the ADA. There are too many negative 'scare' stories about the ADA").

⁶⁶ Martin letter, attachment, p. 7. See also Sutter letter, attachment, p. 2 (noting that "the media has tended to overkill such stories as inmates filing ADA charges, the in vitro fertilization ruling, and John Stossell of ABC news has been extraordinarily harsh on the ADA and portrays the legislation as costly and unnecessary").

⁶⁷ Ringer letter, attachment, p. 1.

⁶⁸ Berliner letter, p. 2.

⁶⁹ The report does not include an evaluation of subtitle B of title II, which pertains to discrimination in transportation, and it also does not include any of the other ADA titles.

⁷⁰ The report does not assess the role of State and local fair employment practices agencies in enforcing title I. The report also does not address the seven other designated Federal agencies having title II responsibilities in areas such as transportation, agriculture, and education, nor does it evaluate the Department of Justice's oversight and coordination of the designated Federal agencies for title II.

⁷¹ USCCR, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81 (Washington, DC: U.S. Government Printing Office, September 1983).

of existing civil rights laws and to provide an analysis of the legal principles on the rights and obligations arising under such laws. Its primary focus was reasonable accommodation, and one of its main aims was to dispel misconceptions about the high costs of providing reasonable accommodation to individuals with disabilities.⁷²

Eight years after passage of the Americans with Disabilities Act, many basic issues, such as who is protected by the act and what employers or other covered entities are required to do under the act, remain unresolved. In large measure, these issues arise out of inherent ambiguities in the language of the statute that have not been resolved by the implementing regulations or the Federal courts. Issues have also arisen as to how effectively the agencies charged with enforcing the ADA have processed charges of discrimination, and whether their technical assistance, outreach, and education have been successful in informing covered entities, the dis-

ability community, and the public at large as to rights and responsibilities under the act. Furthermore, broader issues exist, including whether the act has been successful in opening up opportunities for persons with disabilities and what has been the cost of compliance. These issues, and others that emerged as important during the course of the Commission's study, are examined in this report.

In preparing the report, Commission staff did a literature review and sought input from the disability community, disability experts, legal experts, and representatives of employers and State and local governments. Staff also analyzed and assessed numerous documents obtained from the Equal Employment Opportunity Commission and interviewed Equal Employment Opportunity Commission staff and officials. In addition, the Commission analyzed policy and complaint data from the agency.

⁷² Ibid., pp. 2-3.

2 Background

A comprehensive evaluation and assessment of the U.S. Equal Employment Opportunity Commission's implementation, compliance, and enforcement of title I of the Americans with Disabilities Act of 1990 requires an understanding of the context within which this agency operates. Essential to this understanding is broad knowledge of the characteristics and circumstances of people with disabilities, the people whom the law was designed to protect. Other important components of this understanding are knowledge of how the ADA fits into civil rights laws protecting people with disabilities, as well as disability policy in general, and of the history leading up to the passage of the ADA, including congressional intent in passing the law.

Statistical Profile of the Disability Community

A look at the disability community underscores the ADA's importance as a civil rights statute. The ADA potentially affords civil rights protections to more than one-fifth of the American population, and to a segment of the population that is disproportionately disadvantaged.¹

¹ Much of the data used to describe the characteristics of the population of individuals with disabilities come from the Survey of Income and Program Participation (SIPP) conducted by the U.S. Bureau of the Census. However, the definitions of "disability" and "severe disability" used by the SIPP are not precisely the same as the ADA definition of disability. According to the Bureau of the Census, "The term 'disability' can be defined narrowly or broadly depending on the interest of the analyst." See U.S. Department of Commerce, Bureau of the Census, "Americans with Disabilities: 1991-92," *Current Population Reports: Household Economic Studies*, P70-33, by John M. McNeil, December 1993, p. 1 (hereafter cited as Census, "Americans with Disabilities").

Numbers of People with Disabilities

The ADA was designed to provide equality of opportunity to qualified individuals with disabilities. Because the ADA requires the determination as to whether an individual has a disability to be made on a *case-by-case* basis, it is not possible to know with precision the number of people protected by the act. However, it is certain that the number of persons protected under the ADA is in the tens of millions and growing rapidly.

In 1990, when the ADA was enacted, Congress relied on statistics indicating that 43 million Americans reported having disabilities.² These Americans came from all walks of life: every race,

According to the National Institute on Disability and Rehabilitation Research, "the variety of statutory authorities for the collection of public data sets, and an inconsistently applied definition of disability have resulted in fragmented, incomplete, and inconsistent data sets about individuals." National Institute on Disability and Rehabilitation Research, *Chartbook on Disability in the United States, 1996*, by Lewis E. Kraus, et al., p. i. The National Council on Disability stated, "Lack of detailed and current data about people with disabilities remains an obstacle to effective policy development." National Council on Disability, *Achieving Independence: The Challenge for the 21st Century: A Decade of Progress in Disability Policy, Setting an Agenda for the Future* (Washington, DC: National Council on Disability, 1996), p. 26 (hereafter cited as NCD, *Achieving Independence*). Further, data currently used to measure disability are not always collected for that purpose. Methodologies differ among data sets and results often are not comparable. National Council on Disability, *Study on the Financing of Assistive Technology Devices and Services for Individuals with Disabilities: A Report to the President and the Congress of the United States* (Washington, DC: National Council on Disability, 1995), p. 22 (hereafter cited as NCD, *Study on the Financing of Assistive Technology Devices*). Nonetheless, researchers must rely on the data currently available.

² 42 U.S.C. § 12101(a)(1) (1994).

color, and ethnicity; both men and women; all ages; and all socioeconomic classes. Their disabilities ranged from minor to severe, including both mental and physical disabilities. The ADA was targeted toward persons in this group, although every person who reports having a "disability" may not be protected by the ADA.³

By 1995 the number of Americans reporting disabilities had grown by 25 percent, to 54 million Americans, or almost 21 percent of the population. These persons reported that they had disabilities that limited their ability to perform functional activities, such as lifting and carrying objects, walking, using stairs, keeping track of money and bills, dressing, bathing, seeing, speaking, hearing, etc. Of these persons, 26 million (almost 10 percent of the population) reported their disabilities as "severe."⁴ A severe disability includes the use of a wheelchair, long-term use of a cane or walker, inability to work at a job or do housework, or having certain conditions, such as a developmental disability or Alzheimer's disease.⁵

Critics of the ADA maintain that the number of people with "true" disabilities is actually much smaller than the 43 million figure relied on by Congress in passing the ADA or the 26 million figure representing the number of people with severe disabilities. One author charged that campaigners for the ADA exaggerated the number of people with disabilities for political reasons to ensure passage of the law.⁶ He maintains that the number of people who are deaf, blind, or

in wheelchairs—the people, according to him, government policy traditionally has focused on—is a much smaller number, less than 3 million.⁷ However, the ADA adopted a broad definition of disability,⁸ which clearly includes more than just people who are deaf, blind, or in wheelchairs. Thus, the number of people Congress intended the law to protect is much higher than 3 million and probably above 26 million, the number of people with "severe" disabilities.

TABLE 2.1
Percent Disabled, by Age

Age in years	Any disability	Severe disability
0 to 2	2.6 %	0.0 %
3 to 5	5.2	0.0
6 to 14	12.7	1.9
15 to 21	12.1	3.2
22 to 44	14.9	6.4
45 to 54	24.5	11.5
55 to 64	36.3	21.9
65 to 79	47.3	27.8
80 or more	71.5	53.5

Source: Census, "Americans with Disabilities," p. 2, figure 1.
Data are from 1994–1995.

Socioeconomic Characteristics

Data on persons reporting disabilities reveal that they are a very diverse group. A commonality, however, is that persons with disabilities are disproportionately disadvantaged compared to nondisabled persons: a high percentage of persons with disabilities are elderly, members of minority groups, have low levels of education, have low income, and live in poverty—groups that traditionally have had limited opportunities. Furthermore, persons with disabilities rely heavily on support from Federal programs. Thus, the ADA targets its protections towards a disadvantaged and needy population. The promise of the ADA to open employment and other opportunities for full participation in the American economy and society to persons with

³ Disability is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994).

⁴ Census, "Americans with Disabilities," p. 1. Data reported are from the 1994–1995 Survey of Income and Program Participation.

⁵ Ibid.

⁶ Walter Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: Free Press, 1997), p. 97. According to this author: "To reach the 43 million figure, advocates simply counted everyone over the age of 65 as disabled. They also roped in sufferers from health conditions like diabetes, cancer, epilepsy, and HIV infection even if those conditions caused no current debilitation, were controllable or indeed curable by medication, and were 'invisible' to job interviewers or other suspect classes. In short, they could just as well have picked a figure of 4 million or 143 million." Ibid.

⁷ Ibid.

⁸ See pp. 24–25 below for the definition of disability adopted by the ADA and chap. 4 for further discussion of ADA's definition of disability.

TABLE 2.2

Percent Disabled (Ages 15 to 64), by Race and Hispanic Origin

Race	Any disability	Nonsevere disability	Severe disability
White	17.7 %	7.4 %	10.3 %
Black	20.8	12.7	8.1
American Indian, Eskimo, Aleut	26.9	11.7	15.2
Asian and Pacific Islander	9.6	4.5	5.1
Hispanic origin (of any race)	16.9	9.1	7.8

Source: Census, "Disability."

disabilities holds forth the hope that, with full participation, persons with disabilities will achieve improved living circumstances and lower reliance on Federal programs.

Age, Race/Ethnicity, and Gender

The disability community crosses the boundaries of age, sex, race, and national origin. For example, disability is not limited to persons of certain ages, although the proportion of persons having a disability does rise with age. As shown in table 2.1, almost 13 percent of children aged 6 to 14 years have disabilities, and almost 13 percent of young adults (15 to 21 years old) have disabilities. Almost 15 percent of persons aged 22 to 44 years have disabilities. The percentage of people with disabilities rises to 24.5 percent for persons aged 45 to 54 years and almost half (47.3 percent) of persons aged 55 to 64 have a disability. The largest percentage of persons with disabilities is in the age category of 80 and above: 71.5 percent of persons 80 and older.⁹ Thus, as we age we are more likely to become a part of the disability community.

Recent data suggest that the prevalence of disability is increasing. Between 1970 and 1981, the proportion of the population with disabilities that limited their activities to some extent grew from 11.7 to 14.4 percent. By 1994 the percentage of persons reporting activity limitation had risen to 15.0 percent.¹⁰ One reason for this in-

crease is that the disability rate of young adults has increased in the 1990s. In 1990 the proportion of adults aged 18 to 44 with activity limitation was 8.7 and 8.9 percent for men and women, respectively. By 1994 the proportion of young adults with activity limitation had risen to 10.2 percent for men and 10.3 percent for women.¹¹

As shown in table 2.2, disabilities are found among persons of all races and national origins. However, the disability rate and the proportion of persons requiring assistance to accomplish daily activities differs by race, partly because of differences in age distributions among these groups.¹² Data from 1991 to 1992 show that,

Statistics Abstract: Trends in Disability Rates in the United States, 1970-1994, no. 17, by H. Stephen Kaye et al. (Washington, DC: U.S. Department of Education, November 1996), p. 1 (hereafter cited as NIDRS, *Trends in Disability Rates in the U.S.*). Data reported are from the National Health Interview Survey of 1970, 1981, and 1994, conducted by the U.S. Bureau of the Census for the National Center on Health Statistics.

¹¹ Ibid., p. 4.

¹² DOEd, OSERS, NIDRS, *Disability Statistics Abstract: Need for Assistance in the Activities of Daily Living*, no. 18, by Jae Kennedy et al. (Washington, DC: U.S. Department of Education, June 1997), p. 2 (hereafter cited as NIDRS, *Need for Assistance in the Activities of Daily Living*). The age distribution is not equal among the race and ethnicity categories (and disability is more likely with age). For example, 14.7 percent of the white population are ages 65 and above, compared to 5.6 percent of the Hispanic population; 8.5 percent of the black population; 6.7 percent of the American Indian, Eskimo, and Aleut population; and 6.8 percent of the Asian and Pacific Islander population. Derived from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996*, 116th edition (Washington, DC: U.S. Government Printing Office, 1996), table 23 (hereafter cited as Census, *1996 Statistical Abstract*).

⁹ Census, "Americans with Disabilities," p. 2, figure 1. Data are from 1994-1995.

¹⁰ U.S. Department of Education (DOEd), Office of Special and Rehabilitative Services (OSERS), National Institute on Disability and Rehabilitation Services (NIDRS), *Disability*

among persons ages 15 to 64, the disability rates for whites, blacks, and Hispanics, respectively, are 17.7 percent, 20.8 percent, and 16.9 percent.¹³ The percentage of persons from those groups requiring personal assistance is 1.9 percent, 2.8 percent, 1.3 percent, respectively.¹⁴ Asian and Pacific Islander Americans have the least prevalence of disability, with only 9.6 percent having a disability. American Indians, Eskimos, and Aleuts have the highest disability rate at 26.9 percent.¹⁵ Approximately 0.8 percent of persons from these minority groups require personal assistance.¹⁶

Education

Persons with disabilities, on average, have less education than the population as a whole. Discrimination or limited opportunities may have resulted in lower levels of educational achievement for persons with disabilities. The National Center for Education Statistics has measured the educational attainment of persons with various levels of disability, including disabilities that cause persons to be *unable* to work and disabilities that cause persons to be *limited* in the types of work they can perform. An estimated 45.2 percent of those who are unable to work have less than a high school education. For those who work full-time but are limited in the type of work they can do, 18.1 percent have less than 12 years of education, compared to 11.1 percent of persons with no work disability who work full time.¹⁷

Persons with disabilities have low high school graduation rates, and many of the students with

disabilities who do graduate do not continue their education at postsecondary institutions. Persons with disabilities account for 23 percent of adults aged 25 to 64 who have not completed high school.¹⁸ Only 6.3 percent of all students enrolled in undergraduate postsecondary institutions in the school year 1992–1993 had a disability. Of these students, 46.3 percent were attending school full time (compared to 52.9 percent of nondisabled students).¹⁹

Labor Force Status

Persons with disabilities are less likely to be employed than persons without disabilities.²⁰ This may be the result of discrimination, lower educational attainment, lack of training, or a combination of barriers arising from their disabilities. The overall labor force participation rate for persons with disabilities is significantly lower than that for nondisabled persons. In 1994, the labor force participation rate for persons with disabilities was 51.8 percent; for nondisabled persons, it was 83.0 percent.²¹ Thus, approximately one-half of persons with disabilities were not working, compared to less than one-fifth of nondisabled persons.

Data from the Survey of Income and Program Participation indicate that employment rates vary considerably across types of disabilities. In 1990 only 18 percent of individuals with mental retardation or developmental disabilities and 23 percent of individuals with mental illness were working. However, almost one-half of people

¹³ U.S. Department of Commerce, Bureau of the Census, "Disability," by John McNeil, accessed on Sept. 11, 1997, at <http://www.census.gov/population/www/pop-profile/disabil.html> (hereafter cited as Census, "Disability"). These data are based on 1991–1992 Survey of Income and Program Participation data.

¹⁴ NIDRS, *Need for Assistance in the Activities of Daily Living*, table 3. Data reported are for 1990–1991.

¹⁵ Census, "Disability."

¹⁶ NIDRS, *Need for Assistance in the Activities of Daily Living*, table 3. This number represents the percentage of persons from all races other than white, black, and Hispanic.

¹⁷ DOEd, OSERS, NIDRS, *Disability Statistics Report: Income and Program Participation of People with Work Disabilities*, no. 9, by Mitchell P. LaPlante et al. (Washington, DC: U.S. Department of Education, September 1996) table 1 (hereafter cited as NIDRS, *Income and Program Participation*).

¹⁸ U.S. Department of Commerce, Bureau of the Census, "Americans with Disabilities," *Statistical Brief*, January 1994.

¹⁹ DOEd, National Center for Education Statistics, *The Digest of Education Statistics 1996*, NCES 96–133, by Thomas D. Snyder (Washington, DC: U.S. Government Printing Office, 1996), table 206 (hereafter cited as NCES, *1996 Digest*). These data are based on the 1992–93 National Postsecondary Student Aid Study, conducted by the National Center for Education Statistics. Disabled students are defined as "those who reported that they had one or more of the following conditions: a specific learning disability, a visual handicap, hard of hearing, deafness, a speech disability, an orthopedic handicap, or a health impairment." Ibid.

²⁰ Census, "Americans with Disabilities," p. 3.

²¹ DOEd, OSERS, NIDRS, *Disability Statistics Report: Trends in Labor Force Participation Among Persons with Disabilities, 1983–1994*, no. 10, by Laura Turpin et al. (Washington, DC: U.S. Department of Education, April 1997), table 1, pp. 22–23 (hereafter cited as NIDRS, *Trends in Labor Force Participation*).

with visual impairments and bad backs were working, and two-thirds of people with hearing impairments held jobs.²²

Disability and gender also interact, resulting in different labor force participation rates for men and women with disabilities. Among persons with nonsevere disabilities, 85.1 percent of men and 68.4 percent of women are in the labor force (compared to 89.8 percent and 74.5 percent of nondisabled men and women, respectively).²³ These numbers reflect the national trends of decreased male labor force participation and increased female labor force participation,²⁴ although the labor force participation rate of persons with disabilities experienced more fluctuation.²⁵ Such differences were further differentiated by age.²⁶

Income

Because persons with disabilities are less likely to work full time and attain high levels of education compared to nondisabled persons, they generally have lower incomes than their nondis-

abled counterparts. The severity of a disability also affects earnings potential. The median monthly earnings for nondisabled men is \$2,190. Men with nonsevere disabilities earn a median monthly income of \$1,857, while the median monthly income for men with severe disabilities is \$1,262. Nondisabled women's median monthly income is \$1,470; for women with nonsevere disabilities, median monthly income is \$1,200 and for women with severe disabilities, is \$1,000.²⁷

Participation in Government Programs

Low income and the inability to work translate into the need for support from the Federal Government and other sources. Among the 13 million persons who receive means-tested assistance (cash, food, or rent), 50.6 percent are persons with disabilities.²⁸ The majority of these persons receive assistance in the form of social security disability insurance (SSDI), supplemental security income (SSI), medicare, and medicaid.²⁹ An estimated 4.6 million people receive SSDI and SSI. Of these persons, 95 percent of the male recipients and 87 percent of the female recipients are persons with disabilities.³⁰ Other forms of assistance received by persons with disabilities include veterans' benefits, workers' compensation, social security retirement and survivors' benefits (OASI), aid to families with dependent children (AFDC), and food stamps.³¹

Individuals with Disabilities as a Minority Group

The extent to which individuals with disabilities face prejudice and discrimination in the workplace or other aspects of their lives has been a subject of much debate. As noted in the previous chapter, in passing the ADA, Congress found that individuals with disabilities faced discrimination in "such critical areas, as employment, housing, public accommodations, edu-

²² Paula Mergenhausen, "Enabling Disabled Workers," *American Demographics* (July 1997), p. 38, citing research by Michele Adler, U.S. Department of Health and Human Resources.

²³ Census, "Americans with Disabilities," p. 3.

²⁴ NIDRS, *Trends in Labor Force Participation*, table 2, pp. 24-25. In 1994, 86.9 percent of all men were in the labor force, compared to 70.6 percent of all women. These numbers represent an overall decrease of 1.3 percent for men and an increase of 10.0 percent for women between 1983 and 1994. Overall, the labor force participation of all persons aged 18 to 64 in the United States increased during the 1980s, but remained relatively stable during the early 1990s. *Ibid.*

²⁵ *Ibid.*, p. 4. For example, the labor force participation rate for persons with disabilities increased by 6.4 percent from 1983 to 1994, while for persons without disabilities it increased by only 4.2 percent. Further, nondisabled men experienced a decline in 0.6 percent, compared to a 4.1 percent decline in labor force participation for men with disabilities. Women with and without disabilities experienced increases of 9.7 percent and 21.7 percent, respectively. *Ibid.*, table 2, pp. 24-25.

²⁶ *Ibid.*, table 2, pp. 24-25. Among all women, those 18 to 44 years in age experienced only a 6.1 percent increase in labor force participation from 1983 to 1994 compared to increases of 17.4 percent and 17.0 percent for women ages 45 to 54 and ages 55 to 64, respectively. This can be compared to increases of 5.5 percent, 21.3 percent, and 39.0 percent for the three age groups (18-44, 45-54, and 55-64), respectively, among women with disabilities over the period, and increases of 6.7 percent, 17.4 percent and 13.0, respectively, for the three age groups, among women without disabilities. Similar age differences in labor force participation were experienced by men.

²⁷ Census, "Americans with Disabilities," p. 4.

²⁸ *Ibid.*

²⁹ NIDRS, *Income and Program Participation*, tables 1 and 2. Data reported are for 1990.

³⁰ *Ibid.*, p. 4. Data reported are for 1990. Persons with disabilities include those who reported that they have a work disability that either limits the kind or amount of work they are able to perform or renders them unable to work.

³¹ *Ibid.*, table 2. Data reported are for 1990.

cation, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"³² and that the discrimination took various forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."³³

Some argue that the prejudice and discrimination experienced by people with disabilities is similar to those faced by minorities such as African Americans and Hispanics. For instance, one person with a disability, blindness, expressed his conviction that a widespread fear of people with disabilities pervades society, and that this fear colors interactions between people without disabilities and people with disabilities in all aspects of life. He described his personal experiences of asking people on the street to give him directions and having some people pass him by, pretending not to hear him, and even quickening their pace to avoid him. He contrasted that reaction to the paternalistic reaction of others, who became "gushing," took him by the hand, and brought him to his destination. He also mentioned the difficulty he experiences in getting taxicabs to stop for him, a problem that afflicts a large number of people with disabilities.³⁴

Thus, many people with disabilities see themselves as members of an oppressed minority group. One historian of the disability rights movement began his chronicle of the civil rights movement for people with disabilities by observing that "Pity oppresses." He described the growing pride many people with disabilities have come to take in being identified as disabled. He wrote, "like blacks, women, and gays before them, they are challenging the way America

looks at them"³⁵ and that "millions of disabled people were getting angry, . . . and were coming to see themselves as a class, united in discrimination and empowered by law."³⁶ However, others suggest that the notion that people with a disability constitute a minority group, similar to other minorities, does not reflect reality. For instance, one author has pointed out that polls show that fewer than one-half of people with disabilities regard themselves as members of "a minority group in the same sense as blacks and Hispanics."³⁷

Scholars have pointed to important distinctions between people with disabilities and African Americans and other minority groups. For instance, "unlike black Americans, the majority of persons with disabilities were not subject to discrimination in access to education or in employment during their childhood years. . . . Another important difference between the black and disabled minorities is the extreme heterogeneity of prejudice towards persons with different disabilities."³⁸

Scholarly research suggests that prejudice, along with other factors, such as misinformation, is one of the sources of the lower employment rates and wages of people with disabilities. Studies of public attitudes towards people with disabilities indicate that these attitudes vary considerably by the type of disability, with very negative attitudes attaching to persons with epilepsy, mental and emotional illnesses, and alcohol and drug addiction.³⁹ There appears to be a correlation between how negatively the public views particular disabilities and the wage and employment differentials suffered by people with these disabilities.⁴⁰ A number of other factors,

³² 42 U.S.C. § 12101(a)(3) (1994).

³³ *Id.* § 12101(a)(5) (1994).

³⁴ Jim Dickson, Director of Community Relations, National Organization on Disability, interview in Washington, DC, Mar. 4, 1998, pp. 3-4 (hereafter cited as Dickson interview).

³⁵ Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993), pp. 13-14.

³⁶ *Ibid.*, p. 332.

³⁷ Olson, *The Excuse Factory*, pp. 94-95.

³⁸ William G. Johnson and Marjorie Baldwin, "The Americans With Disabilities Act: Will It Make a Difference?" *Policy Studies Journal*, vol. 21 (1993), p. 779.

³⁹ See Marjorie L. Baldwin, "Can the ADA Achieve Its Employment Goals?" *Annals of the American Academy of Physical and Social Science*, vol. 549 (January 1997), p. 42.

⁴⁰ *Ibid.*, pp. 42-43. Another researcher contends that prejudice is more directed towards people who were born with a disability than toward people who became disabled as

including difficulty in evaluating the likely productivity of applicants with disabilities, reluctance to bear the costs of accommodation and health insurance, and fear for worker safety, also enter into employers' decisions on hiring persons with disabilities.⁴¹

Federal Civil Rights Statutes from 1964 to 1988

Although the ADA was not enacted until 1990, several Federal statutes established the framework for the ADA's provisions against discrimination on the basis of disability. In particular, the Civil Rights Act of 1964⁴² served as a model for future civil rights laws, including the ADA.⁴³ Title VII of the Civil Rights Act of 1964 identified five protected classes (race, color, national origin, gender, and religion) and made it clear that it is unlawful to discriminate based on personal characteristics such as these in employment.⁴⁴

In the late 1960s, a number of Federal laws addressing the civil rights of persons with disabilities were enacted. One of the first laws addressing the needs of persons with disabilities was the Architectural Barriers Act of 1968.⁴⁵ This law required that certain federally financed buildings be accessible to persons with disabilities. The Urban Mass Transit Amendments Act of 1970⁴⁶ required that mass transit facilities and services be accessible to the elderly and persons with disabilities.

The Rehabilitation Act of 1973⁴⁷ opened more doors for Americans with disabilities. Sections

501 and 503 required the development of affirmative action programs for the hiring of persons with disabilities by Federal agencies and by parties contracting with the Federal Government, respectively. Section 502 established the Architectural and Transportation Barriers Compliance Board to ensure compliance with the Architectural Barriers Act of 1968. Section 504 prohibited entities receiving Federal financial assistance from discriminating on the basis of handicap.

The Education for All Handicapped Children Act of 1975⁴⁸ (renamed the Individuals with Disabilities Education Act in 1990)⁴⁹ required States receiving Federal financial assistance to provide a "free appropriate public education" to all children with disabilities. Such instruction was to be provided in the least restrictive setting possible.⁵⁰ In response to concern about the improper treatment of persons with mental retardation residing in institutions, the coordination of services and funding for persons with long-term disabilities was provided for by the Developmentally Disabled Assistance and Bill of Rights Act of 1975.⁵¹

adults. See Johnson, "The Future of Disability Policy," p. 165.

⁴¹ Baldwin, "Can the ADA Achieve Its Employment Goals?" p. 47.

⁴² Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

⁴³ National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* (Washington, DC: National Council on Disability, July 26, 1997), pp. 20-21 (hereafter cited as NCD, *Equality of Opportunity*).

⁴⁴ Pub. L. No. 88-352 § 703, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 20003-2 (1994)).

⁴⁵ Pub. L. No. 90-480, 82 Stat. 718 (codified at 42 U.S.C. §§ 4151-4157 (1994)).

⁴⁶ Pub. L. No. 91-453, 84 Stat. 962 (codified as amended in scattered sections of 49 U.S.C. (1994)).

⁴⁷ Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796i (1994)).

⁴⁸ Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994)). The Education for All Handicapped Children Act of 1975 expanded the Education of the Handicapped Act of 1970 (Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994))). The Education of the Handicapped Act Amendments of 1983 (Pub. L. No. 98-199, 97 Stat. 1357 (codified at 20 U.S.C. §§ 1400-1461 (1994))) supported improved programs for persons with disabilities, parents, and special education teachers. Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), p. 298 (hereafter cited as Hammill, "A Brief Look at the Learning Disabilities Movement").

⁴⁹ Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994)). The Education of the Handicapped Act Amendments of 1990 (Pub. L. No. 101-476, § 901(a), 104 Stat. 1142 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994))) changed the name of the Education for All Handicapped Children Act to the Individuals with Disabilities Education Act (IDEA). The amendments also replaced references to "handicapped children" with "children with disabilities." *Id.* at § 901(b); see also Hammill, "A Brief Look at the Learning Disabilities Movement," p. 298.

⁵⁰ See Pub. L. No. 105-17, § 612(a)(5)(A) (1994 Supp. III); 34 C.F.R. § 300.550(B)(1) (1997); 34 C.F.R. § 104.34(a) (1997).

⁵¹ Pub. L. No. 94-103, 89 Stat. 486 (codified as amended in scattered sections of 42 U.S.C.).

In the 1970s, a disability rights movement began to solidify.⁵² With examples set by activists in the late 1960s and early 1970s, particularly the Physically Disabled Students' Program at the University of California at Berkeley,⁵³ persons with disabilities recognized the civil rights implications of issues they faced daily. In 1977 the American Coalition of Citizens with Disabilities staged sit-ins and demonstrations to protest delay in issuing regulations implementing section 504 of the Rehabilitation Act.⁵⁴ Although the law had been enacted in 1973, changes in the presidential administration and concerns over costs and public reaction led to a delay in issuing the regulations.⁵⁵ Protesters remained at the Department of Health, Education, and Welfare regional office in San Francisco for 25 days demanding that the regulations be signed.⁵⁶ Section 504 regulations were issued soon thereafter.⁵⁷

Also in 1977, the White House Conference on Handicapped Individuals was held. One of the conference recommendations was to establish an agency to coordinate Federal programs for persons with disabilities.⁵⁸ The following year the Rehabilitation, Comprehensive Services, and

Developmental Disabilities Amendments of 1978⁵⁹ established the National Council on the Handicapped as an advisory board within the U.S. Department of Education. Its role was to review and evaluate on a continuing basis all Federal policies, programs, and activities for persons with disabilities.⁶⁰ In 1984 the National Council on the Handicapped (later renamed the National Council on Disability⁶¹) was established as an independent Federal agency.⁶²

Other Federal laws to assist persons with disabilities include the Civil Rights of Institutionalized Persons Act of 1980.⁶³ This law granted the U.S. Department of Justice the authority to sue State and local authorities operating an institution where there is a "pattern or practice" of flagrant violations of constitutional rights. The Telecommunications for the Disabled Act of 1982⁶⁴ required certain workplace and emergency telephones to be compatible with hearing aids. The Voting Accessibility for the Elderly and Handicapped Act of 1984⁶⁵ provided for physically accessible polling sites for Federal elections.

The Handicapped Children's Protection Act of 1986⁶⁶ ensured prevailing parents the right to receive an award of attorneys' fees and related costs for cases brought under the Act equivalent to the community compensation standards for similar cases. The Protection and Advocacy for Mentally Ill Individuals Act of 1986⁶⁷ authorized advocacy services for people with mental illness after their discharge from institutions. Also en-

⁵² Although some have emphasized the role of the "disability rights movement" in events that followed, others maintain that no such movement ever existed. For instance, one author argues that "many of the early demonstrations protesting ostensible government indifference were actually orchestrated from within the government itself. . . . [I]n 1973, when Congress enacted the first major federal initiative on [disability] (known as Section 504), it was under no grass-roots pressure from any organized disabled rights movement or any other source" Olson, *The Excuse Factory*, pp. 98-99.

⁵³ Shapiro, *No Pity*, pp. 50-53. The Physically Disabled Students' Program (PDSP) provided counseling and assistance for students with disabilities. The PDSP, and similar programs at other colleges and universities, encouraged independent living and self-sufficiency. Shapiro, *No Pity*, pp. 50-53.

⁵⁴ NCD, *Equality of Opportunity*, p. 13.

⁵⁵ Shapiro, *No Pity*, pp. 64-66. See also NCD, *Equality of Opportunity*, pp. 16-19.

⁵⁶ NCD, *Equality of Opportunity*, p. 19.

⁵⁷ 34 C.F.R. § 104 (1997).

⁵⁸ National Council on the Handicapped, *On the Threshold of Independence: A Report to the President and to the Congress* (Washington, DC: National Council on the Handicapped, January 1988), p. vii (hereafter cited as NCD, *On the Threshold of Independence*).

⁵⁹ Pub. L. No. 95-602, 92 Stat. 2955 (codified as amended at 29 U.S.C. §§ 701-794 (1994)).

⁶⁰ *Id.* at § 400.

⁶¹ Pub. L. No. 100-630, § 205, 102 Stat. 3289, 3310 (codified as amended at 29 U.S.C. § 780 (1994)).

⁶² Pub. L. No. 98-221, § 141, 98 Stat. 17, 26 (codified at 29 U.S.C. §§ 780 (1994)).

⁶³ Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§ 1997-1997j (1994)).

⁶⁴ Pub. L. No. 97-410, 96 Stat. 2043 (codified as amended at 47 U.S.C. § 610 (1994)).

⁶⁵ Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee-1973ee-6 (1994)).

⁶⁶ Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (1994)).

⁶⁷ Pub. L. No. 99-319, 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 1001-10851 (1994)).

acted in 1986, the Air Carrier Access Act⁶⁸ required accessibility to airlines for persons with disabilities. The Hearing Aid Compatibility Act of 1988⁶⁹ required newly manufactured telephones to be compatible with telecoil-equipped hearing aids. The Fair Housing Amendments Act of 1988⁷⁰ extended the Fair Housing Act of 1968⁷¹ (which prohibited housing discrimination) to persons with disabilities and to all entities not receiving Federal funds.

Laws such as these laid the groundwork and served as a model for the ADA. In particular, the Civil Rights Act of 1964, the Fair Housing Act of 1968, the Education Amendments of 1972⁷² (which prohibited discrimination on the basis of sex in federally funded programs), and the Rehabilitation Act of 1973 set the standard for the ADA. Using knowledge of past civil rights legislation and efforts, the ADA would become a "state-of-the-art civil rights law."⁷³

Legislative History and Final Provisions of the ADA

Overview of Legislative History

In its January 1986 report, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations*, the National Council on Disability (NCD) argued strongly for the creation of civil rights protections for people with disabilities. The report's primary recommendation was the advancement of "equal opportunity laws" for people with disabilities. NCD specifically proposed that Congress "enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforce-

able standards prohibiting discrimination on the basis of handicap."⁷⁴

With this language, NCD introduced the first statement of the Federal Government advocating the new civil rights law for people with disabilities that would become the ADA. Nonetheless, as NCD observed in its July 1997 report, *Equality of Opportunity: The Making of the Americans with Disabilities Act*, "Despite the tremendous amount of respect NCD [had] gained, however, Congress took little action—a great frustration to NCD members."⁷⁵ Former NCD Executive Director Lex Friedan is quoted in the report as stating:

Although Congress pointed to *Toward Independence* as "the Manifesto, the Declaration of Independence for people with disabilities". . . NCD members and staff. . . were frustrated most by the lack of attention to their number-one recommendation, an equal opportunity law. . . . After waiting nearly a year, they began discussing what NCD could do. They concluded that the only way to overcome legislative inertia was for NCD to take the lead.⁷⁶

By February 1987, disability rights attorney Robert Burgdorf had completed a draft of a legislative proposal for NCD. This draft legislative proposal was in the form of an equal opportunity law along the lines called for in NCD's report, *Toward Independence*.⁷⁷ For example, Burgdorf specified that the law should prohibit discrimination by the Federal Government, recipients of financial assistance, Federal contractors and subcontractors, employers, housing providers, places of public accommodation, persons and agencies of interstate commerce, transportation providers, insurance providers, and State and local government.⁷⁸ In addition, Burgdorf's draft legislative proposal required reasonable accom-

⁶⁸ Pub. L. No. 99-435, 100 Stat. 1080 (repealed July 5, 1994).

⁶⁹ Pub. L. No. 100-394, 102 Stat. 976 (codified as amended at 47 U.S.C. § 610 (1994)).

⁷⁰ Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

⁷¹ Pub. L. No. 90-284, §§ 801-901, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

⁷² Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-1688 (1994)).

⁷³ Statement by John Wodatch in U.S. Commission on Civil Rights, "Briefing on the Americans with Disabilities Act" (Washington, DC: U.S. Commission on Civil Rights), May 6, 1994, p. 12.

⁷⁴ National Council on the Handicapped, *Toward Independence: A Report to the President and to the Congress* (Washington, DC: National Council on the Handicapped, January 1986) (hereafter cited as NCD, *Toward Independence*).

⁷⁵ NCD, *Equality of Opportunity*, p. 68.

⁷⁶ *Ibid.*, p. 61.

⁷⁷ *Ibid.*, app. C, Chronology: The ADA's Path to Congress, p. 205.

⁷⁸ *Ibid.*, p. 62.

modation and affirmative steps to eliminate barriers.⁷⁹

At its quarterly meeting in May 1987, "NCD decided to move forward and give official sanction to crafting a legislative proposal, deciding that a comprehensive law . . . was the best way to protect disabled persons' rights."⁸⁰ In November of that year, NCD secured the sponsorship of Sen. Lowell Weicker,⁸¹ as well as the support of Rep. Tony Coelho.⁸²

On April 29, 1988, Representative Coelho introduced H.R. 4498, the Americans with Disabilities Act of 1988.⁸³ The bill stated as its main purpose "to establish a clear and comprehensive prohibition of discrimination on the basis of handicap."⁸⁴ The House Education and Labor Committee report accompanying the final version of the bill 2 years later echoed this language in stating: "The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring individuals with disabilities into the economic and social mainstream of American life."⁸⁵ During the 2 years from the bill's first introduction until its enactment, Congress held many hearings on the Americans with Disabilities Act.⁸⁶

In September 1988, Congress began hearings on the proposed legislation. During hearings in the fall of 1988 and spring of 1989, the Senate Labor and Human Resources Committee, the Labor and Human Resources' Subcommittee on the Handicapped, and the House of Representatives Subcommittee on Select Education heard testimony from key figures in the disability community such as the Chairperson of the National Council on the Handicapped (now known as the National Council on Disability), the

Chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, the Chairperson of the Task Force on the Rights and Empowerment of People with Disabilities, and representatives from the Disability Rights Education and Defense Fund, the U.S. Chamber of Commerce, and the National Coalition for Cancer Survivorship.⁸⁷ These congressional committees also heard testimony from people with disabilities themselves, including Mary DeSapio, a cancer survivor; Joseph Danowsky, an attorney who is blind; and Amy Dimsdale, a college graduate with quadriplegia.⁸⁸

A Senate subcommittee report on the hearings that took place during 1988 and 1989 stated that the testimony and reports presented to Congress drew the same fundamental conclusion, namely: "Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications. . . . Current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas."⁸⁹

Various committees held further hearings with testimony from additional key figures in the fall of 1989.⁹⁰ The testimony presented at

⁸⁷ S. REP. NO. 101-116, at 4 (1989).

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 6.

⁹⁰ See H.R. REP. NO. 101-485(II), at 26-27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 308. The report stated:

"On September 13, 1989, in Washington, D.C., the Subcommittee on Select Education and the Subcommittee on Employment Opportunities heard testimony from: Evan Kemp, Commissioner, Equal Employment Opportunity Commission; Jay Rochlin, Executive Director, President's Committee on Employment of People with Disabilities; Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund; Mark Donovan, Manager, Community Employment and Training Programs, Marriott Corporation; Duane Rasmussen, President, Sell Publishing Company; Paul Wharen, Project Manager, Thomas P. Harkins, Inc."

"On October 6, 1989, at University Place Conference Center, Indianapolis, Indiana, the Subcommittee on Select Education heard testimony from: Greg Fehribach, Chairman, Indiana Governor's Council on People with Disabilities and attorney, Timmons, Endsley, Chavis, Baker and Lewis; Barry Chambers, Commissioner, Indiana Department of Human Services; Deanna Durrett for Joseph Reum, Indiana Department of Mental Health; Muriel Lee, Governor's Planning Council for Persons with Disabilities; Jack Lewis, Professor of Sociology and Social Work, Anderson University, Indiana; David Reynolds, Indiana School for the Deaf, Janna

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 63.

⁸² *Ibid.*, pp. 63-64.

⁸³ H.R. 4498, 100th Cong. (1988). This bill was identical to the Senate bill, introduced in the Senate by Sen. Lowell Weicker (R-CT). See S. 2345, 100th Cong. (1988).

⁸⁴ H.R. 4498, 100th Cong. (1988).

⁸⁵ H.R. REP. NO. 101-485(II), at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

⁸⁶ See H.R. REP. NO. 101-485(II), at 24-28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 306-210.

these and the earlier 1988 hearings, as well as the remarks of House members and Senators themselves, provided persuasive evidence of the need to create positive change not just in the lives of people with disabilities but in the way that society views disability. For example, Sen. Tom Harkin spoke movingly about his brother's disability. Sen. Harkin said:

My brother and millions like him are Americans with disabilities, but they are not disabled. . . . Indeed, by extension, it follows that the only thing a person in a wheelchair cannot do is walk. . . . The only thing a blind person cannot do is see. . . . There are things that all of us cannot do. Who among us can play basketball as well as Larry Bird? Who can pitch a baseball as fast as Orel Hershier? [sic] Who can tell a joke like Jay Leno?⁹¹

Senator Harkin further noted that even outside of the crucial contexts of employment and education, in everyday life and leisure activities persons with disabilities may experience enormous segregation that denies them simple participation. He quoted from a National Council on Disability report summarizing a 1988 Louis Harris poll:

The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to see movies, do not go to the theaters, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue. . . . The extent of nonparticipation of individuals with disabilities in social and recreational activities is alarming.⁹²

In September 1988, Judith Heumann, then of the World Institute on Disability, testified about her personal experiences with disability:

When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly

refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education twice a week for 3 ½ years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.⁹³

In October 1989, Congress also heard powerful testimony from a number of witnesses, including Attorney General Dick Thornburgh, who stated on behalf of President Bush:

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this nation still lead their lives in an intolerable state of isolation and dependence. . . . Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.⁹⁴

As with other civil rights statutes, such as title VI and title VII of the Civil Rights Act of 1964, Congress invoked its constitutional authority to regulate commerce as well as its duty to enforce the equal protection clause of the 14th amendment in establishing its purpose for passing the ADA.⁹⁵ Segregation and isolation were two of the principal equal protection related issues testified to by witnesses at the ADA hearings. Timothy Cook of the National Disability Action Council invoked the spirit of the 14th

Shishler, law clerk for United States Magistrate John Paul Godich)." *Id.*

⁹¹ 135 CONG. REC. S10,711 daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

⁹² 135 CONG. REC. S10,712, (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

⁹³ *Hearing on H.R. 2273 Before the House Comm. on Education and Labor and Senate Comm. on Labor and Human Resources*, 100th Cong. 74-75 (1988) (statement of Judith Heumann, World Institute on Disability), reprinted in H. REP. NO. 101-485(II), 1 at 28-29 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 311.

⁹⁴ *Hearing on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 191 (1989) (statement of Dick Thornburgh, Attorney General of the United States), reprinted in H. REP. NO. 101-485(II), at 32 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 313.

⁹⁵ 42 U.S.C. § 12101 (b)(4) (1994).

amendment right to equal protection of the laws when he testified before Congress that: "As Rosa Parks taught us, and as the Supreme Court ruled . . . in *Brown v. Board of Education*, segregation 'affects the heart and mind in ways that may never be undone. Separate but equal is inherently unequal'."⁹⁶

The general rationale for the statute derives from the concept of equal protection of the laws. Congressional testimony on the ADA addressed specific needs for equality of opportunity in such key areas as employment, education, and public accommodations and services. For example, Congress heard a great deal of testimony and offered numerous statements of its own on the need for including employment provisions in the ADA statute. House members and Senators spoke eloquently before Congress in arguing the need for strong equal employment opportunity provisions in the new law.

For example, in September 1989, Sen. Joseph Biden stated before the Senate that "[t]oo many disabled persons have been locked out of the American workplace, excluded from jobs for which they are more than capable."⁹⁷ Senator Lieberman stated:

Two-thirds of Americans with disabilities between the ages of 16 and 64 are not working; however, 66 percent of working-age persons with disabilities say they want to work. . . . Fifty percent of adults with disabilities have household incomes of \$15,000 or less. Discrimination which prevents people from finishing school, from finding jobs, and from earning a livable wage not only hurts the individuals who are discriminated against, it hurts our entire society.⁹⁸

Debates Over the ADA Bill

In its report on the legislative history of the ADA, the National Council on Disability observed that during congressional hearings and debate on the ADA bill, "an ideological fault line emerged between the interests of the business and disability communities."⁹⁹ NCD identified six areas of

debate influencing members of Congress during this crucial period.¹⁰⁰ NCD observed:

Business groups had a number of overriding concerns. One was the "vagueness of language" contained in the ADA. Business lobbyists argued that such phrases as "undue hardship," "readily achievable," and "readily accessible," were inadequately defined, and would therefore invite frivolous law suits. Businesses, they argued, would not be able to know whether they were in compliance. A second concern was the potential cost of accommodations. One proposed solution was to have government share some of the burden through tax credits and other mechanisms. Third, numerous covered entities lobbied to have a more concrete definition of disability, ideally one that listed every covered disability instead of relying on a flexible definition. Fourth, small businesses argued that they should be exempt from the public accommodations requirements, or at least be phased in more gradually, because small businesses were exempt from other civil rights legislation. Fifth, scores of organizations protested the enforcement mechanisms available under the ADA, especially private litigation and the availability of punitive damages. Sixth, many business groups proposed that the ADA should preempt all other disability laws, so that there would be no confusion between different statutes, and no possibility for bringing multiple suits for one violation.¹⁰¹

These issues became divisive as members of Congress began introducing amendments to the original bill to respond to the concerns of the business community.¹⁰² Despite strong sentiments in favor of the enactment of a new civil rights law for people with disabilities, the bill did not pass in 1989. Although Congress achieved broad consensus among its members in both the House and the Senate on the need for legislation affording equal employment opportunity and access to State and local government-provided services, controversy developed during the hear-

⁹⁶ See S. REP. NO. 101-116, at 10 (1989).

⁹⁷ 135 CONG. REC. S10,792 (daily ed. Sept. 7, 1989) (statement of Sen. Biden).

⁹⁸ 135 CONG. REC. S10,795 (daily ed. Sept. 7, 1989) (statement of Sen. Lieberman).

⁹⁹ NCD, *Equality of Opportunity*, pp. 130-31.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, p. 132.

¹⁰² 135 CONG. REC. S10,715-16, , S10,737-38 (daily ed. Sept. 7, 1989) (statements of Sen. Hatch). See also 136 CONG. REC. H,2421 (daily ed. May 17, 1990) (statement of Rep. Gingrich) (stating: "This is a bill which will affect, not only Americans with disabilities, but all Americans. It will affect the entire American economy, and it is very important that we make it possible for small businesses to make the transition, that we want to maximize the ability to keep jobs, and to keep the economy growing and to have better opportunities for all Americans." *Id.*).

ing and debate over the ADA bill based on the division between the disability and business communities noted in NCD's *Equality of Opportunity* report. Two broad areas of controversy emerged as members of Congress sought to meet the needs of their constituents either in the business or the disability communities. First, some Congress members expressed concern that the new legislation would create enormous costs for employers, particularly small businesses.¹⁰³ Second, there were concerns that the ADA would result in a major increase in frivolous litigation.¹⁰⁴

Costs of ADA Compliance

Some members of Congress believed that the outlay needed for small businesses to provide reasonable accommodation would become an immense drain on their financial resources. For example, Senator Hatch sponsored two amendments to the bill that favored the needs of small businesses with respect to the costs of ADA compliance. The first provided an exemption from the requirements of the act for all employers with 15 or fewer employees.¹⁰⁵ The second was a tax credit to absorb the costs of offering reasonable accommodation to employees with disabilities. Senator Hatch spoke before Congress in favor of these provisions in September of 1989. He stated that:

I have been concerned from the beginning about ensuring that the ability of small business to continue competing successfully was not compromised by this bill. . . . If we place unreasonable, suffocating obligations on these businesses, everyone loses—persons with or without disabilities that currently patronize those businesses and the employees at those businesses who may lose their jobs.¹⁰⁶

Senator Hatch noted further in regard to the tax credit amendment:

My first idea was merely to exempt businesses with 15 or fewer employees, but I felt that some businesses

are so small that we should not be placing this type of burden upon them. The cost of accommodation might result in forcing them out of business and losing employment opportunities. . . we should take into consideration the burdens that are going to be placed upon small businesses. I think the tax credit approach is the appropriate remedy. The reason it is appropriate is because the Federal Government is imposing these obligations. Therefore, I also want the Federal Government to take some responsibility in sharing the obligations. . . The fact of the matter is that the Federal Government should help when it imposes these kinds of burdens. It is not fair if we do not do something to try and alleviate those burdens at least with regard to those who are the most vulnerable businesses in our society.¹⁰⁷

The controversial issue of costs principally emanated from concerns over the need to create "a sensible limit to the responsibility of providing reasonable accommodations."¹⁰⁸ Senate leaders agreed on the employer defense of "undue hardship" as a mechanism for alleviating the costs of providing reasonable accommodation. During the Senate debate on the bill Senator Hatch expressed these concerns on "undue hardship" and "reasonable accommodation":

there are some questions in my mind regarding the practical implications of the requirements of the legislation on certain situations. Specifically, I am thinking of the employment section of the bill, title I, and how the standards of "reasonable accommodation" and "undue hardship" would be applied across the board to the various industries and businesses in our Nation.¹⁰⁹

To allay some of these concerns, Senator Hatch sought to clarify the precise meaning of the term "undue hardship" by asking Senator Harkin, one of the sponsors of the Senate bill, a series of questions. Senator Hatch specifically sought to clarify the extent of employers' obligations in providing reasonable accommodations to persons with disabilities in the Senate bill, S. 933. Senator Harkin clarified first that the type of accommodation provided would vary from set-

¹⁰³ See, e.g., 105 CONG. REC. S10,714-17 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

¹⁰⁴ See 105 CONG. REC. S10,741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

¹⁰⁵ See 42 U.S.C. § 12111(5)(A) (1994).

¹⁰⁶ 135 CONG. REC. S10,715 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

¹⁰⁷ 135 CONG. REC. S10,715, S10,738 (daily ed. Sept. 7, 1989) (statements of Sen. Hatch). See also 136 CONG. REC. H2421 (daily ed. May 17, 1990) (statement of Rep. Gingrich).

¹⁰⁸ NCD, *Equality of Opportunity*, p. 115.

¹⁰⁹ 135 CONG. REC. S10,735 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).

ting to setting and that "no action on the part of the employer that is 'unduly costly, extensive, substantial, disruptive or that will fundamentally alter the nature of the program' is required."¹¹⁰ Second, Senator Hatch clarified that where an employer faced an "undue hardship" as described by the above language, the employer did not have to make the reasonable accommodation.¹¹¹ Finally, Senator Harkin said that the factors to be considered under S. 933 in determining whether an undue hardship to the employer existed would include: (1) the overall size of the business (number of employees, number and type of facilities, and size of the budget); (2) the type of operation maintained by the employer, including the composition and structure of the employer's workforce; and (3) the nature and cost of the accommodation needed.¹¹²

Congress ultimately included several mechanisms to compensate for the potential costs to employers. The final ADA bill included an exemption for small businesses with 15 or fewer employees¹¹³ and the "undue hardship" provision.¹¹⁴ In addition, the final bill included a provision offering employers a "direct threat" defense. Congress achieved broad consensus on this provision, which codified a 1987 decision of the U.S. Supreme Court under the Rehabilitation Act of 1973.¹¹⁵ The ADA's direct threat provision states that "direct threat" "means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹¹⁶

¹¹⁰ *Id.* (statement of Sen. Harkin).

¹¹¹ *Id.* (statement of Sen. Hatch).

¹¹² *Id.* (statement of Sen. Harkin). See discussion on "Final Provision" for a listing of the factors the ADA lists for consideration in determining whether an undue hardship exists.

¹¹³ See 42 U.S.C. §§ 12111(5)(A) (1994) (stating: "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.").

¹¹⁴ 42 U.S.C. § 12111(10) (1994).

¹¹⁵ See *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

¹¹⁶ 42 U.S.C. § 12111(3) (1994).

Concerns About Increased Litigation

The second issue that became the subject of heated controversy was the potential for more and perhaps often frivolous litigation. NCD observed:

This fear built on the perception that phrases such as "reasonable accommodation," "undue hardship," "readily achievable," and "less effective," were inadequately defined, compelling courts to decide the meaning of the ADA.[citation omitted] It also stemmed from the belief that the remedies available under the ADA would invite frivolous law suits.¹¹⁷

The litigation concern related specifically to the terminology that determined the extent of coverage of the new statute. For example, in defining the term "disability," Congress sought to ensure that coverage extended to all individuals with mental or physical impairments significant enough to prevent them from performing a major life activity.¹¹⁸ To this end, Congress defined "disability" in the statute as meaning "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."¹¹⁹

Legislative history documents on the ADA indicate that there was great concern about the potential of this language to create frivolous and unnecessary litigation. Senator Armstrong stated: "The Senate, and the committee, refused to list the mental impairments that are covered by the act; however, neither the Senate nor the committee left any doubt that the act is intended to cover 'any mental or psychological disorder'."¹²⁰ Senator Pryor, one of the cosponsors of the bill, observed more directly:

Let us look at the definition that the ADA bill has for disability with respect to an individual. I quote: "A physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment or being regarded as having such impairment." . . . That is the definition which, in my opinion, is extremely loose. In my opinion, also, it is going to be the subject of liter-

¹¹⁷ NCD, *Equality of Opportunity*, p. 111.

¹¹⁸ 42 U.S.C. § 12102(2) (1994). See also S. REP. NO. 101-116, at 21-24 (1990).

¹¹⁹ *Id.* § 12102(2) (1994).

¹²⁰ 135 CONG. REC. S11,174 (daily ed. Sept. 14, 1989) (statement of Sen. Armstrong).

ally countless issues of litigation in the courts across the country.¹²¹

The bill's sponsors sought to justify this terminology. For example, the Senate report accompanying the unenacted 1989 ADA bill helps to describe the extent of coverage by offering an example of what would constitute an impairment that did not create a "substantial" limitation. It explains that "persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity" and therefore not covered under the statute.¹²²

The Senate report accompanying Senate bill S. 933 attempts to offer both justification for and clarification of the broad terminology "physical or mental impairment." The report states:

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases, and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism. A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities." A "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.¹²³

Preemployment Inquiries

Some members of Congress also expressed concerns over other policy issues, including preemployment and medical inquiries and coverage of HIV/AIDS by the bill. For example, Sen. Jesse Helms did not want to limit employers' prerogatives in conducting preemployment inquiries by prohibiting their asking about a prospective em-

ployee's HIV status before a conditional offer of employment.¹²⁴ Senator Helms stated that if an employer "dares to ask a question about it [HIV status] before there is a conditional job offer, he is in the soup, according to this."¹²⁵ Senator Helms further stated in this context:

What was the point in making him [the prospective employer] go that far? Why could he not sit down and say, son, I want to talk to you about several things that are important to me . . . Are you HIV positive? Are you this or that? Because your condition and beliefs are important to me. . . . Why can the employer not do that? Why does he have to go through all this rigmarole and get down to making a conditional job offer, at which point he has the right to ask the question? Why was that done? Why was that scenario set up?¹²⁶

Senator Harkin explained to Senator Helms that "because even though the person may be HIV positive, he may still be qualified . . . He may be fully qualified."¹²⁷

The main guidance offered in the ADA's legislative history on preemployment and medical inquiries is that any form of inquiry of a potential employee before a job offer is expressly prohibited. Senator Harkin explained that the rationale for this "is to ensure that employers do not inappropriately screen out people with disabilities at the initial stage of the application process by simply reacting to a prejudice or stereotype about a person's disability."¹²⁸

HIV/AIDS

Others in Congress were not satisfied with Senator Harkin's explanation. HIV/AIDS became a focal point of debate. During the House debate over H. 2273, Representative Dannemeyer said that including HIV infection as a covered disability was not sound public policy. He stated:

With this bill, in the form that it is now to be considered by the House, if it is adopted, every HIV carrier in the country immediately comes within the definition of

¹²¹ 135 CONG. REC. S10,741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

¹²² S. REP. NO. 101-116, at 24 (1990).

¹²³ See S. REP. NO. 101-116, at 22 (1989).

¹²⁴ See 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

¹²⁵ 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

¹²⁶ *Id.* (statement of Sen. Helms).

¹²⁷ *Id.* (statement of Sen. Harkin).

¹²⁸ 135 CONG. REC. S10,767 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

a disabled person. Why? Because they have a communicable disease. They are a carrier of a fatal virus that causes death.

Is that sound public policy? And since 70 percent of those people in this country who are HIV carriers are male homosexuals, we are going to witness an attempt, or an utterance on the part of the homosexual community that, when this bill is passed, it will be identified by the homosexual community as their bill of rights.¹²⁹

Others in Congress thought that HIV/AIDS and other contagious diseases should be addressed as public health hazards. For example, Representative Burton stated: "I think it is extremely important that we protect the public health of this Nation. If someone has a communicable disease, tuberculosis, AIDS, or something else, do my colleagues want them preparing their food or handling their food?"¹³⁰

In response to this concern, the final bill contains a provision addressing the need to ensure safety with respect to the food supply. This provision states that a covered entity (employer) may refuse to employ anyone with an infectious disease if the dangers of transmission cannot be eliminated through reasonable accommodation.¹³¹

Final Provisions and Enforcement of Title I of the ADA

The full statement of purpose in the ADA reads:

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

¹²⁹ 135 CONG. REC. H2,422 (daily ed. May. 17, 1990 (statement of Rep. Dannemeyer).

¹³⁰ *Id.* (statement of Rep. Burton).

¹³¹ 42 U.S.C. § 12113(d)(2) (1994). The provision requires the Secretary of Health and Human Services to publish an annual list of infectious diseases based on a review of all infectious and communicable diseases that may be transmitted through handling the food supply. 42 U.S.C. § 12113(d)(1). The requirement states that the Secretary of Health and Human Services shall, not later than 6 months after July 26, 1990, "(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply; (C) publish the methods by which such diseases are transmitted; and (D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public." *Id.*

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹³²

The Americans with Disabilities Act defines an individual with a disability as a person who has:

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.¹³³

The ban on discrimination in title I reads:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.¹³⁴

¹³² 42 U.S.C. § 12101(b) (1994).

¹³³ *Id.* § 12102(2) (1994).

¹³⁴ 42 U.S.C. § 12112(a) (1994). Discrimination as it is used in title I is defined in the following detailed manner as:

"(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

"(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

"(3) utilizing standards, criteria, or methods of administration—

"(A) that have the effect of discrimination on the basis of disability; or

"(B) that perpetuate the discrimination of others who are subject to common administrative control;

"(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an

Title I thus does not protect all individuals with disabilities from discrimination; it protects only "qualified" individuals with a disability, where "qualified" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹³⁵ Title I places a responsibility on employers to make reasonable accommodations necessary for a qualified individual with a disability to perform the job. Although the term "reasonable accommodation" is not defined precisely, title I offers examples of what reasonable accommodation might include:

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

individual with whom the qualified individual is known to have a relationship or association;

"(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

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

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

¹³⁵ 42 U.S.C. § 12111(8), 12112(b) (1994). The statute does not offer a further definition or description of the term "essential functions." It only states that: "For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.*

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹³⁶

Title I includes a prohibition against medical examinations and preemployment inquiries as to whether a job applicant is an individual with a disability or as to the nature or severity of such disability.¹³⁷ However, a covered entity may conduct preemployment inquiries "into the ability of an applicant to perform job-related functions."¹³⁸ A covered entity "may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant" under certain circumstances.¹³⁹ However, a covered entity cannot require a medical examination or make post-employment inquiries of employees unless "such examination or inquiry is shown to be job-related and consistent with business necessity."¹⁴⁰

Title I specifically excludes current abusers of illegal drugs from coverage under its nondiscrimination provisions, stating:

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in

¹³⁶ *Id.* § 12111(9) (1994).

¹³⁷ *Id.* § 12112(d)(1)–(2)(A) (1994).

¹³⁸ *Id.* § 12112(c)(2)(B) (1994).

¹³⁹ The statute allows post-offer examinations if:

"(A) all entering employees are subjected to such an examination regardless of disability;

"(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

"(C) the results of such examination are used only in accordance with this subchapter." *Id.* § 12112(3) (1994).

¹⁴⁰ *Id.* § 12112(4)(A) (1994).

the illegal use of drugs, when the covered entity acts on the basis of such use.¹⁴¹

In addition, title I states that "a test to determine the illegal use of drugs shall not be considered a medical examination."¹⁴² Title I does not prevent employers from taking adverse action on the basis of illegal drug use against employees or applicants who are "currently engaging in the illegal use of drugs."¹⁴³ Finally, title I states that "it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure" that individuals who are rehabilitated or former drug users "are no longer engaging in the illegal use of drugs."¹⁴⁴

Title I also specifies several "defenses" that employers can use to avoid liability. For instance, title I allows a "business necessity" defense:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.¹⁴⁵

Employers can claim that providing reasonable accommodation would result in an undue hardship. An undue hardship is defined as "an

action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."¹⁴⁶ The factors used in determining whether an undue hardship exists are:

(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁴⁷

In addition, title I allows a so-called "direct threat" defense.¹⁴⁸ Employers may have as a qualifications standard that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."¹⁴⁹ The statute defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁵⁰ In response to concerns about communicable diseases as public health hazards, title I also allows, in certain circumstances, employers to offer a defense that an employee or applicant for a food handling position has an infectious or communicable disease that is "transmitted to others through the handling of food."¹⁵¹ For this defense to pertain, the particular disease must appear on a list to be published annually by the U.S. Department of Health and Human Services and must not be able to be eliminated by reasonable accommodation.¹⁵² Finally, religious organiza-

¹⁴¹ *Id.* § 12114(a) (1994).

¹⁴² *Id.* § 12114(d)(1) (1994).

¹⁴³ *Id.* § 12114(a) (1994).

¹⁴⁴ *Id.* § 12114(b) (1994) (stating: "Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who— (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs." *Id.*).

¹⁴⁵ *Id.* § 12113(a) (1994).

¹⁴⁶ *Id.* § 12111(10)(A) (1994).

¹⁴⁷ *Id.* § 12111(10)(B) (1994).

¹⁴⁸ *See id.* § 12113(b) (1994).

¹⁴⁹ *Id.* § 12113(b) (1994).

¹⁵⁰ *Id.* § 12111(3) (1994).

¹⁵¹ *Id.* § 12113(d)(2) (1994).

¹⁵² *Id.* § 12113(d)(2) (1994). This is followed by a provision stating: "Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, or

tions are permitted to give preference to individuals of a particular religion.¹⁵³

Congress has charged various Federal agencies with implementing the nondiscrimination provisions of the ADA. Each agency has its own role and responsibilities fulfilling the requirements of the act. The U.S. Equal Employment Opportunity Commission (EEOC) is the agency primarily responsible for title I.

Congress required EEOC to issue its implementing regulations for title I within 1 year of the passage of the act. Accordingly, the EEOC issued its title I regulations on July 26, 1991.¹⁵⁴ These regulations became effective on July 26, 1992.¹⁵⁵ Under the requirements of EEOC's regulations, title I applied to organizations with 25 or more employees until July 26, 1994, when it became applicable to organizations with 15 or more employees.¹⁵⁶

The U.S. Department of Justice (DOJ) is responsible for employment issues relating to State and local governments. Because such issues implicate both title I and title II of the ADA, DOJ and EEOC have issued a joint regulation describing the procedures for processing employment complaints that fall within the overlapping jurisdiction of both titles.¹⁵⁷ The regulation states that if the EEOC determines that it does not have jurisdiction under title I,

the EEOC shall promptly refer the complaint to the Civil Rights Division at DOJ.¹⁵⁸

The Role of Other Federal Agencies and Programs

Although the EEOC and DOJ have primary responsibility for enforcing title I and title II, subtitle A, of the ADA, respectively, several other Federal agencies and programs play a role in the implementation of the Americans with Disabilities Act.

President's Committee on Employment of People with Disabilities

The President's Committee on Employment of People with Disabilities is a small Federal agency that was created in 1947 by Executive Order. Its original purpose was to find and encourage employers to hire disabled veterans returning from World War II.¹⁵⁹ Over the years, the mission grew to include all persons with disabilities. Today, its mission is "to facilitate the communication, coordination and promotion of public and private efforts to enhance the employment of people with disabilities."¹⁶⁰ The President's Committee "provides information, training, and technical assistance to America's business leaders, organized labor, rehabilitation and service providers, advocacy organizations, families and individuals with disabilities" and "reports to the President on the progress and problems of maximizing employment opportunities for people with disabilities."¹⁶¹ According to its Executive Director, the President's Committee is essentially a marketing and advertising agency, which advertises the employability of persons with disabilities.

The President's Committee plays an important role in providing technical assistance on the ADA, particularly providing information to em-

discance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services." *Id.* § 12113(d)(3) (1994). Title I requires the Department of Health and Human Services to publish a list of infectious and communicable diseases that are transmitted through handling the food supply. *Id.* § 12113(d)(1) (1994).

¹⁵³ *Id.* § 12113(c) (1994).

¹⁵⁴ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991) (codified at 29 C.F.R. § 1630).

¹⁵⁵ 56 Fed. Reg. 35,726 (1991).

¹⁵⁶ 29 C.F.R. § 1630.2(e) (1997).

¹⁵⁷ Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 59 Fed. Reg. 39,898 (1994) (codified at 29 C.F.R. § 1640).

¹⁵⁸ 29 C.F.R. § 1640.6(b).

¹⁵⁹ John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, interview in Washington, DC, Oct. 16, 1997, p. 2 (hereafter cited as Lancaster interview).

¹⁶⁰ "President's Committee on Employment of People with Disabilities," undated information sheet provided to Commission staff by John Lancaster, Executive Director, USCCR/OCRE files (hereafter cited as President's Committee information sheet).

¹⁶¹ *Ibid.*

employers on how to provide accommodations required under the statute. One of the President's Committee's largest services is the Job Accommodation Network (JAN), which is operated under contract by West Virginia University.¹⁶² JAN, whose mission is "to assist in the hiring, retraining, retention or advancement of persons with disabilities by providing accommodation information," operates a toll-free telephone information line, as well as an Internet Web site. JAN's telephone line is answered by professional consultants who can provide information on accommodation methods, devices, and strategies.¹⁶³ According to the Executive Director of the President's Committee, in 1996, JAN received approximately 85,000 calls from employers. These calls resulted in 22,000 persons with disabilities either being hired or retained. The large number of calls is an indication that information is reaching employers and that they are interested in the assistance the President's Committee can provide them, the Executive Director said. He stressed the need for technical assistance to be provided not only by enforcement agencies, such as EEOC and DOJ, but also by JAN and other nonenforcement agencies, such as the Disabilities Business and Technical Assistance Centers and independent living centers across the country. Both EEOC and DOJ list JAN as a source of information in their pamphlets. Furthermore, the President's Committee has set up a procedure with OFCCP so that employers are directed automatically to JAN for employment information.¹⁶⁴

Another major function of the President's Committee is to disseminate public service announcements and publications to educate the public, including employers, persons with disabilities, and labor unions. The President's Committee also runs the Business Leadership Network. In this program, employers who are interested in hiring persons with disabilities

educate other employers on disability-related topics. This program was in operation in approximately 7 States in 1997 and was expected to expand to 13 States in 1998.¹⁶⁵

The President's Committee also runs two demonstration projects. The High School/High Tech program is operating in 17 cities. Under the program, President's Committee staff members locate producers or users of technology (such as NASA and NASA contractors) and work with them to provide paid summer internships for high school students with disabilities. The program has served more than 4,500 students with disabilities. Among last year's interns, 60 percent had emotional and learning disorders, and 40 percent had physical or developmental disabilities. Forty-five percent were from minority groups. The Committee is beginning to track this program and has found that many of the students go on to a 2- or 4-year school to study in technology fields.¹⁶⁶

A second demonstration project is the Workforce Recruitment Program, operated in conjunction with the Department of Defense. This program identifies students who are ready for competitive work and are then entered into a database that is provided to potential employers. Initially limited to Federal employers, the program now includes private employers. In 1996, 1,500 students were interviewed for this program at 141 colleges or universities. Of these students, 1,200 were selected for inclusion in the database. Two hundred thirty-eight of the students participated in a summer internship program, and 30 found permanent employment. This program is expanding every year. Next year, three large temporary agencies will be involved in the project.¹⁶⁷

Protection and Advocacy Systems

The national protection and advocacy (P&A) system is a federally funded program created by the Developmental Disabilities Assistance and Bill of Rights Act of 1975 to address concerns about mistreatment and abuse of persons with developmental disabilities.¹⁶⁸ Congress enacted

¹⁶² Lancaster interview, p. 2.

¹⁶³ President's Committee on Employment of People with Disabilities, "JAN Job Accommodation Network," undated information sheet provided to Commission staff by John Lancaster, Executive Director, President's Committee on Employment of People with Disabilities, USCCR/OCRE files (hereafter cited as JAN information sheet).

¹⁶⁴ Lancaster interview, p. 2.

¹⁶⁵ *Ibid.*, pp. 2, 3.

¹⁶⁶ *Ibid.*, pp. 2-3; President's Committee information sheet.

¹⁶⁷ *Ibid.*

¹⁶⁸ See Pub. L. No. 94-103 § 113, 89 Stat. 486,504 (codified as amended in scattered sections of 42 U.S.C.).

the law in response to the "inhumane and despicable conditions" uncovered by investigative reporting into State-run institutions, such as Willowbrook in New York.¹⁶⁹ The purpose of the act was "to protect the human and civil rights" of individuals with developmental disabilities. The law established protection and advocacy agencies (P&As) in each State to provide legal representation and advocacy for such individuals. The P&As are public and private agencies designated by the Governor to be the State P&A. A national membership association for P&As, the National Association of Protection and Advocacy Systems (NAPAS), coordinates the work of and provides training, technical assistance, and information to the P&As. The State P&A agencies can only be redesignated for "good cause." As a result, there has been little change in the P&A system since the mid 1970s, when it first developed.

When the P&A system was first created, its mandate was restricted to protection and advocacy on behalf of people with developmental disabilities. Since then, Congress has expanded the mandate of the P&A system several times. In 1984 Congress added clients of vocational rehabilitation, the Client Assistance Program (CAP).¹⁷⁰ The CAP was established as a mandatory formula grant program under the 1984 amendments to the Rehabilitation Act to provide assistance to people with disabilities in obtaining information and access to the services, facilities, and projects available under the Rehabilitation Act.¹⁷¹ In 1986, Congress enacted the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), which expanded the P&A program to include people with mental illness residing in 24-hour care facilities such as jails, prisons, and mental hospitals.¹⁷² The Protection and Advocacy of Individual Rights (PAIR) program was established for all individuals with

disabilities who are not eligible under the other programs and was funded as a national program in 1994.¹⁷³ The PAIR program serves as a catch-all program that theoretically serves the largest number of people since it covers a broad range of people with disabilities. However, in fact the PAIR program remains the smallest since it is the newest and the least well funded.¹⁷⁴ The PAIR program supports much of P&As' work under the ADA.

The protection and advocacy program is administered by three Federal agencies. The Administration of Developmental Disabilities at the U.S. Department of Health and Human Services (HHS) administers the original P&A program, Protection and Advocacy for People with Developmental Disabilities (PADD). The Rehabilitation Services Administration of the Office of Special Education and Rehabilitation Services at the U.S. Department of Education administers the CAP and PAIR programs; and the Center for Mental Health Services (CMHS), also at HHS, administers PAIMI.

The Executive Director of NAPAS indicated that the central mission of the P&A system is to respond to allegations of abuse, neglect, and violations of the rights of people with disabilities or discrimination based on their disability. P&As pursue legal, administrative, and other remedies on behalf of their clients. Although P&As are advocacy organizations for people with disabilities, they have authority to litigate and seek administrative remedies against institutions, including jails, prisons, hospitals, and mental institutions that abuse and neglect individuals. These are sometimes class action suits.¹⁷⁵ As noted above, under the PAIR program, P&As can file suits under the ADA on behalf of their clients.

National Council on Disability

The National Council on Disability is an independent Federal agency, composed of 15 members appointed by the President and confirmed by the U.S. Senate. Initially created in 1978 as an advisory board in the U.S. Depart-

¹⁶⁹ National Association of Protection and Advocacy Systems, *Annual Report of the P&A System 1996-1997* (Washington, DC: National Association of Protection and Advocacy Systems, 1997), p. 4 (hereafter cited as NAPAS, *Annual Report 1996-1997*). See also Curtis L. Decker, Executive Director, National Association of Protection and Advocacy Systems, interview in Washington, DC, Nov. 12, 1997, p. 2 (hereafter cited as Decker interview).

¹⁷⁰ 29 U.S.C. § 732 (1994).

¹⁷¹ See *id.*

¹⁷² See *id.* § 794e (1994).

¹⁷³ Decker interview, p. 3.

¹⁷⁴ *Ibid.*, pp. 2-3.

¹⁷⁵ *Ibid.*, p. 2.

ment of Education, NCD became an independent agency in 1984. Its overall purpose is:

to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.¹⁷⁶

NCD has no enforcement responsibilities with respect to the ADA or any other statute. Instead, its responsibilities include:

reviewing and evaluating, on a continuing basis, policies, programs, practices, and procedures concerning individuals with disabilities conducted or assisted by federal departments and agencies . . . to assess the effectiveness of such policies, programs, practices, procedures, statutes, and regulations in meeting the needs of individuals with disabilities.¹⁷⁷

NCD must also review and evaluate "new and emerging disability policy issues affecting individuals with disabilities at the federal, state, and local levels, and in the private sector. . . ." NCD is also charged with:

making recommendations to the President, the Congress, the Secretary of Education, the Director of the National Institute on Disability and Rehabilitation Research, and other officials of federal agencies respecting ways to better promote equal opportunity, independent living, and inclusions and integration into all aspects of society for Americans with disabilities.¹⁷⁸

With respect to the ADA, NCD is tasked with "gathering information about the implementation, effectiveness, and impact" of the law. NCD publishes an annual progress report on national disability policy for the President and Congress.¹⁷⁹

Explaining how NCD carries out its mandate, the agency's General Counsel told the Commission that NCD's mandate is to track ADA enforcement, but that the agency does not have the power, or the staff, to coordinate ADA efforts

across agencies. The agency measures its success by the number of its recommendations implemented by other agencies. In making recommendations, NCD works to ensure that it has grassroots support from the disability community, so that there is a constituency that will help ensure the recommendations are implemented.¹⁸⁰

National Institute on Disability and Rehabilitation Research

The National Institute on Disability and Rehabilitation Research (NIDRR) began development of a \$5 million ADA technical assistance initiative shortly after the passage of the ADA.¹⁸¹ NIDRR issued a proposed priority establishing 10 technical assistance centers, called disability and business technical assistance centers (DBTACs), one in each of the U.S. Department of Education's 10 regions. These initial grants ran for 5 years, ending in 1996. At that time, NIDRR issued a new proposed priority for 10 new DBTACs. As of January 1998, the program was in the second year of its second cycle. The budget was \$6.2 million.¹⁸² The DBTACs:

focus on providing, within their respective regions, materials, technical assistance, and training to businesses, persons with disabilities, state and local government agencies, and others to facilitate appropriate implementation of the ADA, successful outcomes for individuals with disabilities, and greater accessibility in public accommodations.¹⁸³

The DBTACs also develop resources, such as databases, reference guides, and expert consultant pools, to assist in the technical assistance programs and promote public awareness of the ADA. Each DBTAC has a network of State affiliates and coalitions of organizations concerned

¹⁷⁶ NCD, *Achieving Independence*, app. F, "Description of the National Council on Disability," p. 187.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, p. 188.

¹⁷⁹ *Ibid.*

¹⁸⁰ Andrew Imparato, General Counsel, National Council on Disability, interview in Washington, DC, Oct. 20, 1997.

¹⁸¹ David Esquith, Policy and Planning Division, National Institute on Disability and Rehabilitation Research, interview in Washington, DC, Jan. 8, 1998, p. 2 (hereafter cited as Esquith interview).

¹⁸² DOE, OSERS, NIDRR, *Report of the Americans with Disabilities Act (ADA) Technical Assistance Program, The NIDRR Fifth Year (FY 1996)*, prepared by the ADA Technical Assistance Coordinator Contract (hereafter cited as NIDRR, *Report of the ADA Technical Assistance Program*); Esquith interview, p. 2.

¹⁸³ *Ibid.*, p. v.

with disability issues (including businesses, State and local government agencies, and disability groups) in each State.

The DBTACs play an important role in disseminating information and technical assistance relating to the ADA throughout the country. According to NIDRR staff overseeing their activities, the DBTAC program has been concerned since its inception about quality control and about establishing a reputation for issuing solid, legally sufficient material. To this end, the DBTAC program has a working relationship with DOJ and EEOC. These agencies review all written material prepared by a DBTAC or any of NIDRR's grantees for legal sufficiency. In addition, NIDRR has established liaisons at EEOC and DOJ to assist the DBTACs in answering questions that require the expertise of those agencies. Each DBTAC has access to an information specialist at DOJ and EEOC headquarters. The DBTAC project directors hold semi-annual meetings. At each of these meetings officials from DOJ and EEOC brief NIDRR and DBTAC staff. In turn, the DBTACs relate to EEOC and DOJ staff any major concerns or issues in their respective regions.

NIDRR has been very concerned with ensuring that DBTAC staff stays current and is aware of recent policy developments in the field.¹⁸⁴ The DBTACs incorporate changes in the law in their training. In addition, the DBTACs train their State affiliates on these developments. Depending upon the magnitude of the legal or policy development, the DBTACs will issue newsletters that go out to all of their customers. The DBTACs have regular publications that they send to their customers, free of charge, although the DBTACs enclose an optional reimbursement request for expenses with all materials they distribute. NIDRR's policy is never to refuse to send anyone any material due to inability to pay.¹⁸⁵

¹⁸⁴ However, a NIDRR grantee has found that the DBTACs are not well-prepared to provide technical assistance on issues related to psychiatric disabilities. Matrix Research Institute, "Responses to the Americans with Disabilities Act Project Questionnaire," February 1998, enclosure to Barbara Granger, Director of Training and Dissemination, Matrix Research Institute, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 19, 1998.

¹⁸⁵ Esquith interview, p. 4.

A Broader Context: America's Disability Policy

Although the ADA often is thought of as the culmination of a long line of statutes extending civil rights protections to different groups of Americans, it also needs to be understood as a major new component of the Nation's broader policy towards people with disabilities. With the exception of section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act is the only major component of the set of programs that constitute America's disability policy that is premised on a recognition that people with disabilities have a right and, indeed, a responsibility to work. The Americans with Disabilities Act sets a goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.¹⁸⁶ Most of the rest of the Nation's disability policies are premised on what has been termed a "medical" or "charity" model of disability. Under this model, people with disabilities are injured, or limited, and deserve assistance in the form of health care, vocational rehabilitation, and, when they cannot work, income supports.¹⁸⁷ Based on the medical model, over the years, the United States has put in place a variety of supports for people with disabilities. The largest of these is the social security disability insurance (SSDI) program, which provides benefits to individuals covered under the social secu-

¹⁸⁶ 42 U.S.C. § 12101(8) (1994).

¹⁸⁷ See Mary Louise Breslin, Disability Rights Education and Defense Fund, presentation at "Employment Post the Americans with Disabilities Act," conference in Washington, DC, Nov. 17-18, 1997 (hereafter cited as 1997 Post-ADA Conference), p. 5. Ms. Breslin summarized the history of disability policy as follows: Up until the 1970s, the policy was based on pity, which is in conflict with the civil rights goals of today. Science and medicine had a role in creating the pity/charity model of disability policy, starting with the eugenics movement and Social Darwinism and the view that there is a "normal person." The original hostility was replaced with pity, which correlates with segregation. This left a legacy of institutionalization and a belief that persons with disabilities were abnormal. It also led to doctors' being charged with making determinations of whether a person was disabled. Ms. Breslin continued that under the charity/medical model of disability, persons with disabilities are perceived as unable to work. People who are able to work are not disabled. There is no middle ground between dependence and unsupported work. She added that the disability benefit programs are critical, but they give the message of incapacity.

rity program who no longer are able to work. Other programs include supplemental security income (SSI) instituted in 1974 for individuals with disabilities who were not eligible for SSDI, State workers' compensation programs, and disability coverage for servicemen provided by the Department of Veterans' Affairs.¹⁸⁸

According to the National Council on Disability, "[d]esigned as a safety net for people who are terminally ill or too severely disabled to work, Social Security Programs for people with disabilities have had the unintended effect of trapping people with disability in lifetimes of poverty."¹⁸⁹ A number of studies has documented that labor force participation rates of individuals with disabilities declined as disability benefits became more generous, particularly during the decade of the 1970s. For instance, one researcher writes that "between 1970 and 1978, the number of workers on the [disability insurance] rolls nearly doubled, from 1.5 million to 2.9 million, and expenditures quadrupled. . . . Over roughly the same period, the number of people returning to work fell to an all-time low. . . ."¹⁹⁰ Researchers have attributed the declining labor force participation rates among individuals with disabili-

ties to work disincentives created by the Nation's disability benefits programs.

Participation in either SSDI or SSI usually confers coverage by medicaid or medicare and hence provides health care benefits to people with disabilities participating in the programs. Thus, SSDI/SSI participants who choose to join the work force and become employed not only lose their SSDI/SSI benefits, but also lose health care coverage. Generally, the new employers of former program participants either do not offer health care insurance or offer health care insurance that excludes prior conditions, including medical costs related to their disability. One disability researcher has explained that these "disincentive effects of the health care coverage provided by [disability benefits] programs" can overpower any incentive to work provided by the ADA:

Consider, for example, a person with a disability who is faced with the choice of applying for a [disability benefits] program or going to work for an employer who will provide the accommodations needed for the person to work because of the influence of the ADA. Assume further that the employer does not have group coverage for his workers or that the group coverage that is provided has many . . . exclusions. Even if the job offers a wage substantially greater than the disability benefits that would be provided by [the disability benefits program], the difference is unlikely to offset the value of a lifetime of guaranteed health care coverage to a person with a chronic condition.¹⁹¹

The National Council on Disability reported that "[a]bout 9.2 million people with disabilities receive Medicaid and/or Medicare, largely as a result of being on Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI)" and that "[p]eople with disabilities frequently list the lack of access to adequate and affordable health insurance as a major barrier to employment."¹⁹²

The disincentive effects of disability benefits programs have been widely recognized. According to one economist's analysis of the Nation's disability policy:

the principal thrust of disability policy in the United States continues to be providing transfer payments to

¹⁸⁸ See William G. Johnson, "The Future of Disability Policy: Benefit Payments or Civil Rights?" *The Annals of the American Academy of Physical and Social Sciences* (January 1997), pp. 160-63.

¹⁸⁹ National Council on Disability, *Achieving Independence: The Challenge for the 21st Century: A Decade of Progress in Disability Policy, Setting an Agenda for the Future* (Washington, DC: National Council on Disability, July 26, 1996), p. 72 (hereafter cited as NCD, *Achieving Independence*).

¹⁹⁰ Carolyn L. Weaver, "Incentives Versus Controls in Federal Disability Policy," ch. 1 in Carolyn L. Weaver, ed., *Disability and Work: Incentives, Rights, and Opportunities* (Washington, DC: The AEI Press, 1991), p. 4 (hereafter cited as Weaver, *Disability and Work*). See also Sherwin Rosen, "Disability Accommodation and the Labor Market," ch. 2 in Weaver, *Disability and Work*, p. 20. Rosen summarizes the findings of research as follows: "Cotterman and Raisian calculate that during the decade of the 1970s the proportion of the disabled not working increased among virtually all age and sex groups. . . . The growth of social security disability payments has been directly linked to this phenomenon," citing Robert F. Cotterman and John Raisian, "The Incidence of Disability 1970 to 2020: A Public Policy Dilemma?" report submitted to the National Council on the Disabled (Washington, DC: Unicon Research Corp., May 1988) and Donald O. Parsons, "The Decline in Male Labor Force Participation," *Journal of Political Economy*, vol. 88, no. 1 (February 1980), pp. 117-34.

¹⁹¹ Johnson, "The Future of Disability Policy," p. 171.

¹⁹² NCD, *Achieving Independence*, pp. 81, 82.

those labeled "unable to perform any substantial gainful activity." Until both the disability community and policymakers take the risk of shifting from a disability policy primarily based on transfers to one based on the proposition that people with disabilities can and should be expected to work, a new and growing population of young people with disabilities can look forward to a life of dependency.¹⁹³

Another author has written:

The Social Security program's expansion greatly steepened the "welfare trap" by which recipients find themselves not much better off financially (and often worse off) if they take a job than if they stay home. . . . Indeed, [the] welfare trap [faced by people with disabilities is] deeper than that of the much discussed (and smaller) Aid to Families with Dependent Children program, simply because it [is] much more generous.¹⁹⁴

Another expert wrote to the Commission:

Social Security . . . benefits provide a financial disincentive for persons with disabilities to return to work. . . . It is my belief that health insurance continues to be one of the most significant area for disincentives for return to work for persons who have been chronically ill, such as those who have been on Social Security benefits. Without addressing this issue, many of those who have been unemployed will continue to not feel confident that they should pursue meaningful work and reduce or eliminate their need for the health insurance coverage that comes with Social Security insurance.¹⁹⁵

The associate director of the State of Illinois' Office of Rehabilitation Services wrote:

The ADA needs to address the rights of [persons with disabilities] regarding such items as Vocational Rehabilitation, SSI, SSDI and health benefits. For example, there needs to be a more definitive policy regarding disabilities and company health insurance. There is such a wide variance of health insurance policies, that a person who receives disability benefits and medicare

and Medicaid is often in a better position not to return to the labor force. Since one of the private sectors [sic] biggest fears is the cost of health insurance for [persons with disabilities], there needs to be a system prepared by federal and state governments to guarantee health benefits for persons with disabilities to open up more employment opportunities.¹⁹⁶

Thus, the Nation's traditional disability benefit and health insurance system provides disincentives to paid employment that are at odds with the ADA's goal of ensuring equal employment opportunity to people with disabilities. In fall 1997, a national conference held in Washington, D.C., on "Employment Post the Americans with Disabilities Act" underscored the contradictions between the ADA and traditional disability benefit policies.¹⁹⁷ A major theme of the conference, which included Federal and State officials and policy makers, disability advocates, service providers, disability researchers, employers, and consumers, was that there is a fundamental conflict between much of disability policy, particularly SSI and SSDI benefits, and the ADA.¹⁹⁸

¹⁹⁶ Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 2. Mr. Suter also recommended changes to the Vocational Rehabilitation system: "The ADA should also be used as the measuring stick for eligibility for Vocational Rehab services offered by the federal and state governments. The present policy in place nationwide is to service a small section of the disability community based upon the 'Order of Selection. If the ADA guidelines were used to determine eligibility, more persons with disabilities would be served. There would also have to be a correlation of increased funding for the states. Many [persons with disabilities] fall through the cracks because of differing eligibility criteria." Ibid.

¹⁹⁷ The purpose of the conference was "to engage national and state policy leaders, researchers, disability advocates, consumers, services providers, employers, congressional staff and government officials in a dialogue about the impact of policies and programs on the employment of people with disabilities and innovative approaches to reforming and overcoming some of the existing barriers." See "Employment Post the Americans with Disabilities Act Conference Summary," USCCR/OCRE files, p. 1. The conference followed up on a conference held the previous year on the topic of "Employment and Return to Work for People with Disabilities." Another conference was planned for the following year. Ibid., pp. 1-2.

¹⁹⁸ See Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, presentation at 1997 Post-ADA Conference, p. 6. Mr. Imparato gave as the thesis of his talk that civil rights laws are in conflict with disability policies. He added that the reality of Federal policy in prac-

¹⁹³ Richard V. Burkhauser, "Post ADA: Are People with Disabilities Expected to Work?" *Annals of the American Academy of Physical and Social Sciences*, vol. 549 (January 1997), p. 72 (hereafter cited as Burkhauser, "Are People with Disabilities Expected to Work?").

¹⁹⁴ Olson, *The Excuse Factory*, p. 92.

¹⁹⁵ Suzanne M. Bruyère, Director, ILR Program on Employment and Disability, Cornell University, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 11, 1998, enclosure, p. 2.

The SSI/SSDI programs are based on a dependency, charity model of disability, whereas section 504 and the ADA promote independence and working. A member of the National Council on Disability noted the conflicting assumptions of disability benefits programs and the ADA:

- dependence versus productivity—disability programs are based on the dependence, charity model.
- integration versus segregation—the Americans with Disabilities Act talks about the most integrated setting, but the Rehabilitation Act sets up a segregated system and even segregates by disability types.
- rights versus responsibilities—it is incumbent upon the disability community to take responsibility, to take advantage of the opportunities open to it.¹⁹⁹

The Chairman of the President's Committee on Employment of People with Disabilities explained the conflict between the ADA and disability benefits programs as follows. Because private insurers deny coverage for preexisting conditions, individuals with disabilities are dependent on medicare and medicaid for health insurance. However, to receive medicare and medicaid, individuals with disabilities must label themselves as unemployable. In turn, this makes it hard for them to exercise their rights under the Americans with Disabilities Act.²⁰⁰

Congressman Jim Bunning said that he perceived two main problems with SSI/SSDI programs. First, it takes too long to get on SSDI, sometimes it takes as long as 1½ years, and some people even die before they receive SSDI benefits. Second, the SSDI program is not conducive to getting people back to work. Representative Bunning added that the passage of the Americans with Disabilities Act showed that Congress recognizes that people with disabilities want to work and will work if the barriers that keep them from working are eliminated. However, he said, this recognition

never changed the SSDI program, which remains a "black hole for people with disabilities—less than one percent of SSDI recipients leave the rolls because of work."²⁰¹

Conference participants called for a major overhaul of the Nation's disability policy to reconcile these conflicts and create a Federal disability policy that encourages individuals with disabilities to work, while simultaneously providing them with needed supports, assistance, and assistive technology.²⁰² For instance, the Chairman of the President's Committee stated that, in contrast to the ADA, many government programs are based on "insulting and patronizing" attitudes about people with disabilities. He said that the Americans with Disabilities Act is just a beginning and argued that although the ADA had provided individuals with disabilities with statutory protections, the Nation still must make full participation and equal opportunity a reality for persons with disabilities. To do this, it is necessary to change attitudes and policies that make persons with disabilities dependent.²⁰³

In particular, conference participants advocated separating eligibility for federally supported health care from participation in disability benefits programs to offer working people with disabilities the chance to participate in such programs, possibly by paying a portion of their insurance premiums themselves.²⁰⁴ Congressman Bunning, for example, told conference participants that three main things need to be done: (1) allow persons with disabilities to choose what services they will get and who will provide them; (2) enable as many providers as possible to participate in the return to work program through an innovative payment mechanism; and (3) provide health insurance security.²⁰⁵

tice is that it usually sends the message that people with disabilities cannot and should not work. Ibid.

¹⁹⁹ Bonnie O'Day, member, National Council on Disability, presentation at 1997 Post-ADA Conference, p. 19.

²⁰⁰ Tony Coelho, Chairman of the President's Committee on Employment of People with Disabilities, presentation at 1997 Post-ADA Conference, p. 3 (hereafter cited as Coelho presentation).

²⁰¹ Congressman Jim Bunning (R-KY), presentation at 1997 Post-ADA Conference, p. 28 (hereafter cited as Bunning presentation).

²⁰² 1997 Post-ADA Conference.

²⁰³ Coelho presentation, p. 3.

²⁰⁴ Ibid., p. 4. See also Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998 (stating: "The unavailability of health insurance should not be a disincentive to work and Medicaid should be available at a sliding scale.").

²⁰⁵ Bunning presentation, p. 28.

Conference participants also noted that other barriers that prevent people with disabilities from becoming employed, such as inaccessible transportation and the need for personal assistance supports, need to be addressed for individuals with disabilities to have equal employment opportunity.²⁰⁶

Conference participants pointed to lack of preparation as another major reason why people with disabilities have been unable to take advantage of the new opportunities provided by the ADA. A conference participant representing employers argued that lack of skills is a major barrier to employment for people with disabilities and the Federal Government needs to assist them in becoming more competitive in the labor market.²⁰⁷ The Acting Assistant Secretary for Policy for the U.S. Department of Labor told conference participants that there is some evidence that the United States is beginning to experience a worker shortage, which he believed is really a skills shortage. He said that it is becoming increasingly necessary to take steps to provide skills to traditionally excluded groups and the government should pay the same attention to eliminating the barriers and providing skills to individuals with disabilities as it has for individuals on welfare. He added that changes in technology have, for the first time, made it possible for many people with severe disabilities to work.²⁰⁸ Another speaker noted that one-half of students with disabilities do not graduate from high school and argued that the Federal Government should ensure that they are provided equal educational opportunity and "relevant training for jobs of today and tomorrow."²⁰⁹ In calling for better job training for people with disabilities, A representative of United Cerebral

Palsy Associations said that "[w]ork is where preparation meets opportunity."²¹⁰

Conference participants held out the prospect that reforming the Nation's disability policy not only would benefit people with disabilities, but also would save taxpayers' money, because if people with disabilities were able to work, they would need less public money. The current system costs taxpayers possibly as much as \$300 billion a year and is likely to become even more costly.²¹¹

The National Council on Disability and the National Academy of Social Insurance both have called upon Congress to reform the Nation's disability policy along the lines advocated by the conference participants.²¹² For instance, the Disability Policy Panel of the National Academy of Social Insurance, pointing to the excessive cost and complexity of existing policy, which permits persons leaving the SSDI roles to "buy in" to medicare, has recommended "an improved medicare buy-in that is more affordable and understandable for [SSDI] beneficiaries who return to work despite the continuation of their impairments. The Panel recommends a centrally-administered medicare buy-in with a simplified premium structure scaled to earnings."²¹³ The panel also recommended "a personal assistance tax credit to compensate working people for part of the cost of personal assistance services they need in order to work."²¹⁴ The National Council on Disability has called for a host of changes to existing policy to create "a system that serves as a trampoline, rather than a safety net, supporting people as they maximize their potential, catching them when they fall, and supporting their efforts toward independence again, always moving toward

²⁰⁶ E.g., Coelho presentation, p. 4. See also Ringer letter, attachment, p. 1 (stating: "vocational rehabilitation needs to be demolished and resurrected with new methods and new goals to measure success. Rehabilitation needs some assistance from overall policies related to transportation, affordable accessible housing and personal assistance.").

²⁰⁷ Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, presentation at 1997 Post-ADA Conference, pp. 8-9.

²⁰⁸ Seth Harris, Acting Assistant Secretary for Policy, U.S. Department of Labor, presentation at 1997 Post-ADA Conference, p. 3.

²⁰⁹ Coelho presentation, p. 4.

²¹⁰ Tony Young, Policy Associate, United Cerebral Palsy Associations, presentation at 1997 Post-ADA Conference, p. 7.

²¹¹ Coelho presentation, p. 4.

²¹² See NCD, *Achieving Independence*; National Academy of Social Insurance, *Balancing Security and Opportunity: The Challenge of Disability Income Policy*, Report of the Disability Policy Panel (Washington, DC: National Academy of Social Insurance, 1996) (hereafter cited as National Academy of Social Insurance, *Balancing Security and Opportunity*).

²¹³ National Academy of Social Insurance, *Balancing Security and Opportunity*, pp. 145-46.

²¹⁴ *Ibid.*, p. 147.

the goal of maximal employment.”²¹⁵ According to the National Council on Disability, “key ingredients” of such a system “include access to health insurance, tax credits to ensure that transitioning from benefits to employment does not produce financial disincentives, flexibility to accommodate disabilities that intermittently limit work capacity, and third parties with a vested interest in assisting people with disabilities in maximizing their employment.”²¹⁶

The President and Congress have taken steps towards reforming disability policy to remove work disincentives and promote the purposes of the ADA. On March 13, 1998, “to support the goals articulated in the findings and purpose section of the Americans with Disabilities Act of 1990,” President William J. Clinton issued an executive order establishing a National Task Force on Employment of People with Disabilities “to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population.”²¹⁷ The Secretary of Labor is the Chair of the task force, and the Vice Chair is the Chair of the President’s Committee on Employment of People with Disabilities. The members of the task force include Secretaries of a number of Federal Cabinet-level agencies, the Chairperson of the National Council on Disability, the Chair of the Equal Employment Opportunity Commission, and heads of several other Federal agencies.²¹⁸ The task force is charged with issuing four reports between November 15, 1998, and July 26, 2002, to develop and recommend to the President a Federal policy to reduce employment bar-

riers faced by individuals with disabilities. Among the specific charges the Executive order gives the task force are:

- (1) analyze the existing programs and policies of Task Force member agencies to determine what changes, modifications, and innovations may be necessary to remove barriers to work faced by people with disabilities;
- (2) develop and recommend options to address health insurance coverage as a barrier to employment for people with disabilities;
- (3) subject to the availability of appropriations, analyze State and private disability systems . . . and their effect on Federal programs and employment of people with disabilities.²¹⁹

Congressional action in this area includes introduction in the U.S. House of Representatives of a bipartisan bill sponsored by Reps. Jim Bunning and Barbara Kennelly.²²⁰ If passed, the bill would move in the direction called for by proponents of disability policy reform. Entitled the “Ticket to Work and Self Sufficiency Act of 1998” (H.R. 3433), the bill would extend medicare coverage for people leaving the SSDI rolls and joining the work force for up to an additional 2 years and would provide other supports to persons with disabilities seeking to enter the work force.²²¹ For instance, the bill provides social security beneficiaries with choice of providers of services that assist them in becoming em-

²¹⁵ NCD, *Achieving Independence*, p. 76.

²¹⁶ *Ibid.*

²¹⁷ Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998).

²¹⁸ The full list of members is: the Secretary of Labor; Secretary of Education, Secretary of Veterans Affairs, Secretary of Health and Human Services, Commissioner of Social Security, Secretary of the Treasury, Secretary of Commerce, Secretary of Transportation, Director of the Office of Personnel Management, Administrator of the Small Business Administration, the Chair of the Equal Employment Opportunity Commission, the Chairperson of the National Council on Disability, the Chair of the President’s Committee on Employment of People with Disabilities, and “such other senior executive branch officials as may be determined by the Chair of the Task Force.” Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998) at § 1(a).

²¹⁹ Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (1998) at §§ 1(c)(1)–(3).

²²⁰ H.R. 3433, 105th Cong. (1998).

²²¹ *Id.* § 3, 105th Cong. (1998). See also “Bunning Announces Hearing on the ‘Ticket to Work and Self-Sufficiency Act of 1998,’” Advisory from the Committee on Ways and Means, Subcommittee on Social Security, Mar. 10, 1998 (hereafter cited as “Ticket to Work and Self-Sufficiency Act of 1998”). See also “Bipartisan Bill Seeks to Help Disabled leave SSDI to Return to Work,” *Daily Labor Report* (Mar. 12, 1998), p. A9. The proposed bill has been criticized for merely adding 2 years to the extended medicare coverage rather than adopting a sliding scale “buy-in” program that would allow working people with disabilities to continue in medicare indefinitely, paying their own premiums at prices depending on their earnings. See “Ticket to Work and Self-Sufficiency Act of 1998,” *Hearing on H.R. 3433 Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105th Cong. 3 (Mar. 17, 1998) (statement of the Consortium for Citizens with Disabilities Task Force on Social Security, presented by Tony Young, Public Policy Associate, United Cerebral Palsy Associations, Inc.).

ployed.²²² The bill also would create a demonstration project to test a gradual offset of SSDI benefits by reducing benefits \$1 for every \$2 in earnings above a minimum amount.²²³ Finally, the bill would create an Advisory Panel to be made up of one member each appointed by the Chairman of the House Committee on Ways and Means, the ranking minority member of the Committee on Ways and Means, the Chairman of the Committee on Finance of the Senate, and the ranking minority member of the Senate Committee on Finance, as well as two members appointed by the President. The Advisory Panel

would advise the Commissioner of Social Security on implementing the Ticket to Work program, on disabled beneficiaries' access to employment networks, on research and demonstration project designs, and on the development of performance measurements. The Advisory Panel would submit progress reports to the President and members of Congress.²²⁴ A similar bill, The Work Incentives Improvement Act of 1998, was introduced in the U.S. Senate on March 25, 1998, by Sens. James M. Jeffords, Thomas Harkin, and Edward M. Kennedy.²²⁵

²²² H.R. 3433, § 2, 105th Cong. (1998).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ S. 1858, 105th Cong. (1988).

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Testimony

Before the Subcommittee on Social Security and Family
Policy, Committee on Finance, U.S. Senate

For Release on Delivery
Expected at 2:00 p.m.
Wednesday, July 29, 1998

SOCIAL SECURITY DISABILITY INSURANCE

Factors Affecting Beneficiaries' Return to Work

Statement of Cynthia M. Fagnoni, Director
Income Security Issues
Health, Education, and Human Services Division



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for Disabilities
(11)

**Testimony of Susan Daniels, Deputy Commissioner
for Disability and Income Security Programs,
Social Security Administration,
before the Senate Special Committee on Aging –
May 2, 2000**

Mr. Chairman, Senator Breaux, members of the Committee, thank you for inviting me here today to talk to you about SSA's representative payee program – particularly as it relates to organizational payees. Today, I will outline for you the Social Security Administration's representative payee program as it applies to organizations, the problems we have faced (including resource constraints), recent changes that we have implemented and legislation we have sent to Congress in order to improve our program. Then, of course, I would be happy to respond to your questions.

History of Representative Payments

Congress passed legislation in 1939 which granted SSA broad discretionary authority to appoint representative payees to receive and disburse benefits for those beneficiaries who were found to be incapable of managing or directing the management of their benefits. The appointment of a payee was intended to ensure that SSA's most vulnerable beneficiaries receive the full support and benefit that their payments are intended to deliver. In this same 1939 legislation, Congress extended benefits to wives of retired workers, and widows and dependent children of deceased workers. Accordingly, the representative payee program was initially designed with the needs of the elderly and children in mind.

Subsequent events, including the enactment of disability benefits in 1956, the enactment of Supplemental Security Income (SSI) in 1972, and demographic and political changes in American society -- such as the de-institutionalization of the mentally ill, and the increase in substance abusers -- have all contributed to the change in the nature of the beneficiary population served by representative payees. Today, about 13.3 percent of our 49 million Social Security and SSI beneficiaries have representative payees -- 6.5 million beneficiaries served by about 4.2 million payees. By contrast, 30 years ago, only 5.2 percent of the Social Security

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population were paid through representative payees. Also, about 42 percent of beneficiaries who are paid through a representative payee today are disabled. Hence, the role of a payee today is different from that which Congress envisioned in 1939.

For these same reasons, the Social Security and SSI disability rolls typically include people with special needs, such as the mentally ill, homeless and substance abusers. Many years ago, these same individuals might have been institutionalized, with the institution serving as their payee. Today, these individuals are not institutionalized, and often have no close family willing or able to serve as payee. Consequently, SSA generally must rely on community organizations to serve as payee. When such beneficiaries need help in the management of their financial affairs, institutions and organizations, or sometimes acquaintances, have stepped in to act as payees. Many times these payees assert that, in addition to money management, they must address social service issues, such as finding shelter for the habitually homeless, dealing with medical decisions, and encouraging beneficiaries to seek treatment for substance abuse or mental illness.

Organizational Payees

As I mentioned earlier, about 6.5 million Social Security and SSI beneficiaries require representative payees. Family members serve as representative payees for about 84 percent of these beneficiaries. Payees for the remaining 16 percent are friends, institutions of various types, such as government or social service agencies, financial organizations and fee-for-service organizations. (Fee-for-service organizations meet the qualifications and are authorized to collect a fee from the beneficiary's payment for their services as representative payee.) Currently, about 45,000 organizational representative payees serve approximately 750,000 Social Security and SSI beneficiaries. Among those, there are approximately:

- 855 fee-for-service payees serving almost 60,000 SSA beneficiaries;
- 1,000 entities (excluding fee-for-service organizations), which we call "volume payees," serving 250,000 beneficiaries. (A "volume payee" is an organization that serves 100 or more beneficiaries.); and
- 360 State mental hospitals serving 80,000 beneficiaries.

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In order to qualify to collect a fee, an organization must serve at least 5 beneficiaries and be a:

- State or local government agency whose mission is to carry out income maintenance, social service or health-care related activities;
- State or local government agency with fiduciary responsibilities, or
- community-based, non-profit social service agency which is bonded or licensed in the State that it serves.

Determining the Need for Representative Payment

The law provides that if the Commissioner determines that it is in the interest of the individual, benefits may be paid to a representative payee. Generally, we appoint a payee if we determine that the beneficiary is not able to manage or direct the management of benefit payments in his or her interest. If the beneficiary is under age 18, payment is usually made to a representative payee. In the case of an adult beneficiary, benefits will be paid to a representative payee if the individual is legally incompetent, or mentally or physically incapable of managing or directing the management of his or her benefit payments.

To decide if an individual has a mental or physical impairment that prevents him or her from receiving benefits directly, we look at:

- medical evidence;
- the beneficiary's living situation (such as whether he/she lives alone, if anyone helps him/her manage their funds);
- how the beneficiary is handling money now; and
- what his/her needs are and how they are being met (whether they can obtain their own food, clothing and shelter or if he/she is dependent on others to supply those needs).

Once we determine that an individual needs a payee, SSA identifies persons who are willing and best able to serve in this capacity. Whenever possible, the preferred payee is a family member or friend who has shown interest in the well-being of the

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beneficiary. When such persons cannot be found, SSA turns to certain organizations that have agreed to perform the duties of a representative payee.

SSA closely reviews all applications for representative payment before selecting a payee. Individuals must show their relationship and interest in the beneficiary. Plus, the beneficiary is given the opportunity to protest the selection of a prospective payee. We notify the beneficiary that someone has applied to be their payee and who that person or organization is. We ask the beneficiary to contact our field office if they disagree with either the fact that they need a payee or if they would prefer that someone else serve as their representative payee.

Representative Payee Responsibilities

The representative payee is to use the benefit payments only for the beneficiary's current and foreseeable needs or save and invest them, if the beneficiary's current needs are being met. We believe that the representative payment program best accomplishes this when we have a collaboration with the payee and the beneficiary. To that end, we strive for a payee program that:

- preserves the rights of beneficiaries and treats them with respect and dignity;
- keeps beneficiaries well-informed about their benefits;
- prepares new representative payees with a clear understanding of their role and our expectations of them;
- furnishes continuing support to payees as they execute their duties;
- ensures that benefits are used in the best interest of the beneficiary; and
- monitors the use of benefits in an effective and productive manner.

SSA informs the representative payee of his or her responsibilities at the time he/she files to be representative payee and also mails a more extensive guide to the payee once he/she has been selected. Once selected, all representative payees are required to:

- determine the beneficiary's needs and use his/her payments to meet those needs;
- conserve any money left after meeting those needs;
- report any changes or events which could affect the beneficiary's eligibility for

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benefits;

- help the beneficiary get medical treatment when necessary;
- maintain records of the money received on behalf of the beneficiary and records of all expenditures; and
- complete written reports accounting for the use of the funds.

Annually, SSA requires each representative payee – whether an individual who represents only one beneficiary or an organization that represents hundreds—to give an accounting of the benefits received for each beneficiary and how they were spent. More specifically, the accounting form asks how much of the benefits were spent on food, housing, personal items and how much was saved and in what type of account the money was conserved. (The only exception to this annual accounting process is for State mental institutions which undergo an onsite visit every 3 years.) Each accounting request is controlled to make sure it is completed. All returned forms are reviewed to ensure that responses are complete and acceptable. If incomplete, or if the accounting form raises questions, SSA will contact the payee to resolve the issue. If the representative payee fails to return the accounting form, our local field office conducts a face-to-face interview with the payee, the beneficiary and, if different from the payee, the custodian (e.g., the nursing home if a relative is the payee).

SSA Initiatives to Deter Misuse of Benefits by Organizational Payees

Almost all representative payees provide much needed help to beneficiaries without abusing this responsibility. Unfortunately, there have been some instances of misuse by representative payees. Misuse of benefits occurs when the payee neither uses benefits for the current and foreseeable needs of the beneficiary, nor conserves benefits for the beneficiary. Of the 6.5 million beneficiaries with representative payees, there are only about 650 instances of misuse confirmed per year, or only one-hundredth of one percent of all representative payees cases. The amount of benefits misused by payees is a small percentage of the total benefits paid – about \$3 million per year of the \$30 billion in annual benefits for beneficiaries with payees. However, that is no consolation to a beneficiary who has lost his or her much needed benefits. Nor is it acceptable to those of us charged with administering the Social Security and SSI programs.

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SSA is committed to protecting beneficiaries from benefit misuse. The recently televised representative payee misuse case, the Aurora Foundation, Inc., in Martinsburg, West Virginia, has resulted in the president of that organization pleading guilty to the embezzlement of Social Security and SSI beneficiary funds. As a result of our review of this criminal enterprise, SSA has strengthened our oversight process. To that end, we have several new initiatives underway that will help prevent misuse by organizational payees.

1. Triennial Onsite Reviews of all Fee-for-Service Payees.

SSA has begun a review of the approximately 855 fee-for-service payees on a triennial cycle. **[Note – there is an open issue concerning expanding these reviews to include some or all volume payees.]** SSA's Office of the Inspector General will participate as necessary, in these reviews. This review will ensure payee compliance through a face-to-face meeting with the payee and examination of a sample of beneficiary records. The review includes an assessment of the payee's record keeping, and SSA will interview a sample of beneficiaries in order to assess whether their needs are being met. Expenses may be corroborated with providers of the services. In addition, we will contact vendors to ensure that bills are being paid. We believe that an added benefit of this initiative will be that the lines of communication between SSA and the payee will be improved. Over the last year, approximately 300 of these reviews have already been conducted as part of a pilot process, and a regular ongoing schedule will begin this summer.

2. Annual Verification of Bonding or Licensing.

Currently, in order to collect a fee from a beneficiary's check, the non-governmental fee-for-service organizational payee must be either licensed or bonded. This is a statutory requirement. Beginning June of this year, SSA will require all non-governmental fee-for-service organizations to annually show that they continue to meet those requirements. ✓

3. A 6-Month Review for All Newly Appointed Fee-for-Service Payees.

SSA will visit fee-for-service payees 6 months after their initial appointment as

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payee to ensure that they fully understand their duties and responsibilities, and are on the right track with respect to record keeping and reporting. We will focus on their accounting procedures so that, they will be able to account for beneficiaries' funds as well as comply with our requests for review. This initiative is now in place and applies to all new fee-for-service payees appointed on or after January 1, 2000.

4. Random Reviews of Volume and Fee-for-Service Payees.

Each year SSA will conduct a random sample of 25 percent of volume payees (serving 100 or more beneficiaries) and fee-for-service payees. We will review a sample of beneficiary records for compliance with our policies and procedures. We are developing guidelines and instructions needed to implement this initiative. The instructions provide our reviewers with information that includes: how to conduct the interview, the interviewing forms, how to review the record keeping (bank statements, cancelled checks, bills, contracts, etc.), and how to document our database with the findings from the review. This initiative is scheduled for implementation in Fiscal Year 2001.

In addition, SSA continues to monitor for "trigger events." That is, we conduct reviews of payees in response to certain "trigger" events, such as third-party reports of misuse and complaints from vendors of failure to receive payment. This review has an emphasis on addressing the complaints.

I believe that these measures will help to ensure that organizational representative payees appointed by SSA will carry out their duties and responsibilities in accordance with the policies and procedures that are designed to protect our beneficiaries. This improved organizational payee monitoring process will:

- Provide the oversight necessary to ensure that payees fulfill their duties to our beneficiaries;
- Deter potential misuse by regular site visits coupled with random reviews;
- Provide an opportunity for ongoing education by SSA for these payees about their duties and responsibilities;
- Improve lines of communication between the payee and SSA; and

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- Ensure that the payee continues to be qualified under the law to charge a fee for its services.

Legislation

We recognize that administrative actions alone are not sufficient to address all of the problems we identified as a result of our analysis of the Aurora misuse case. We believe that some of these problems can only be resolved through legislation. Therefore, in February, we sent to Congress a legislative proposal for consideration that would provide additional safeguards for beneficiaries with representative payees.

Currently, when *any* payee has been determined to have misused an individual's benefits, SSA can reissue the benefits only in cases where there has been negligent failure on our part to investigate or monitor the payee. In virtually all other cases, the individual loses his or her funds unless SSA or the beneficiary can obtain restitution of the misused benefits from the payee. Additionally, SSA can seek restitution only through civil processes if the representative payee refuses to return the misused funds.

To facilitate restitution of misused funds to beneficiaries, our legislative proposal would require SSA to reissue benefit payments (including any respective fees) in all cases when an organizational payee is found to have misused a beneficiary's funds, without either a finding of negligence on SSA's part or restitution from the organizational payee. Requiring re-issuance of such misused benefit payments, including any fees that were deducted from the beneficiary's benefit, would provide additional protection to the most vulnerable of beneficiaries -- those who have no family or friends willing or able to be a payee.

This new authority would enable us to promptly restore benefits that have been misused by an organizational representative payee, thereby avoiding the hardship that can be caused by such a loss. SSA would, through all available avenues of legal recourse, continue to seek restitution of the misused funds from the former representative payee. We would do so for two reasons. First, for the deterrent effect and, second, to offset the additional costs incurred by the Social Security trust funds or the general fund in restoring misused benefits to the beneficiary.

In addition to this change, the legislative proposal would include other provisions designed to increase the safeguards for beneficiaries with representative payees. Specifically, it would:

- **Require non-governmental fee-for-service organizational payees to be bonded and licensed, provided that licensing is available under State or local law.** (The requirement under current law is bonding *or* licensing.) This proposed requirement would add further safeguards to a beneficiary's funds. State licensing provides some oversight by the State into the organization's business practices, and bonding provides some assurance that a surety company has investigated the organization and approved it for the level of risk associated with the bond. The proceeds from redeemed bonds would reduce the costs to the program when re-issuing benefits in cases of representative payee misuse.
- **Provide that when an organization has been found to have misused an individual's benefits, the organization shall not qualify for the fee from that individual's benefits for months the payee misused the funds.** Requiring payees to return the fees charged for periods of misuse is reasonable because the payee was clearly not properly performing the service for which the fee was paid. Permitting the organization to retain the fees is tantamount to rewarding the payee for violating his or her responsibility to use the benefits for the individual's current and future needs.
- **Provide that misused benefits (including any respective representative payee fees) would be treated as an overpayment to the payee and, therefore, subject to current SSA overpayment recovery authority.** Although SSA has been given expanded authority in the recovery of overpayments (such as tax refund offset, referral to contract collection agencies, notifying credit bureaus, and administrative offset of future federal benefit/payments), these tools cannot be used to recoup benefits misused by a representative payee. Providing that benefits misused by any representative payee would be an overpayment to the payee would provide SSA with additional means for recouping the misused payments. This proposal would also permit re-issuance of the recovered amounts to the beneficiary (unless already re-issued by SSA). This change would improve the protection of all beneficiaries with payees, not just those

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with organizational payees.

Also, in September 1999, we sent a legislative proposal to Congress that, in addition to other provisions, would extend civil monetary penalty provisions to representative payees that misuse benefits. As it pertains to representative payees, this legislative proposal would allow SSA to impose administrative penalties and assessments against representative payees who make false statements to obtain or retain benefits. This would improve our ability to ensure that individuals who commit this type of fraud against SSA are penalized, even if such individuals are not prosecuted criminally. We urge Congress to give these proposals their prompt attention.

Advisory Committee & Inspector General Recommendations Implemented

To address the evolving needs of the beneficiaries and the payees that assist them, SSA chartered an advisory committee (AdCom) to review the representative payee program. In 1995 and 1996, the committee held hearings and conducted research into key representative payment issues. SSA also requested its Office of the Inspector General (OIG) to review and make recommendations to improve the representative payee program. SSA requested these reviews in order to better meet the needs of the changing demographics of our representative payee population.

Both the AdCom and OIG made several recommendations -- from how to select a representative payee to the kind of monitoring program needed. SSA evaluated the recommendations within the framework of our competing priorities and resource limitations. We have implemented several recommendations including:

- The development and distribution of a handbook for organizational payees.
- Issuing instructions to field offices to screen payees more thoroughly.
- Conducting onsite reviews of fee-for-service and volume payees.
- Developing and distributing a pamphlet for beneficiaries informing them of their rights and responsibilities.

In addition, as resources permit, we plan to:

- Develop an accounting form tailored to organizational payees.

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- Expand our automated Representative Payment System.
- Develop and distribute a handbook for individual payees.

Advisory Committee & Inspector General Recommendations Not Implemented

There were some recommendations that we have not adopted. For example, it was suggested that SSA require a higher performance standard from organizations that collect a fee (fee-for-service payees). We do encourage organizations to provide extra services (e.g., negotiating the beneficiary's rental agreement with the landlord). However, we did not adopt this suggestion because we believe that requiring extra services would discourage the organization from providing the basic payee services that some individuals would not have otherwise. Another example is the recommendation that SSA only accept a challenge of a beneficiary's capability from those in a position to know. While we agree that a finding of incapability is a serious matter, and we are wary of spurious allegations, our policy is to respond to third party reports of beneficiary incapability by conducting an investigation, regardless of the nature of the source. Only then can we be assured that the beneficiary receives the full benefit of their funds.

Conclusion

In conclusion, let me convey our special concern for beneficiaries who need a representative payee because these are the most vulnerable of our beneficiaries. We will not tolerate misuse of benefits by representative payees and continue to strive for ways to strengthen our representative payee program. Recognizing this, we have looked outside of our agency (AdCom) and within (OIG) for improvements. We have implemented some of the recommendations and, as resources permit, we will implement others. We have recently set in motion plans to improve our monitoring and oversight process. Finally, we believe with the help of Congress, we will be able to improve the package of protections for our beneficiaries with payees when funds have been misused.