

NOTE TO: Ceci Rouse, Julie Fernandes, Tom Freedman, Mary Smith
FROM: Cynthia Rice
SUBJ: Two Civil Rights Commission Reports on the ADA

Disabilities

Attached please find the summaries and introductory chapters from two new reports from the U.S. Commission on Civil Rights:

Helping State and Local Governments Comply with the ADA (re: Justice Dept's role)

Helping Employers Comply with the ADA (re: EEOC's role)

which were transmitted to the President and to Congress at the end of September. I have the full copies, which came to us from Staff Secretary, in my office.

Please let me know what you think of these recommendations and how they interact with our other civil rights efforts (to increase funding for EEOC, etc.)

As you may recall the President, in his July 29th memorandum on employment of people with disabilities, directed "the Attorney General, the Chair of the Equal Employment Opportunity Commission, and the Administrator of the Small Business Administration to expand public education regarding the requirements of the ADA to employers, employees, and others whose rights may be affected, with special attention to small businesses and underserved communities, such as racial and language minorities that may not have ready access to information that is already available." I'm checking on the follow up.

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.

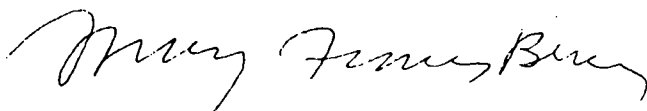
The report contains numerous other findings and recommendations that the Commission believes will enhance EEOC's enforcement of the Americans with Disabilities Act. However, more important than the specific failings of EEOC's Americans with Disabilities Act implementation and enforcement program, the 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, 306-310.

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 Hersher? [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,

dinance, 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).

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-

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).

Helping State and Local Governments Comply with the ADA

An Assessment of How the
United States Department of Justice
Is Enforcing Title II, Subpart A, 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 State and Local Governments Comply with the ADA*, pursuant to Public Law 103-419. The report, along with a companion report, *Helping Employers Comply with the ADA* (dealing with enforcement of title I of the ADA by the Equal Employment Opportunity Commission) 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.

This report focuses specifically on the efforts of the U.S. Department of Justice (DOJ) to enforce title II, subtitle A, of the Americans with Disabilities Act, which prohibits discrimination based on disability by public entities such as State and local governments. The report evaluates DOJ's regulations and policies clarifying the language of the statute; processing of complaints of discrimination based on disability; litigation; and outreach, education, and technical assistance efforts relating to the act. The report also assesses DOJ's effectiveness in its role as coordinator of the Americans with Disabilities Act enforcement efforts of seven other designated Federal agencies.

The Commission finds that DOJ's implementation and enforcement program for the Americans with Disabilities Act is generally adequate, given its limited resources and extensive responsibilities. DOJ deserves positive recognition for several aspects of its Americans with Disabilities Act enforcement to date. Perhaps the greatest strength of DOJ's Americans with Disabilities Act implementation and enforcement efforts is its technical assistance and outreach and education program, which is extremely effective and praised widely by agency stakeholders. Another strength is DOJ's innovative use of alternative dispute resolution or mediation techniques to resolve complaints of discrimination. For many cases, mediation results in an expedited resolution of the case to the satisfaction of both parties, without the unnecessary use of resources for investigation or litigation. However, the Commission has identified several ways in which DOJ could improve its enforcement of title II, subtitle A, of the Americans with Disabilities Act and offers specific findings and recommendations to increase DOJ's effectiveness in carrying out its mission to enforce title II.

A general weakness of DOJ's Americans with Disabilities Act implementation and enforcement program is that it appears unresponsive to the concerns and priorities of its stakeholders, including individuals with disabilities, State and local government agencies, disability professionals, and disability experts. To ensure that all stakeholders have a voice in DOJ's decisionmaking related to the Americans with Disabilities Act, the Commission recommends that the Disability Rights Section, the office responsible for the Americans with Disabilities Act, 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 DOJ stakeholders.

Among important specific failings the Commission identified in DOJ's title II, subtitle A, implementation and enforcement program is that DOJ does not develop and publish indepth policy guidance documents to clarify the meaning of the law and explain the reasoning behind the positions it takes in controversial areas. Instead, DOJ's Americans with Disabilities Act policy development is limited to its enforcement and technical assistance activities, such as investigation of complaints and negotiation of settlement agreements, filing of *amicus curiae* briefs, and development and dissemination of technical assistance materials. The divergent rulings among Federal courts on title II issues reinforces the need for DOJ to develop and publish formal title II policy guidance.

The Department of Justice is required by its regulations to investigate all charges of discrimination it receives under title II. The Commission found that DOJ does not have enough investigators to investigate all charges of discrimination received. Without additional investigators, the length of time it takes for a complaint to be resolved and the possibility that the complaint may never be investigated are increased.

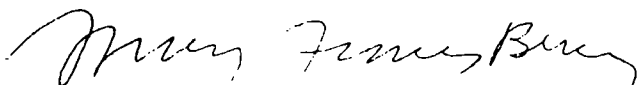
The Commission also found that DOJ has not directed sufficient resources toward establishing legal precedent that is binding on parties in subsequent cases. One significant obstacle has been that title II regulations require DOJ to attempt to negotiate a resolution to every complaint before considering litigation. However, the past has shown a positive result from more litigation efforts by DOJ in many areas affecting larger numbers of people, such as clarifying curb cuts and eliminating improper mental health inquiries in professional licensing procedures.

Finally, the Commission found that DOJ has not fulfilled its responsibility to monitor and coordinate the ADA enforcement activities of the Federal agencies designated to enforce the statute. DOJ has not assigned staff to that function. Interactions between DRS and the designated Federal ADA agencies generally are informal and usually are initiated by the agencies when they believe they need assistance. Given that the designated agencies have not referred cases to DOJ in title II areas where it would be important for the Federal Government to engage in litigation to develop the law, it is evident that stronger leadership and coordination by DOJ is necessary.

The report contains numerous other findings and recommendations to assist DOJ in enhancing its enforcement of title II, subtitle A, of the Americans with Disabilities Act. Although DOJ can implement many of these recommendations within its existing budget, the major failings in the title II, subtitle A, enforcement effort, particularly the lack of investigators to investigate complaints of discrimination, cannot be rectified until DOJ receives additional resources for enforcing the Americans with Disabilities Act. The Commission calls upon Congress to provide the resources needed for DOJ to carry out the full range of its responsibilities under the Americans with Disabilities Act.

The goals of the Americans with Disabilities Act—equality of opportunity, full participation, independent living, and economic self-sufficiency—are truly important. If achieved, they 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 Bush signed the Americans with Disabilities Act (ADA) into law.² With the 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 supporting the rights of individuals with disabilities.

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.³ 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"⁴ 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."⁵

Congress noted that "historically, society has tended to isolate and segregate individuals with disabilities,"⁶ that individuals with disabilities "occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally"⁷ 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.⁸

Furthermore, individuals with disabilities, unlike others experiencing discrimination, often had "no legal recourse to redress such discrimination."⁹

Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"¹⁰ and that ongoing discrimination

¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1994)).

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

³ 42 U.S.C. § 12101(a) (1994).

⁴ *Id.* § 12101(a)(3).

⁵ *Id.* § 12101(a)(5).

⁶ *Id.* § 12101(a)(2).

⁷ *Id.* § 12101(a)(6).

⁸ *Id.* § 12101(a)(7).

⁹ *Id.* § 12101(a)(4).

¹⁰ *Id.* § 12101(a)(8).

against individuals with disabilities prevented the accomplishment of these goals:

[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.¹¹

To eliminate this invidious discrimination, Congress stated that it is the purpose of the ADA:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (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.¹²

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 findings. Title I of the act bans discrimination against persons with disabilities in employment.¹³ Title II prohibits discrimination by State and local governments and requires that they ensure all activities, programs, and public transportation services they provide are accessible to persons with disabilities.¹⁴ Title III provides for nondiscrimination against persons with disabilities in public accommodations and certain public transportation services provided by private entities.¹⁵ Title IV of the act bans dis-

crimination in telecommunications.¹⁶ A fifth title contains miscellaneous provisions clarifying ADA's relationship to other laws and addressing such issues as health insurance.¹⁷

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.¹⁸

The basic nondiscrimination provision of title II, subtitle A, states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.¹⁹

Thus, title II, subtitle A, limits its coverage to "qualified" individuals with disabilities. Subtitle A defines "qualified individual with a disability" as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.²⁰

Subtitle A defines "public entity" as:

— (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of title 45).²¹

¹¹ *Id.* § 12101(a)(9).

¹² *Id.* § 12101(b)(1)-(4).

¹³ Pub. L. No. 101-336, title I, §§ 101-108, 104 Stat. 330, 330-37 (codified at 42 U.S.C. §§ 12111-12117 (1994)).

¹⁴ *Id.*, title II, §§ 201-246, 104 Stat. 337, 337-53 (42 U.S.C. §§ 12131-12165 (1994)).

¹⁵ *Id.*, title III, §§ 301-310, 104 Stat. 353, 353-65 (42 U.S.C. §§ 12181-12189 (1994)).

¹⁶ *Id.*, title IV, §§ 401-402, 104 Stat. 366, 366-69 (47 U.S.C. §§ 225, 611 (1994)).

¹⁷ *Id.*, title V, §§ 501-514, 104 Stat. 369, 369-78 (42 U.S.C. §§ 12201-12213 (1994)).

¹⁸ 42 U.S.C. § 12102(2)(a)-(c) (1994).

¹⁹ *Id.* § 12132.

²⁰ *Id.* § 12131(2).

²¹ *Id.* § 12131(1)(a)-(c).

Title II of the statute seeks to ensure that State and local governments provide equal access to their services to people with disabilities.²² In May 1990, Rep. Don Edwards explained the purpose behind title II in this way:

The ADA extends the protections of section 504 of the Rehabilitation Act, prohibiting discrimination in federally funded programs, to all programs, activities and services of State or local governments, regardless of the receipt of Federal financial assistance. Section 504 served as the first step toward breaking barriers that, for too long, kept persons with disabilities out of the American mainstream. . . . By enacting title II, we cover those remaining government entities who were not covered in the past.²³

As the ADA was being debated in Congress, the main issues on which Congress was divided with respect to title II were the extent to which the new law would encroach on traditionally held State and local prerogatives generally and the requirements for public transportation systems. For example, Senator Pryor of Utah expressed concern with respect to title II that "[t]his legislation basically preempts all State and local laws and regulations regarding access for the disabled."²⁴

Congress has charged various Federal agencies with implementing the ADA. The U.S. Department of Justice (DOJ) is the agency primarily responsible for subtitle A of title II.²⁵ Within DOJ, responsibility for enforcing title II, subtitle A, of the ADA largely falls to the Disability Rights Section of the Civil Rights Division. To obtain compliance with the ADA, DOJ uses implementing regulations, policy guidance, complaint investigations, mediation, settlement, and in some cases, litigation.

In compliance with the congressional requirement to promulgate regulations consistent with the ADA and with the coordination regulations under 28 C.F.R. part 41, the U.S. Depart-

ment of Justice issued its regulation implementing title II, subtitle A, on July 26, 1991.²⁶ This regulation designates eight Federal agencies (including DOJ) to address complaints of discrimination under title II, subchapter A, with DOJ assuming an oversight and coordination role. The regulations state:

The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.²⁷

The designated agencies are: U.S. Department of Agriculture, U.S. Department of Education, U.S. Department of Health and Human Services, U.S. Department of Housing and Urban Development, U.S. Department of Interior, U.S. Department of Justice, U.S. Department of Labor, and U.S. Department of Transportation.²⁸ Under the regulation, each of these agencies is tasked with investigating and resolving complaints.²⁹ In addition, the regulation states that DOJ may assign responsibility for the implementation of compliance procedures not assigned to specific designated agencies to other specific agencies.³⁰ If informal resolution efforts fail, a complaint may be referred to the DOJ for possible litigation.³¹

In the 6 years since the ADA went into effect, much has been said about overzealous enforcement of the ADA by the Equal Employment Opportunity Commission and the Department of Justice. But other observers have told the Commission that they do not believe the two agencies have been sufficiently aggressive in enforcing the law, although they often give the agencies credit for trying. For instance, one individual told Commission staff that the basic perception in the disability community is that there is no enforcement

²² 42 U.S.C. §§ 12131-12161 (1994).

²³ 135 CONG. REC. H2439 (daily ed. May 17, 1990) (statement of Rep. Edwards).

²⁴ 135 CONG. REC. S10741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

²⁵ 42 U.S.C. § 12134(a) (1994), subtitle B, entitled "Actions Applicable To Public Transportation Provided By Public Entities Considered Discriminatory," 42 U.S.C. §§ 12141-12165 (1994), is under the regulatory authority of the U.S. Department of Transportation.

²⁶ Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694 (1991) (codified at 35 C.F.R. pt. 35 (1997)).

²⁷ 28 C.F.R. § 35.190(a) (1997).

²⁸ *Id.* § 35.190(b)(1)-(8) (1997).

²⁹ *Id.* §§ 35.170-178 (1997).

³⁰ *Id.* § 35.190(c) (1997).

³¹ *Id.* § 35.174 (1997).

of the ADA.³² A grantee of the National Institute on Disability and Rehabilitation Research (NIDRR) 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."³³ Another NIDRR grantee wrote, "Basically, no federal agency with [ADA] enforcement responsibility is doing a great job."³⁴

To date, the public debate over the impact and enforcement of the ADA has largely 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. Therefore, under its 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 and the U.S. Department of Justice. In this report, the Commission examines how well the U.S. Department of Justice is fulfilling its mandate to implement and enforce the ADA's nondiscrimination prohibitions in accessibility to State and local government services under title II, subtitle A, of the act.³⁵ A companion report evaluates the title I implementation and enforcement activities of the U.S. Equal Employment Opportunity Commission. The reports evaluate each agency's regulations and policy guidance, participation in litigation, processing of complaints, and provision of technical assistance.³⁶

³² U.S. Commission on Civil Rights, Summary of National Institute on Disability and Rehabilitation Research (NIDRR), ADA Technical Assistance Program Project Directors' Meeting, Arlington, VA, Feb. 24-25, 1998, p. 6. This opinion was expressed by an individual NIDRR grantee and does not reflect NIDRR's views on the effectiveness of ADA enforcement.

³³ NIDRR, ADA Project Directors' responses, p. 2.

³⁴ *Ibid.*, p. 5.

³⁵ The report does not include an evaluation of subtitle B of title II, which deals with discrimination in transportation, and it also does not include any of the other ADA titles.

³⁶ The report does not assess the role of State and local fair employment practices agencies in the enforcement of 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.

Eight years after passage of the Americans with Disabilities Act, many basic issues, such as who the act protects 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 law that have not been resolved through the regulations or by the Federal courts. In addition to these policy issues, concerns have 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 disability community, and the public at large as to rights and responsibilities under the act.

Some of the issues that have arisen specifically with respect to the Department of Justice's title II enforcement are: whether DOJ has developed and published sufficient policy documents on title II; whether DOJ has an adequate formal or informal mechanism for disability advocacy groups to comment on the cases and issues DOJ addresses; whether DOJ has mediated complaints against State and local governments where a pattern or practice of discrimination exists, with the result that the personal situation of one individual with a disability is resolved but the overall discriminatory practice continues; whether DOJ has engaged sufficiently in litigation to develop caselaw and put State and local government agencies on notice that they must comply with title II; whether DOJ coordinates adequately with State and local governments; and whether DOJ reviews State and local government entities' section 504 transition plans in relation to ADA compliance. Broader issues also exist, including whether the act has been successful in opening up opportunities for persons with disabilities and what has been the cost of compliance.

In preparing this report, Commission staff did a literature review and sought information from the disability community, disability experts, and representatives of employers and State and local governments. Staff also analyzed and assessed numerous documents obtained from the Department of Justice, interviewed Department of Justice staff and officials, and analyzed complaint data from the agencies.

2 Overview of Enforcement of Title II

Since 1973, State and local government programs and activities that receive Federal financial assistance have been prohibited from discriminating against individuals based on disability under section 504 of the Rehabilitation Act of 1973.¹ Title II, subtitle A, of the Americans with Disabilities Act (ADA)² and its implementing regulations³ extend section 504's nondiscrimination mandate to all actions of State and local government entities, regardless of whether they receive Federal funding.⁴ Thus, State and local government operations which do not receive Federal funds, such as courts, legislative bodies, and licensing activi-

ties, must meet the section 504 standards incorporated into title II.⁵

The U.S. Department of Justice (DOJ) is the main Federal agency responsible for investigating and enforcing ADA title II compliance by State and local governments.⁶ Within DOJ, authority for ADA enforcement and administration is delegated to the Civil Rights Division (CRD). CRD is charged with monitoring and revising regulations, investigating and resolving complaints of discrimination, enforcing compliance with the statute by State and local governments, and coordinating the title II enforcement efforts of seven other Federal agencies.⁷ Within

¹ Pub. L. No. 93-112 § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1994)). Each Federal agency has its own set of regulations that apply section 504 to its programs. Typical 504 requirements include reasonable accommodations for employees with disabilities, program and building accessibility, and effective communication with people who have sensory disabilities. U.S. Department of Justice (DOJ), Civil Rights Division (CRD), *A Guide to Disability Rights Laws* (May 1997), p. 13 (hereafter cited as DOJ/CRD, *A Guide to Disability Rights Laws*).

² 42 U.S.C. §§ 12131-12134 (1994). Throughout this chapter, unless otherwise specified, the term "title II" is used as an abbreviation to refer to title II, subtitle A, of the ADA. While DOJ is responsible for title II, subtitle A, of the ADA, the U.S. Department of Transportation (DOT) handles enforcement provisions of title II, subtitle B, which prohibits discrimination in public transportation. See 42 U.S.C. §§ 12,141-12165 (1994). DOT is charged with developing ADA regulations that specify requirements for transportation vehicles and facilities. See 42 U.S.C. §§ 12164-12165 (1994); DOJ, CRD, *Title II Highlights*, (undated), p. 1 (hereafter cited as *Title II Highlights*).

³ 28 C.F.R. §§ 35.101-190 (1997).

⁴ See 28 C.F.R. § 35.102 (1997); 28 C.F.R. pt. 35, app. A § 35.102.

⁵ DOJ, CRD, Disability Rights Section (DRS), *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993), p. 1 (hereafter cited as DOJ/CRD, *Title II Technical Assistance Manual*); Arlene B. Mayerson, *Americans with Disabilities Act Annotated: Legislative History, Regulations and Commentary*, 2 vols. (Deerfield, IL: Clark Boardman Callaghan, 1997), vol. 2, § 202, at 20-21.

⁶ DOJ coordinates the compliance activities of Federal agencies with respect to State and local government components and provides policy guidance and interpretations to these agencies to ensure the consistent and effective implementation of title II. 28 C.F.R. § 35.190(a) (1997). DOJ also enforces title II in more functional areas than the other seven federal agencies responsible for title II compliance by State and local governments. See *id.* § 35.190(b)(1)-(8).

⁷ U.S. Commission on Civil Rights (USCCR), *Funding Federal Civil Rights Enforcement* (1995), pp. 33-35 (hereafter cited as USCCR, *Funding Federal Civil Rights Enforcement*); John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), USCCR, Feb. 6, 1998, attachment, "Subject: CRD Performance Plan as Mandated by GPRA—Response to Request for Documents No. 10" (hereafter cited as CRD Performance Plan as Mandated by GPRA); and John Wodatch et al., Chief, Disability Rights

the Civil Rights Division, the Disability Rights Section (DRS) handles these title II implementation, enforcement, regulatory, coordination, and technical assistance responsibilities to address and prevent discrimination based on disability.⁸

Civil Rights Division

Mission and Responsibilities

Established in 1957, the Civil Rights Division of the Department of Justice is responsible for enforcing civil and criminal statutes, the Constitution, and Executive orders.⁹ Although CRD initially focused on voting and post-Civil War criminal statutes, the Civil Rights Act of 1964¹⁰ expanded its authority.¹¹ Under that act, CRD receives, investigates, and litigates charges of discrimination in places of public accommodation, elementary through postsecondary schools, public facilities owned by State or local governments, programs or activities receiving Federal financial assistance, and employment.¹² In 1980, Executive Order 12250¹³ expanded the authority of CRD. The order empowered CRD to: assist other Federal agencies in developing standards and procedures for civil rights enforcement; initiate cooperative programs among agencies, including the development of sample memoranda of understanding to improve the coordination of laws covered by the order; evaluate civil rights laws and regulations to improve their enforcement; and

develop guidelines for comprehensive employee training in civil rights enforcement.¹⁴ During the 1980s, the Civil Rights Division's Coordination and Review Section was authorized by Executive Order 12250 of 1980¹⁵ to coordinate the civil rights enforcement activities of other Federal agencies under title VI of the Civil Rights Act of 1964¹⁶ and title IX of the Education Amendments of 1972.¹⁷ The Coordination and Review Section (a) assisted the other agencies in developing guidelines and regulations for civil rights enforcement; (b) established procedures to govern agencies' recordkeeping, reporting, and exchange of information; (c) fostered cooperation among Federal, State, and local agencies; (d) evaluated

Section, Civil Rights Division, U.S. Department of Justice, interview, statement of Wodatch, Washington, D.C., Sept. 3, 1997, pp. 2-3 (hereafter cited as DOJ September 1997 interview).

⁸ CRD Performance Plan as Mandated by GPRA; John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment, "Subject: Mission and Functions Statements—Response to Request for Documents No. 5," p. 5; DOJ September 1997 interview, statement of Wodatch, pp. 2-3; and DOJ, CRD, *Enforcing the ADA: A Status Report from the Department of Justice (January-March 1995)*, p. 3 (hereafter cited as DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*).

⁹ USCCR, *Funding Federal Civil Rights Enforcement*, p. 23.

¹⁰ 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1994).

¹¹ USCCR, *Funding Federal Civil Rights Enforcement*, p. 23.

¹² *Ibid.*

¹³ Exec. Order No. 12250, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note (1994). Exec. Order No. 12250 is explained below.

¹⁴ Exec. Order No. 12250, §§ 1-202 to 1-207, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note (1988); USCCR, *Funding Federal Civil Rights Enforcement*, p. 26.

¹⁵ Exec. Order No. 12250, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note (1994). Executive Order 12250 authorizes the Attorney General to review all "rules, regulations, and orders" of Federal agencies that implement and enforce title VI of the Civil Rights Act of 1964 and "identify those which are inadequate, unclear, or unnecessarily inconsistent." *Id.* § 1-202. In addition to title VI, this order applies to title IX of the Education Amendments Act of 1972, section 504 of the Rehabilitation Act of 1973, and "any other provision of Federal statutory law which provides. . . that no person in the United States shall. . . be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 1-201(a)-(d).

Within DOJ, the Coordination and Review Section (CORS) is responsible for monitoring the title VI implementation and enforcement responsibilities, policies, and practices of Federal agencies that have financial assistance programs. This oversight responsibility requires that CORS issue guidelines on securing voluntary compliance, initiating sanctions, and referring cases of noncompliance to DOJ. The CORS' coordinators provide technical assistance to agencies to ensure uniform enforcement of title VI. See USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (1996), pp. 48-49 (hereafter cited as *Title VI Enforcement*). In 1995, when the Civil Rights Division reorganized, enforcement responsibilities for section 504 were transferred from CORS to the Disability Rights Section. See Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, Memorandum for Janet Reno re Proposed Reorganization of the Civil Rights Division, July 7, 1994, attachment, "Reprogramming Action FY 1994," p. 2; DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*, p. 5 and USCCR, *Funding Federal Civil Rights Enforcement*, p. 26.

¹⁶ 42 U.S.C. §§ 2000d to 2000d-4a (1994); USCCR, *Funding Federal Civil Rights Enforcement*, p. 26.

¹⁷ 20 U.S.C. §§ 1681-1688 (1994); USCCR, *Funding Federal Civil Rights Enforcement*, p. 26.

the civil rights laws to improve their enforcement; and (e) trained employees to enforce civil rights statutes more efficiently and effectively.¹⁸

In the early 1990s, with enactment of the ADA,¹⁹ CRD's civil rights enforcement responsibilities again increased to encompass the ADA.²⁰ Initially, CRD's Coordination and Review Section carried out ADA legislative, regulatory, and technical assistance activities.²¹ Reorganizations within CRD have since transferred those responsibilities from the Coordination and Review Section to the Disability Rights Section. In addition, some ADA litigation activities are carried out by the Special Litigation Section.

CRD enforces title II and III²² compliance by 80,000 State and local government entities and 6 million private enterprises, respectively, that are covered by these two titles.²³ The four offices

within CRD that receive, process, investigate, and resolve alleged violations of title II of the ADA are the Disability Rights, the Special Litigation, Voting, and Housing and Civil Enforcement Sections.²⁴ In addition, the Disability Rights Section has authority to enforce titles II and III and can initiate litigation (a) under title II after conducting its own administrative investigations and issuing a letter of findings upon referral from designated Federal agencies that conduct title II investigations;²⁵ and (b) under title III, upon its own investigation and if there is reasonable cause to believe that "any person or group of persons" is engaged in a "pattern or practice" of discrimination or when it finds any person or group of persons has been discriminated against and the alleged discrimination raises an issue of general public importance.²⁶ DOJ also may intervene or participate as *amicus curiae* in litigation initiated by other parties.²⁷

Organization, Budget, and Staff

The Civil Rights Division is headed by the Assistant Attorney General for Civil Rights.²⁸

¹⁸ Exec. Order No. 12250, §§ 1-202 to 1-207, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note (1994); USCCR, *Funding Federal Civil Rights Enforcement*, p. 26.

¹⁹ 42 U.S.C. §§ 12101-12213 (Supp. 1994).

²⁰ USCCR, *Funding Federal Civil Rights Enforcement*, pp. 33-35. Title III of the ADA is codified at 42 U.S.C. §§ 12181-12189 (1994). Title III prohibits discrimination based on disability in public accommodations, commercial facilities, and other programs in private organizations, such as those that offer examinations and courses related to educational and occupational certification. *Ibid*; see also DOJ/CRD, "Title III Highlights"; USCCR, *Funding Federal Civil Rights Enforcement*, p. 25. The Equal Employment Opportunity Commission (EEOC) has significant enforcement responsibilities for title I of the ADA. See EEOC, "Policy Guidance: Provisions of the ADA." Although the Civil Rights Division has investigative and enforcement responsibilities for title III of the ADA, this chapter focuses on title II, subtitle A, of the statute.

²¹ USCCR, *Title VI Enforcement*, p. 62.

²² Title III is not evaluated in this report. Toby Olson, Director, Region X of Northwest Disability Business Technical Assistance Center, states, "the evaluation of the ADA should be expanded to include implementation and enforcement of title III. Title III presents the most significant gap in resources for ADA enforcement. The Department of Justice is currently able to open investigations on only about forty percent of the title III complaints filed. In contrast, ninety percent of complaints filed under title II result in opened investigations. The shortage of attorneys knowledgeable in the provisions of this title along with the limitations on the remedies available through private law suits make it extremely difficult to find attorneys willing to take on even the most meritorious Title III suits."

²³ USCCR, *Funding Federal Civil Rights Enforcement*, p. 25; John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment, "Subject: CRD Performance Plan as Mandated by GPRA—Response to Request for Documents No.

10" (hereafter cited as CRD Performance Plan as Mandated by GPRA). Because of the growing backlog of title II cases under the ADA, DOJ has implemented several initiatives to assist CRD with its ADA investigative and enforcement endeavors. See DOJ September 1997 interview, p. 3. For instance, some ADA duties are performed by all 94 of the DOJ's U.S. attorneys' offices. *Ibid*. CRD delegates cases to the U.S. attorneys where policy is clear. See DOJ November 1997 interview, statement of Wodatch, p. 4. In particular, once CRD determined the ADA requirements for telephone emergency services, the U.S. attorneys became responsible for handling cases related to this matter. See DOJ September 1997 interview, pp. 3-4. In addition, most States are managing title III cases, although some have worked on title II cases regarding access to city halls. See DOJ November interview, p. 4. Similarly, DOJ is partnering with 26 States to issue and enforce policies concerning service animals. See DOJ September 1997 interview, p. 4.

²⁴ USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

²⁵ 28 C.F.R. §§ 35.174, 35.190(b)(6), 36.503 (1997); CRD Performance Plan as Mandated by GPRA; USCCR, *Funding Federal Civil Rights Enforcement*, pp. 25 and 34.

²⁶ 42 U.S.C. §§ 12188(b)(1) (1994); CRD Performance Plan as Mandated by GPRA; USCCR, *Funding Federal Civil Rights Enforcement*, pp. 25, 34.

²⁷ See John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the U.S. Department of Justice, p. 1 (hereafter cited as DOJ Comments, July 17, 1998).

²⁸ DOJ, CRD, Organization Chart (May 17, 1995). Any reference in this chapter to an "Assistant Attorney General" re-

CRD is comprised of an Office of Redress Administration; an Administrative Management Section; Complaint Adjudication Office; and 10 "subject matter" sections. Each is responsible for enforcing a range of civil and criminal statutes.²⁹ These 10 sections are:

- Appellate Section
- Coordination and Review Section
- Criminal Section
- Disability Rights Section
- Educational Opportunities Section
- Employment Litigation Section
- Housing and Civil Enforcement Section
- Special Litigation Section
- Voting Section
- Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Nine of the sections are headed by Section Chiefs who report to the Assistant Attorney General for Civil Rights. The Office of the Special Counsel is headed by the Special Counsel for Immigration-Related Unfair Employment Practices.

To fund its additional compliance and enforcement responsibilities under the ADA, CRD received increased annual appropriations throughout most of the 1990s.³⁰ Resources appropriated by Congress rose by 90 percent between fiscal years 1989 (\$27.8 million) and 1993 (\$52.7 million).³¹ During this 4-year period, Congress approved a CRD staff increase from 394 full-time equivalent positions (FTEs) to almost 500 FTEs.³²

Between 1994 and 1996, CRD's appropriations continued to increase; and in fiscal year

fers to DOJ's Assistant Attorney General for Civil Rights. DOJ was established in 1870. In addition to CRD, major organizations within the Department include the Drug Enforcement Administration, Federal Bureau of Prisons, Federal Bureau of Investigation, Immigration and Naturalization Service, Community-Oriented Policing Service, Office of the Inspector General, Office of Justice Programs, and the U.S. Marshals Service. See DOJ, *Strategic Plan: 1997-2002* (September 1997), pp. 5-6.

²⁹ DOJ, CRD, Organization Chart (May 17, 1995).

³⁰ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment, "Response to Question 1: U.S. Department of Justice, Civil Rights Division, Appropriations and FTE (1989-1998)" (hereafter cited as Appropriations and FTE (1989-1998)).

³¹ Appropriations and FTE (1989-1998).

³² Ibid.

1997, Congress appropriated \$62.4 million to fund CRD's activities and programs.³³ Despite these additional financial resources, CRD has not received additional personnel since fiscal year 1996, and the FTE level remains at 579.³⁴

The two sections of the CRD that have enforcement responsibilities under the ADA are the Disability Rights Section and the Special Litigation Section (SLS). The Disability Rights Section (DRS) is responsible for most of DOJ's enforcement activities under the ADA and is the focus of this report. SLS handles some ADA issues and is discussed briefly.

Generally, SLS is charged with protecting the civil rights of persons in publicly operated institutions (such as juvenile and adult correctional facilities, nursing homes, and facilities for persons with mental illness and cognitive disabilities) when there have been systematic violations of such rights.³⁵ SLS enforces civil rights protections embodied in Federal statutes such as title II of the ADA, the Civil Rights of Institutionalized Persons Act (CRIPA),³⁶ and section 210401 of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA).³⁷ These civil rights

³³ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment, "Response to Question 1: U.S. Department of Justice, Civil Rights Division, Appropriations and FTE (1989-1998)" and attachment, "Response to Document Request Number 10, Civil Rights Division, Salaries and Expenses: Crosswalk of 1997 Changes."

³⁴ Appropriations and FTE (1989-1998).

³⁵ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Preliminary Information Request for the Special Litigation Section: Response to Request for Documents No. 3," p. 2 (hereafter cited as Special Litigation Section); USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

³⁶ 42 U.S.C. §§ 1997-1997j (1994). CRIPA authorizes the Attorney General to institute civil actions to remedy violations of the Constitution or laws of the United States at certain State and local residences for the developmentally disabled, juvenile facilities, nursing homes, and prisons and jails. 42 U.S.C. § 1997(a) (1994).

³⁷ 42 U.S.C. § 14141 (1994) (authorizing civil action by Attorney General to eliminate a "pattern or practice" of conduct by governmental employees that deprives persons of rights, privileges, or immunities protected by the Constitution or Federal law). The SLS uses the VCCLEA as an adjunct to CRIPA cases in juvenile detention facilities where there is a "pattern or practice" of abuse by detention officers. See Special Litigation Section, p. 1; USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

protections include quality of care; adequacy of food, clothing, and shelter; medical care; supervision; safety; and training programs.³⁸ In addition, through enforcement of title III of the Civil Rights Act of 1964,³⁹ SLS prohibits discrimination in public facilities on the basis of race, religion, national origin, and disability.⁴⁰

With respect to the ADA, SLS is responsible for processing, investigating, and resolving complaints of alleged violations of title II, such as pattern or practice complaints regarding activities in publicly operated mental health, mental retardation, and juvenile facilities; nursing homes; and other residential institutions.⁴¹ SLS staff promote the principle that community placement is essential for institutionalized persons whose assessed needs can be met in less restrictive settings.⁴²

Disability Rights Section Creation

The Coordination and Review Section of CRD initially handled implementation and enforcement duties under the ADA.⁴³ In 1992, DOJ divided ADA responsibilities among three sections: Coordination and Review, Employment Litigation, and a newly established Public Access Section.⁴⁴ The Coordination and Review Section retained responsibility for administrative enforcement of title II of the ADA, the Employment Litigation Section handled employment cases falling under title I of the ADA, and the Public Access Section developed technical assistance for

titles II and III (and enforced title III) of the ADA.⁴⁵ After less than 2 years, however, DOJ acknowledged two problems with this arrangement. First, since complaints often raised issues under more than one title of the ADA, the sections were duplicating enforcement efforts.⁴⁶ Second, the high volume of title II complaints received by the Coordination and Review Section detracted from the its ability to enforce other civil rights laws.⁴⁷ Further, DOJ officials recognized that disability-related cases could be handled more efficiently and uniformly by creating one office staffed by personnel with expertise in disability issues and laws. Such an office also could serve as a central point of contact for persons seeking information about or claiming violations of the ADA.⁴⁸

In March 1995, CRD changed the name of the Public Access Section to the Disability Rights Section (DRS) and transferred personnel from the Employment Litigation and Coordination and Review Sections to DRS.⁴⁹ CRD assigned all disability-related coordination and enforcement responsibilities to the newly established Disability Rights Section. These responsibilities included all ADA regulatory, enforcement, technical assistance, and certification activities, as well as similar activities required by section 504 of the Rehabilitation Act.⁵⁰

³⁸ USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

³⁹ 42 U.S.C. §§ 2000b to 2000b-3 (1994).

⁴⁰ 42 U.S.C. § 2000b (1994); Special Litigation Section, p. 1.

⁴¹ USCCR, *Federal Funding of Civil Rights Enforcement*, p. 25; CRD Performance Plan as Mandated by GPRA. Before "late fiscal year 1996" the SLS investigated individual title II complaints in jails and prisons. This responsibility was transferred to the Disability Rights Section in "late" fiscal year 1996.

⁴² USCCR, *Funding Federal Civil Rights Enforcement*, p. 25; CRD Performance Plan as Mandated by GPRA.

⁴³ USCCR, *Funding Federal Civil Rights Enforcement*, p. 33.

⁴⁴ Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, DOJ, Memorandum for Attorney General Janet Reno re Proposed Reorganization of the Civil Rights Division, July 7, 1994, attachment, "Reprogramming Action FY 1994," p. 2 (hereafter cited as Roseborough memorandum).

⁴⁵ Ibid. See also John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 3, 1998, DRS Response to Commission's Information Request, pp. 2-3 (hereafter cited as DRS June 3, 1998, Response).

⁴⁶ Roseborough memorandum, p. 2.

⁴⁷ Ibid., p. 3; USCCR, *Funding Federal Civil Rights Enforcement*, p. 33. In fiscal year 1992, the Coordination and Review Section received 575 ADA complaints and began investigating 301 of them. In fiscal year 1994, the number of complaints was 1,414; and CORS began investigating 692. DOJ, CRD, *Salaries and Expenses FY 1993*, p. 19; DOJ, CRD, *Salaries and Expenses FY 1994*, p. 19; DOJ, CRD, *Salaries and Expenses FY 1996*, p. 18; USCCR, *Funding Federal Civil Rights Enforcement*, p. 33.

⁴⁸ Roseborough memorandum, p. 2.

⁴⁹ DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*, p. 3.

⁵⁰ DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*, p. 3.

Mission and Responsibilities

The Disability Rights Section aims to "provide equal opportunity for people with disabilities in the United States by vigorously and effectively implementing the Americans with Disabilities Act (ADA)."⁵¹ To accomplish this goal, DRS focuses its efforts on enforcement, certification, regulatory, coordination, technical assistance, and mediation activities.⁵²

According to DRS staff, almost 100 percent of staff time and financial resources are used to enforce titles I, II and III of the ADA.⁵³ For example, DRS is the only Federal agency authorized to litigate against State and local government employers under title I. DRS enforces titles II and III by investigating complaints and doing compliance reviews. DRS staff may also litigate cases based on title II complaints when DRS has investigated and issued a letter of findings, cases referred to DRS by other Federal agencies, or cases already being litigated by private parties. Because litigation requires significant resources, however, DRS generally will litigate only when other attempts to resolve complaints, such as mediation and formal settlement agreements, have failed.⁵⁴ DRS staff estimate that approximately 40 percent of staff time and resources are used for title II technical assistance and enforcement, and approximately 60 percent of staff time and resources are used for title I enforce-

ment and title III technical assistance and enforcement.⁵⁵

DRS performs other functions related to titles I, II, and III of the ADA. For example, DRS is responsible for developing regulations to implement titles II and III.⁵⁶ In addition, because DOJ is a member of the U.S. Architectural and Transportation Barriers Compliance Board (Access Board), DRS staff participates in the development of ADA guidelines on building and facilities accessibility.⁵⁷

DRS also handles requests from State and local government entities to certify that their architectural codes comply with ADA requirements. To help State and local jurisdictions achieve certification, DRS provides technical assistance and does detailed evaluations of developing codes. Similarly, for the private sector, DRS will review model architectural codes to determine compliance with ADA accessibility requirements.⁵⁸

DRS staff and grantees provide free, extensive technical assistance to the public on the ADA. This technical assistance is offered in several formats. DRS receives more than 163,000 calls a year to its toll-free ADA information phone line, however, most technical assistance is provided in ADA publications, including a series of technical assistance manuals and questions and answers documents. Many of these publications are available on DRS' Web site or by fax on demand, and are also distributed to 15,000 public libraries. Some technical assistance is provided in the form of video.⁵⁹

The ADA is the first of a new generation of civil rights laws in which Congress assigned Federal agencies not only the duty to enforce, but also to inform all parties (persons with dis-

⁵¹ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Subject: Mission, Function, Responsibilities, Planning, Organization, Staffing, and Budget, DRS Response to Request for Documents No. 1," p. 1 (hereafter cited as Mission, Function, Staffing, and Budget).

⁵² *Ibid.*

⁵³ DRS June 3, 1998, Response, p. 2. Approximately 4 percent of staff time is devoted to coordination and certification activities, some of which fall under section 504 of the Rehabilitation Act. *Ibid.*

⁵⁴ Under section 513 of the ADA, 42 U.S.C. § 12212, the ADA regulations "encourage" the "use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, . . . and arbitration. . . to resolve disputes arising under the Act." 28 C.F.R. § 35.176 (1997). If a public entity refuses to negotiate toward voluntary compliance, or if negotiations are unsuccessful, a designated agency "shall refer the matter to the Attorney General with a recommendation for appropriate action." 28 C.F.R. § 35.174 (1997). See also Mission, Function, Staffing and Budget, p. 1-2.

⁵⁵ DRS June 3, 1998, Response, p. 2.

⁵⁶ See 42 U.S.C. § 12134 (1994). See also Mission, Function, Staffing and Budget, p. 2.

⁵⁷ See 29 U.S.C. § 792 (1994). See also Mission, Function, Staffing and Budget, p. 2; DOJ September interview, p. 2. DRS' participation in the development of ADA Standards for Accessible Design requires that the section staff use innovative methods to solicit comments from corporations, governments, architects, and the disability community.

⁵⁸ See 42 U.S.C. § 12188 (1994). See also Mission, Function, Staffing and Budget, p. 2.

⁵⁹ Mission, Function, Staffing and Budget, p. 3. See chap. 7 for an indepth discussion of DOJ technical assistance activities.

abilities and covered entities) of their responsibilities and rights under the law.⁶⁰ DRS is now tailoring technical assistance to specific issues of limited scope, such as its "ADA Guide for Small Businesses" document; initially, the Section created materials that were more comprehensive and technical, like legal treatises.⁶¹ This change has been made in response to feedback DRS has received from those persons who have requested or used technical assistance materials.

Since June 1996, DRS also has had responsibilities under sections 212 and 213 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SREFA).⁶² SREFA requires all agencies that regulate small businesses to publish Small Business Compliance Guides and provide "informal small entity guidance" on request.⁶³

Finally, DRS is responsible for adjusting to new issues as its staff sees them developing. This is a particular strength of DRS.⁶⁴ Examples of such issues under title III include: (1) NCAA cases involving the scholarship eligibility of students with learning disabilities; (2) the trend in movie theater design to stadium-style seating, which presents particular problems for persons who use wheelchairs; and (3) the use of interpreters in hospitals, although most title II issues arise in contexts such as courts and prisons; in fact, over half of the title II complaints DRS receives come from prisoners.⁶⁵ Approximately one-quarter of the complaints DRS receives are about hotels (under title III). In the emerging area of insurance, DRS concentrates its resources on cases involving automobile or home insurance matters rather than health or life insurance to minimize the impact of complex fact-finding that would arise from dealing with actuarial issues. Most of these cases fall under title

III, including a brief filed by DRS in a case challenging a cap in medical benefits that was significantly lower for persons with AIDS.⁶⁶

Organization, Budget, and Staff

The Disability Rights Section is led by a Section Chief who is responsible for the overall administration of the Section and who reports to the Assistant Attorney General for Civil Rights through a Deputy Assistant Attorney General.⁶⁷ DRS has three Deputy Chiefs who report directly to the Section Chief.⁶⁸ Each Deputy Chief leads a team of six to seven attorneys, an architect, a paralegal, and a secretary. Each team is assigned to cover ADA cases arising within a specific group of States.⁶⁹ Deputy Chiefs supervise all stages and aspects of litigation, review technical assistance documents, and assist the Section Chief in management and substantive ADA policy matters.⁷⁰

Several positions in DRS report directly to the Section Chief. These include a Special Legal Counsel, a Special Litigation Counsel, a Technical Assistance Program Manager, and a Supervisory Attorney for Certification and Coordination. Supervisory Attorneys for Investigations and Office Administration also report to the Section Chief, but through a Deputy Chief.⁷¹ These management positions, along with the Deputy Chiefs, form a Management Team that assists the Section Chief with various responsibilities, such as deciding administrative or policy issues. With the exception of the Supervisory Attorney for Office Administration, all of these management officials also provide disability rights training and technical assistance to other Federal agencies, disability rights organizations,

⁶⁰ John L. Wodatch, Chief, DRS, U.S. Department of Justice, Interview, April 16, 1998, p. 3 (hereafter cited as Wodatch interview).

⁶¹ *Ibid.*, p. 3.

⁶² Pub. L. No. 104-121, §§ 212, 213, 110 Stat. 857, 858-59 (1996) (codified at 5 U.S.C. § 601 note (Supp. II 1997)). This act requires agencies that regulate small businesses to establish a program that advises businesses on complying with statutes and regulations. *Id.* § 212; CRD Performance Plan as Mandated by GPRA.

⁶³ CRD Performance Plan as Mandated by GPRA.

⁶⁴ Wodatch interview, p. 3.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ DOJ, DRS, Organizational Chart (Aug. 21, 1997); John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Subject: Mission, Function, Responsibilities, Planning, Organization, Staffing, and Budget—Response to Request for Documents No. 2," p. 1 (hereafter cited as Organization, Staffing, and Budget).

⁶⁸ DOJ, DRS, Organizational Chart (Aug. 21, 1997); Organization, Staffing, and Budget, p. 1.

⁶⁹ Organization, Staffing, and Budget, p. 1.

⁷⁰ *Ibid.*, p. 2.

⁷¹ *Ibid.*, pp. 2-6.

and groups subject to Section 504 and/or ADA requirements.⁷²

The Special Legal Counsel primarily is responsible for reviewing all ADA briefs, policy letters, technical assistance materials, and ADA policy documents from other Federal agencies to verify they are based on sound legal principles. The Special Legal Counsel also participates in the development of ADA investigations and litigation.⁷³ The Special Litigation Counsel is responsible for litigating those cases involving significant legal issues that are likely to establish important precedent.⁷⁴ The Technical Assistance Manager leads a multidisciplinary team of 20, including an architect/accessibility specialist, equal opportunity specialists, program analysts, student interns, and a secretary. In addition, the Technical Assistance Manager supervises operation of the toll-free ADA information line and maintenance of the DRS Web site, and coordinates technical assistance publications efforts.⁷⁵

The Supervisory Attorney for Certification and Coordination also supervises a multidisciplinary team of attorneys, architects/accessibility specialists, civil rights program specialists, and a secretary. In addition to managing DOJ's coordination and certification activities, this Supervisory Attorney is CRD's liaison to the Architectural and Transportation Barriers Compliance Board.⁷⁶

The Supervisory Attorney for Investigations oversees all stages of complaints processing, including intake, investigation, mediation, and negotiation. When mediation does not resolve a case, the Supervisory Attorney for Investigations decides how such cases should proceed. This Supervisory Attorney also decides which title II cases DOJ should investigate and which it should refer to other agencies, and makes recommendations to the Deputy Chiefs as to which title I and title III cases to "open."⁷⁷

The Supervisory Attorney for Office Administration supervises those employees involved in

the administrative activities of DRS, including a staff assistant, two interpreters, front desk personnel, mail processing and data processing personnel, student interns, and secretarial staff. This Supervisory Attorney oversees procurement and budget issues, mail processing, office space allocation, and development of administrative policies and procedures.⁷⁸

DRS has 23 staff attorneys, 19 of whom work in the Enforcement/Litigation Unit, and 15 investigators.⁷⁹ Investigators are expected to have strong investigative skills and a thorough understanding of the ADA.⁸⁰ DRS also has six architects who advise attorneys and investigators on technical matters and review State accessibility or building codes that have been submitted to DOJ for certification.⁸¹ Other DRS personnel include 14 technical assistance staff, 7 certification and coordination staff, and several support staff.⁸² In total, DRS is composed of more than 70 professional and support staff persons,⁸³ up from 22 in 1992 when the section was called the Public Access Section and had fewer responsibilities.⁸⁴ DRS anticipates a staff of 73 for fiscal year 1998.⁸⁵

To fund DRS' activities and programs, Congress appropriated \$9.25 million in fiscal year 1997 and \$10 million in fiscal year 1998.⁸⁶ Attorney General Janet Reno has asked Congress for a 13.7 percent increase in funding for fiscal year 1999 to continue vigorous enforcement of the

⁷² Ibid., p. 6.

⁷³ Ibid., p. 3.

⁷⁴ Ibid. The Special Litigation Counsel currently serves as an Acting Deputy Chief. Ibid.

⁷⁵ Organization, Staffing, and Budget, pp. 2-3.

⁷⁶ Ibid., p. 4.

⁷⁷ Ibid., p. 5.

⁷⁸ Ibid., pp. 5-6.

⁷⁹ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Subject: Mission, Function, Responsibilities, Planning, Organization, Staffing, and Budget—Response to Request for Documents No. 3," pp. 1-7 (hereafter cited as Organization, Staffing, and Budget—Document 3).

⁸⁰ DOJ interview, Nov. 7, 1997, p. 4.

⁸¹ Organization, Staffing, and Budget—Document 3, pp. 2-7.

⁸² Organization, Staffing, and Budget, pp. 1-4.

⁸³ DOJ, DRS, Organizational Chart, Aug. 21, 1997.

⁸⁴ USCCR, *Federal Funding of Civil Rights Enforcement*, pp. 33-34.

⁸⁵ CRD Performance Plan as Mandated by GPRA.

⁸⁶ Ibid. The fiscal year 1998 budget figure is an estimate. Ibid.

ADA.⁸⁷ This additional funding, \$1.27 million, would enable the Disability Rights Section to hire additional attorneys, investigators, mediators, and architects.⁸⁸ Additional funds would be used as follows: (1) \$507,000 for four attorneys and four investigators, as well as funds for architects, and others who serve as prelitigation consultants to increase enforcement efforts; (2) \$263,000 in increased funding for two attorneys and three specialists to help other Federal agencies enforce section 504 of the Rehabilitation Act and title II of the ADA; and (3) \$500,000 in additional funding to expand the mediation program.⁸⁹

Use of Computer Technology

Information about the Disability Rights Section can be obtained from the DRS' ADA home page⁹⁰ or from the home page of the Civil Rights Division.⁹¹ These Web sites provide helpful information about DRS, including DRS' address and phone numbers for voice and TDD. The purpose of the DRS and a listing of the Section's responsibilities are available. For instance, DRS informs Internet users that it engages in technical assistance activities to raise public awareness of the ADA. There also is an ADA toll-free information line for both voice and TDD which includes a fax-on-demand service allowing the public to have ADA publications faxed directly to their home or office 24 hours a day. According to DRS, the ADA home page on the Internet receives up to 70,000 hits per week.⁹² A standard form for filing a complaint under title II is available by fax, and this fax number is listed on the Web site.

Staff Training

Soon after the ADA became law, Department of Justice staff and outside disability rights advocates conducted initial training for staff who

would be handling ADA cases.⁹³ At that time staff attended a 5-day training program on all titles of the ADA, the regulations, the ADA Standards for Accessible Design, different types of disabilities, and issues of significance to persons with disabilities. The Disability Rights Education and Defense Fund (DREDF) conducted the training as part of a contract with the Equal Employment Opportunity Commission (EEOC). The initial training also included several inhouse training sessions on the regulations and standards of the ADA. In addition, training sessions from outside groups about disability specific issues were held.⁹⁴ Recently, Assistant U.S. Attorneys and DRS conducted a 2-day training session for the U.S. Attorney office staff, and last year DRS provided similar training for the investigators.⁹⁵

DRS staff acknowledges the necessity for training, since the ADA is a very complex statute.⁹⁶ Generally, DRS staff believe that the training they have been given regarding the ADA has been more than adequate and has allowed them to perform their jobs well.⁹⁷ Members of the investigative staff indicated that the on-the-job training they have received is better than any other training they could get, particularly because every ADA case is different from the one before.⁹⁸ One investigator, who responded to calls on the ADA information line for 2 years, feels that this was a beneficial form of training.⁹⁹

⁸⁷ DOJ, "Attorney General Reno Requests Increased Funding in FY 1999 to Continue Enforcing the Americans With Disabilities Act," Press Release 98-045, Feb. 3, 1998, p. 1.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, p. 2.

⁹⁰ <<http://www.usdoj.gov/crt/ada/adahom1.htm>>.

⁹¹ <<http://www.usdoj.gov/crt>>.

⁹² Ruth Lusher, Supervisor of Technical Assistance Program, DRS, CRD, DOJ, Response to Questions, April 1998, p. 3.

⁹³ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Response to Request Questions 1-3: Staff Training (hereafter cited as Staff Training)."

⁹⁴ *Ibid.*

⁹⁵ Bebe Novich, Trial Attorney, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p. 2 (hereafter cited as Novich interview); DOJ Comments, July 17, 1998, p. 2.

⁹⁶ L. Irene Bowen, Deputy Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p.2 (hereafter cited as Bowen interview).

⁹⁷ Ron Whisonant, Investigator, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p.2 (hereafter cited as Whisonant interview); Robb Wolfson, Investigator, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p. 2 (hereafter cited as Wolfson interview). See also Novich interview, p. 2.

⁹⁸ Whisonant interview, p. 2; Wolfson interview, p. 2.

⁹⁹ Whisonant interview, p. 2.

ADA training is an ongoing process. When the toll-free ADA information line was established in early 1994 and new technical assistance staff were hired, two 3-day training sessions were held. These sessions covered titles II and III of the ADA, other disability rights laws, procedures for handling information line calls, and resources available from Federal, regional, or State agencies.¹⁰⁰

Training is a high priority and is based on staff needs.¹⁰¹ The Disability Rights Section periodically holds training for its staff and the staff of the U.S. attorneys' offices. Investigators, technical assistance staff, and new attorneys have participated in a 3-day session on titles II and III. Attorneys are given training when they become part of the DRS staff.¹⁰² Two days of training on all titles of the ADA for U.S. attorney office staff was provided by DRS staff. In addition, EEOC staff provided 2 days of training on title I for all DRS staff.

DRS staff also sends several attorneys to attend the District of Columbia Bar Association's annual ADA Enforcement and Compliance Update. These 1-day training sessions, conducted by members of the DC Bar and DRS, focus on keeping attorneys abreast of recent court rulings and continuing to build their litigation skills.¹⁰³ In addition, individual staff members pursue outside training opportunities on a continuing basis, through bar organizations, other professional organizations, and private training providers.¹⁰⁴

Continuous training also takes place through unit, team, and staff meetings. For example, the technical assistance/ADA information line staff meet twice monthly for training and discussion of ADA requirements and information line procedures. DRS staff also are provided with other internal forms of training such as (1) team meetings to discuss the status and development of the ADA law, (2) discussions on what needs to

be updated, and (3) discovery updates, which look at the ADA laws and rules.¹⁰⁵

The effectiveness of training for DRS staff is evaluated through written or oral feedback.¹⁰⁶ One DRS trial attorney indicated the training that DRS provides to its attorneys generally is "more than adequate" for them to perform their jobs effectively. However, she believes the Section could benefit from providing attorneys more training to enhance their litigation skills.¹⁰⁷ Currently, very little training, formal or informal, is provided for litigation.¹⁰⁸

DRS architects provide training on the ADA standards and how they are applied, to other DRS staff members, inspectors, other architects, and builders.¹⁰⁹ Architects also work in the areas of technical assistance and certification.¹¹⁰

Past Performance

The Disability Rights Section is the newest component of the CRD. Created in 1995, it was the Attorney General for Civil Rights' response to the public's call for a section devoted to enforcing titles II and III of the American with Disabilities Act, and his reorganization to strengthen the Coordination and Review's title VI efforts.¹¹¹

The Disability Rights Section was not created under ideal conditions. Staff were assigned from other sections, primarily the Coordination and Review Section,¹¹² which affected that Section's ability to carry out its responsibilities. Furthermore, DRS inherited both a large number of complaints and pending inventory to be addressed by a relatively small staff. Almost immediately after the passage of the ADA, the CRD began ADA investigations in 1,168 cases and litigation in 5 cases during fiscal year 1993.

¹⁰⁰ Staff Training.

¹⁰¹ Renee Wohlenhaus, Deputy Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p.2 (hereafter cited as Wohlenhaus interview).

¹⁰² Bowen interview, p. 2.

¹⁰³ Staff Training.

¹⁰⁴ Ibid.

¹⁰⁵ Allison Nichol, Deputy Chief, DRS CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 2 (hereafter cited as Nichol interview).

¹⁰⁶ Staff Training.

¹⁰⁷ Novich interview, p. 2.

¹⁰⁸ Ibid.

¹⁰⁹ Ellen Harland, Architect, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 2 (hereafter cited as Harland interview).

¹¹⁰ Ibid.

¹¹¹ See USCCR, *Title VI Enforcement*, pp. 62, 134.

¹¹² See *ibid.*, pp. 62-63.

These complaints were handled within the Coordination and Review and the Public Access sections until DRS was created.¹¹³ Because of other responsibilities, the Coordination and Review Section could not address the ADA complaints effectively.¹¹⁴

Due to insufficient resources and staff, the number of completed investigations has decreased since fiscal year 1994. In addition, the pending inventory rose from 980 in fiscal year 1993 (before DRS) to 1,850 in fiscal year 1994.¹¹⁵ For fiscal year 1995, CRD requested an additional 10 full-time staff for DRS. However, the final appropriation reduced DRS staff by 12, leaving DRS with 46 full-time employees, 2 fewer than in fiscal year 1994.¹¹⁶ The fiscal year 1996 budget did not request any additional staff for the Section.

CRD estimates that as a result of DRS' limited resources, the number of ADA investigations will continue to decrease, while the pending inventory of complaints will increase.¹¹⁷ Because of the volume of complaints and limited investigative staff, DRS does not open all ADA complaints for investigations.¹¹⁸ CRD is attempting to address some of these problems. In a report released in 1997, the National Council on Disability reported that the CRD is working with U.S. attorneys nationwide on ADA enforcement and is using its mediation program in the ADA complaints process.¹¹⁹ By 1997 approximately

350 professional mediators in 42 States had received ADA training and were mediating complaints referred by DOJ on a pro bono basis.¹²⁰ Approximately 90 percent of DOJ's ADA complainants have opted for mediation, and 82 percent of these complaints have been mediated successfully.¹²¹

Another major area in ADA enforcement is technical assistance, including outreach and education activities. To carry out its technical assistance responsibilities, the DRS has disseminated numerous technical assistance documents, operated an information telephone line, and used technology to get information on the ADA to the public.¹²²

The accomplishments of DRS are positive signs that CRD is making strides in its enforcement of the ADA. The DRS Section Chief has stated that, on the whole and considering the limited resources, DRS has established a broad-based, strong enforcement program that is beginning to improve conditions and remove barriers for people with disabilities in their everyday lives.¹²³ The Section Chief also stated that to address a wide range of issues that surface throughout the nation, DRS enforces the ADA by handling a mix of large-scale, precedent-setting cases and smaller scale, community- or individual-type cases.¹²⁴ According to the DRS Section Chief, DRS has enforced the ADA by: (1) participating in litigation to gain access to emergency 911 services for persons with hearing impairments, (2) acting to ensure equal employment for persons with disabilities by concentrating on precedent-setting issues, (3) challenging job requirements in cases involving an emergency medical technician with hearing loss and a firefighter with monocular vision, (4) intervening in litigation against the City and County of Denver and the Denver Police Department regarding its pattern and practice of employment discrimination against persons with disabilities, and (5) providing consultation to CRD's Appellate Sec-

¹¹³ In fiscal year 1994, DRS had 48 staff members. USCCR, *Funding Federal Civil Rights Enforcement*, p. 34.

¹¹⁴ "The Public Access Section had no non-ADA responsibility. The reorganization transferred disability rights responsibilities (and some staff) from the Coordination and Review Section and the Employment Litigation Section to the Public Access Section, which was then renamed to reflect the fact that nearly all of the Civil Rights Division's disability rights responsibilities would be handled by this Section. The primary reason for the change was to free Coordination and Review Section resources to coordinating the enforcement of other civil rights statutes (e.g., title VI and title IX) by Federal agencies." DOJ Comments, July 17, 1998, p. 2.

¹¹⁵ USCCR, *Funding Federal Civil Rights Enforcement*, p. 34.

¹¹⁶ *Ibid.*, p. 35.

¹¹⁷ *Ibid.*

¹¹⁸ Wodatch interview, p. 5.

¹¹⁹ National Council on Disability, *National Disability Policy: A Progress Report: July 26, 1996-October 31, 1997* (Washington, DC: National Council on Disability, Oct. 31,

1997), p. 31 (hereafter cited as NCD, *National Disability Policy: A Progress Report*).

¹²⁰ *Ibid.*, p. 32.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 31.

¹²³ Wodatch interview, p. 2.

¹²⁴ *Ibid.*

tion in submitting *amicus* briefs, e.g., the Eleventh Circuit Court of Appeals in a case challenging the applicability of title II to public employment.¹²⁵

DRS also has handled cases based on what the Section Chief referred to as "right to citizen participation." These cases have involved issues such as accessibility of town halls, courthouses, and other municipal buildings, jury service, and police treatment of persons with disabilities. Although the Department's Appellate Section handles cases in Federal courts of appeal in which the constitutionality of the ADA is challenged by State and local governments, DRS also has spent a significant amount of time working in this area by providing support to the Appellate Section and defending the constitutionality of the ADA in district court cases.¹²⁶

DRS also has sought to enforce the ADA by opening doors of opportunity for persons with disabilities. For example, DRS has obtained consent decrees in cases involving companies that provide exam preparation courses, such as Bar/Bri, and has filed *amicus* briefs in cases challenging mental health inquiries by professional licensing entities.¹²⁷

Strategic Planning

U.S. Department of Justice

The DOJ strategic plan for 1997-2002 guides the department's budget and sets forth DOJ's mission, long range goals, strategies for meeting goals, and indicators to measure performance during the next several years.¹²⁸ Attorney General Reno indicates that the plan is a "living document" and that the Department intends to modify and update it based on ongoing comments and feedback from Congress and the public.¹²⁹ The strategic plan reflects the mandate of the Government Performance and Results Act of

1993 (GPRA):¹³⁰ to administer programs effectively and focus on outcomes.¹³¹

The plan is structured according to DOJ's major responsibilities, rather than by its bureaus, divisions, offices, and other components. These responsibilities include:

- Investigating and prosecuting criminal offenses
- Assisting State and local governments
- Enforcing Federal laws (including civil rights statutes) and defending the Nation's interests
- Administering immigration laws fairly and effectively
- Protecting society by confining detainees and prisoners in safe and secure environments
- Administering the judicial system at the Federal, State, and local levels
- Efficiently managing endeavors related to law enforcement, legal representation, and immigration¹³²

For each of these major responsibilities, the plan outlines several goals, strategies to accomplish them, and indicators to measure their attainment.¹³³ For only a few of its responsibilities does DOJ establish goals that either allude to or explicitly address the needs of persons with disabilities. For instance, with respect to enforcing Federal laws and defending the Nation's interests, DOJ's first priority is to protect the civil rights of all Americans by promoting compliance with the civil rights laws.¹³⁴ To secure the civil rights of all Americans, DOJ intends to protect laws and programs that promote opportunity for "traditionally excluded individuals," recruit the support of State attorneys general in enforcement actions, and strengthen relations with other Federal agencies that enforce major civil rights statutes.¹³⁵ DOJ stresses that a major element of its strategic planning process is ongoing evaluation of its major programs and ini-

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid., pp. 2-3.

¹²⁸ DOJ, *Strategic Plan 1997-2002*, Message from the Attorney General and p. 1.

¹²⁹ Ibid.

¹³⁰ Pub. Law. No. 103-62, § 2, 107 Stat. 285, 285 (1993) (codified at 31 U.S.C. § 115 note (1994) (Congressional Findings and Statement of Purposes)).

¹³¹ DOJ, *Strategic Plan 1997-2002*, Message from the Attorney General and p. 1.

¹³² DOJ, *Strategic Plan 1997-2002*, pp. 7-25.

¹³³ Ibid.

¹³⁴ Ibid., p. 12.

¹³⁵ Ibid.

tiatives.¹³⁶ DOJ's Office of the Inspector General will assess performance.¹³⁷

DOJ's strategic plan includes a summary of resources, systems, and processes that are critical to goal achievement and a somewhat brief description of how its goals and objectives will be achieved. DOJ does not (1) address key external factors that could affect achievement of these goals, (2) provide a description of how program evaluations will be used in establishing goals, or (3) provide a schedule of future program evaluations in its strategic plan. These factors were supposed to be included in all Federal agencies' strategic plans.

Civil Rights Division

CRD's most recent mission and goals statement includes more direct references to persons with disabilities. CRD's overall mission is:

To vindicate the constitutional and Federal rights of persons who have been subjected to discrimination on the basis of race, color, gender, disability, religion, familial status, and national origin; and in so doing, to deter others from engaging in discrimination.¹³⁸

CRD's six general goals, in summary, are:

- Reduce police and other official criminal misconduct, and eliminate violent activity by private citizens
- Prevent or eliminate barriers to full participation in the electoral process
- Eliminate discrimination in employment, credit transactions, and housing and educational opportunities
- Protect the constitutional and statutory rights of institutionalized individuals
- Ensure that public services, programs, and activities are accessible to persons with disabilities
- Eliminate immigration-related discriminatory employment practices¹³⁹

¹³⁶ Ibid., p. 30.

¹³⁷ Ibid., p. 31. The Office of the Inspector General also does special reviews at the request of senior DOJ officials or Congress. Ibid., pp. 31-32.

¹³⁸ CRD Performance Plan as Mandated by GPRA.

¹³⁹ Ibid.

Disability Rights Section

The Disability Rights Section obtained the assistance of disability and civil rights groups to develop a strategic plan.¹⁴⁰ In its plan, DRS explicitly addresses ADA title II's goals and objectives.¹⁴¹ The plan's six priorities, in summary, are:

- Ensure that new construction of public facilities covered under the ADA is in compliance with title II (as well as title III)¹⁴²
- Challenge policies and eligibility criteria that exclude individuals with disabilities from programs and services
- Litigate basic issues related to reasonable accommodations
- Undertake an active *amicus* program to assist in defining key statutory terms, such as "individual with a disability," "undue hardship," and "fundamental alteration"
- Monitor Federal agencies' enforcement of ADA's title II and section 504
- Partner with Federal, State, and local agencies, as well as the general public, to ensure the broadest possible enforcement of laws that protect individuals with disabilities from discrimination¹⁴³

Title II Implementation, Enforcement, and Compliance Activities Regulatory and Policymaking Functions Regulations

The ADA required the U.S. Attorney General to develop and announce final regulations on title II, subtitle A, within 1 year of the ADA's enactment,¹⁴⁴ and on July 26, 1991, DOJ issued the implementing regulations.¹⁴⁵ The regulations

¹⁴⁰ DOJ September interview, p. 4; DRS June 3, 1998, Response, pp. 3-4.

¹⁴¹ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Subject: Disability Rights Section Strategic Plan, DRS Response to Request for Documents No. 4 (hereafter cited as Disability Rights Section Strategic Plan).

¹⁴² DRS priority issues on building construction/alterations led to a program in which staff determine where construction is occurring and ensure that ADA requirements are satisfied. See DOJ September interview, p. 4.

¹⁴³ Disability Rights Section Strategic Plan.

¹⁴⁴ 42 U.S.C. § 12134(a) (1994).

¹⁴⁵ Nondiscrimination on the basis of disability in State and local government services, 56 Fed. Reg. 35,716 (1991)

are divided into seven subparts. Subpart A describes the purpose and application of the ADA, as well as its relationship to other laws.¹⁴⁶ It also provides definitions of key terms used in the ADA, and establishes requirements for notice, self-evaluation, and the adoption and publication of grievance procedures for public entities with 50 or more employees.¹⁴⁷ Subpart B discusses subjects such as the ADA's general prohibition against discrimination, illegal use of drugs, retaliation, maintenance of accessible features, and personal devices and services.¹⁴⁸ Subpart C discusses the ADA's prohibition against employment discrimination.¹⁴⁹ Subparts D and E establish ADA requirements for program accessibility and communications, respectively.¹⁵⁰ Subpart F sets forth the compliance procedures that must be followed under title II.¹⁵¹ Subpart G lists the Federal agencies that, in addition to DOJ, have designated investigative and enforcement responsibility for particular title II State and local government compliance issues.¹⁵²

DOJ's title II, subtitle A, regulation adopts the prohibitions of discrimination based on disability that were established under section 504 of the Rehabilitation Act of 1973 and extends them to protect disabled individuals who participate in State and local activities that do not receive Federal financial support.¹⁵³ Furthermore, the regulation implements standards to determine the presence of discrimination on the basis of disability; defines "disability," "qualified individuals with a disability," and other terms used

in civil rights statutes; and establishes a complaint mechanism for resolving allegations of discrimination.¹⁵⁴

One final, significant point is that the title II regulations state that designated agencies, including DOJ, must investigate and attempt to resolve every complaint received.¹⁵⁵ DOJ officials acknowledge that they do not investigate every complaint and are considering amending the regulations to eliminate this requirement.¹⁵⁶

The regulations and the accompanying section by section analysis are comprehensive and clear. They provide specific guidance about official DOJ policy on issues not specifically addressed in the statute itself, such as the applicability of title II to public employment.¹⁵⁷ This very specificity, however, has led some Federal district courts to disagree with DOJ policy as extending too far from the intended scope of title II. For example, in several public employment cases filed under title II, courts have ruled that title II does not apply to employment.¹⁵⁸ The "flow of precedent," however, has been to find that title II does encompass employment dis-

(codified at 28 C.F.R. pt. 35 (1997)). Title II, subtitle A, regulations are not limited in coverage to State and local "executive" agencies. Rather, they apply to the activities of the judicial and legislative branches of State and local governments as well. See 28 C.F.R. §§ 35.102(a), 35.105 (28 C.F.R. Part 35 applies to public entities; public entity means any instrumentality of a State or States or local government) (1997).

¹⁴⁶ 28 C.F.R. §§ 35.101-103 (1997).

¹⁴⁷ *Id.* §§ 35.104-107.

¹⁴⁸ *Id.* §§ 35.130-135 (1997).

¹⁴⁹ *Id.* §§ 35.140 (1997).

¹⁵⁰ *Id.* §§ 35.149-151 (subpart D) (1977); *Id.* § 35.160-164 (1997).

¹⁵¹ *Id.* §§ 35.170-178 (1997).

¹⁵² *Id.* §§ 35.190 (1997).

¹⁵³ *Id.* § 35.102 & app. A § 35.102 (analysis of § 35.102) (1997).

¹⁵⁴ *Id.* §§ 35.104, 35.130, 35.170 (1997).

¹⁵⁵ *Id.* § 35.172 (1997). This requirement applies to each "complete complaint." *Id.* This is defined as a written, signed statement that contains the complainant's name and address and describes the alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the violation. *Id.* § 35.103.

¹⁵⁶ DRS Staff, DOJ, interview in Washington, DC, November 3, 1997, p. 4.

¹⁵⁷ See, e.g. 28 C.F.R. § 35.140 (1997).

¹⁵⁸ In *Decker v. Univ. of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997), the plaintiff, a tenured college professor, filed an employment discrimination claim under title II. The court held that the plain language of 42 U.S.C. § 12132 providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" did not encompass employment claims. The court noted the lack of an explicit provision governing employment discrimination and that the phrase "services, programs, or activities," as a whole, "focuses on a public entity's outputs rather than inputs." *Id.* at 578 (citing *Bledsoe v. Palm Beach Soil and Conservation Dist.*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996)). In *Iskander v. Rodeo Sanitary Dist.*, 1995 U.S. Dist. LEXIS 1620, No. C-94-0479-SC, at *24 (N.D. Cal. Feb. 7, 1995), *aff'd mem.*, 121 F.3d 715 (9th Cir. 1997), the court held that title II was limited to "the rendering of services to the public by public entities."

crimination claims.¹⁵⁹ This and other issues are discussed in greater detail in the next chapter.

Policy

DRS provides ADA guidance through regulations, *amicus curiae* briefs, technical assistance materials, and policy letters that are written on an ongoing basis as responses to inquiries about the ADA.¹⁶⁰ These methods of developing policy do not provide an opportunity for disability advocacy groups to participate in the process, whereas if formal guidance documents, similar to those produced by the EEOC, were developed and published the public could offer comment.¹⁶¹ Between 1990 and 1997, DOJ issued more than 200 policy letters and 700 technical letters to assist and guide Federal agencies, State and local governments, education officials, the disability community, and the general public on the requirements and implementation of the ADA. There is no real difference between the technical and policy letters in terms of their importance or the deference they should be accorded nor are these letters binding on DOJ.¹⁶² Information provided in response to one letter does not set binding precedent that DOJ must follow in all

subsequent cases, although DRS staff attempt to provide consistent responses to similar inquiries. Technical and policy letters have been issued in response to inquiries from members of Congress, private organizations, State and local agencies, and private citizens about provisions of the statute, as well as requests for clarification or interpretation of ADA provisions.¹⁶³

According to one DRS staff member, the biggest technical assistance issue where more guidance needs to be provided is program accessibility. Even though the concept of program accessibility has existed since the enactment of section 504 of the Rehabilitation Act of 1973,¹⁶⁴ knowledge and understanding in this area are lacking, particularly in smaller towns where many title II entities do not have sufficient staff to work on these issues.¹⁶⁵ To address this gap, DRS has developed a grant for small towns and another grant for title II entities. DRS is also going to produce materials for small businesses, which should help small towns become aware of DRS and other resources.¹⁶⁶ Often officials, from any size of local government, argue that their lack of knowledge and understanding is because no persons with disabilities live in their community.¹⁶⁷

Coordinating and Monitoring Federal Agencies' Enforcement Efforts

DRS has oversight and coordination responsibilities for the seven executive agencies that DOJ's July 26, 1991, regulations on title II, subpart A, authorized to enforce title II compliance in the Nation's approximately 80,000 State and local governmental units.¹⁶⁸ The U.S. Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation are charged with investigating and resolving com-

¹⁵⁹ See, e.g., *Bledsoe v. Palm Beach City Soil & Water Conservation Dist.*, 133 F.3d 816, 820-25 (11th Cir. 1998) (relying on final clause of § 12132 which protects individuals from being "subjected to discrimination by any [public] entity," ADA legislative history, DOJ implementing regulations and the "flow of precedent"). This decision, the only circuit court decision on point to date, reversed the decision on which the *Decker* court relied. For an extensive list of decisions holding that employment discrimination claims may be brought under title II of the ADA, see *Bledsoe*, 133 F.3d at 820 n. 4.

¹⁶⁰ DRS Staff, DOJ, interview in Washington, DC, Sept. 3, 1997, p. 5; Wodatch interview, pp. 3-4. DOJ *amicus curiae* briefs, technical assistance materials and policy letters are discussed in greater depth in chaps. 3 and 4.

¹⁶¹ Wodatch interview, p. 4.

¹⁶² Breen interview, p. 2. DRS notes that staff respond to inquiries received from Congress and members of the public. These letters are not officially referred to as "policy" or "technical" letters. The letters referred to throughout this report as "policy" letters are those that are identified by the Civil Rights Division's Freedom of Information Act (FOIA) office as "core letters." They represent the letters in which a question was addressed for the first time. The letters referred to in this report as "technical" letters are those that are not "core" or "policy" letters. None of these letters represents a binding legal interpretation of the ADA. See DOJ Comments, July 17, 1998, p. 2.

¹⁶³ See DOJ Title II/ADA Policy Letters and Title II/ADA Technical Letters, 1990-Present.

¹⁶⁴ Jim Bostrom, Architect, DRS, CRD, DOJ, interview in Washington, DC, Apr. 16, 1998, p. 2.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ 56 Fed. Reg. 35,694, 35,715-16,722-23 (1991) (codified at 28 C.F.R. § 35.190); USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

plaints of discrimination on the basis of disability in State and local governments' programs, activities, and services.¹⁶⁹ DOJ designated these seven agencies in particular, rather than all Federal agencies that administer financial assistance programs, because the Department considered them to have the largest civil rights compliance staffs and the most experience in complaint investigations and disability issues.¹⁷⁰ DOJ assigns these Federal agencies title II enforcement responsibilities for particular State and local agencies based on their respective major functions.¹⁷¹ Therefore, the agencies investigate and resolve complaints of alleged violations of the ADA related to their substantive areas of concern.¹⁷²

¹⁶⁹ 28 C.F.R. § 35.190 (1997).

¹⁷⁰ *Id.*, pt. 35, app. A § 35.190 (1997). Some of the designated agencies are "well staffed," such as the Departments of Education, Health and Human Services, and Housing and Urban Development. In contrast, at agencies such as the Department of Interior, civil rights enforcement responsibilities are handled by only two staff persons. See DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997, p. 5 (Statement of John Wodatch).

¹⁷¹ 28 C.F.R. pt. 35, app. A § 35.190 (1997). The division of responsibilities is made functionally rather than by the name of the public entities. For instance, all State and local agencies (regardless of their names) that administer, implement, or regulate services or programs relating to lands and natural resources fall within the Department of Interior's jurisdiction. 28 C.F.R. pt. 35, app. A § 35.190 (1997).

¹⁷² DRS Staff, DOJ, interview in Washington, DC, Sept. 3, 1997, p. 4. These agencies also have substantial responsibilities for enforcing section 504. See 56 Fed. Reg. 35,695 (1991). The Federal agencies ensure title II, subtitle A, compliance in the State and local governments that administer programs and services in the following functional areas:

- (1) U.S. Department of Agriculture: Farming and the raising of livestock, including extension services.
- (2) U.S. Department of Education: Education systems, elementary and secondary schools, institutions of higher education (other than health-related schools), and libraries.
- (3) U.S. Department of Health and Human Services: Schools of medicine, dentistry, nursing, and other health-related schools; health care and social service providers and institutions, including "grass-roots" community services organizations and programs; and preschool and daycare programs.
- (4) U.S. Department of Housing and Urban Development: State and local public housing, and housing assistance and referral.
- (5) U.S. Department of Interior: Lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.

DRS acts as a clearinghouse for complaints under title II by determining which designated agency should investigate a given complaint and referring the complaint to that agency. Referrals are made by DRS civil rights program specialists who may also provide advice and support to the designated agency involved. DRS staff request that each designated agency notify DRS when cases are resolved.¹⁷³

The preamble to the title II, subtitle A, regulations states that the use of delegation agreements reduces duplication of efforts and thereby strengthens overall civil rights enforcement.¹⁷⁴ Aside from this provision, however, Congress did not address the overlapping responsibilities of Federal agencies when designing the ADA. For example, some public entities, such as residential treatment centers, must comply with both the Fair Housing Act and the ADA. In addition, the Department of Housing and Urban Development has enforcement responsibilities under both of these laws.¹⁷⁵ Under title II, DRS does not have independent authority to handle cases under the purview of the designated agencies and it must first get a referral from an agency to take on a case.¹⁷⁶ However, the agencies have not referred many cases to DRS.¹⁷⁷ Although DRS staff have expressed uneasiness about changing the ADA, eliminating the requirement for a referral from the designated agencies would be one change that could improve the ADA.¹⁷⁸ ADA enforcement might be improved by eliminating the designated agencies' responsibilities under the ADA and centralizing all enforcement duties within DRS, however, at pres-

(6) U.S. Department of Labor: Labor and the work force programs, services, and regulatory activities.

(7) U.S. Department of Transportation: All transportation programs and activities, including highways, public transportation, traffic management (nonlaw enforcement), automobile licensing and inspection, and driver licensing. See 28 C.F.R. § 35.190 (1997).

¹⁷³ DRS June 3, 1998, Response, pp. 12-13.

¹⁷⁴ 28 C.F.R. pt. 35, app. A § 35.190 (1997).

¹⁷⁵ 24 C.F.R. § 100.1 (1997); 28 C.F.R. § 35.190(b)(4) (1997); Blizard interview, p. 2.

¹⁷⁶ 28 C.F.R. 35.174 (1997) (referral to Attorney General by designated agency when voluntary compliance negotiations are unsuccessful).

¹⁷⁷ Wodatch interview, p. 6.

¹⁷⁸ *Ibid.*

ent, DOJ and DRS do not have the resources to assume these responsibilities.¹⁷⁹

DRS staff acknowledges it could improve ADA enforcement through better communication and information sharing with the designated agencies.¹⁸⁰ Once a month a coordination meeting, which involves the designated agencies, is held at EEOC.¹⁸¹ Currently, communication occurs almost exclusively between DRS' coordination staff and one or two designated agency contact persons. Expanded communication between the respective enforcement staffs could foster information sharing and referral of cases.¹⁸² For example, DRS enforcement staff recently informed Department of Transportation (DOT) staff that they could get compensatory damages in ADA cases. It appears DOT staff previously were not aware of this authority.¹⁸³

Many accessibility complaints fall under the jurisdiction of the designated agencies. For example, complaints about school building accessibility are investigated by the Department of Education. One DRS architect said she is unaware of any instances when staff from the Department of Education or any of the other designated agencies have contacted DRS architects for advice or assistance on building accessibility complaints.¹⁸⁴

One official at the Department of Education (DOEd) has expressed satisfaction with the interaction with DRS, stating that "DRS has been responsive to all of our requests for consultation on any given issue, including meeting with our staff as the need arose, consulting with staff over the telephone on an as-needed basis, and sharing informational materials."¹⁸⁵ In monitoring and coordinating DOEd's enforcement activities, DRS participates in monthly meetings to discuss employment-related disability issues. The Director of DRS and his staff have been involved in consulta-

tion on a number of issues, and DRS also issues DOEd policy guidance and interpretations periodically. DOEd has found these approaches to be effective.¹⁸⁶ An official at the Department of Labor (DOL) states that generally their contacts with DRS have been informal, although DRS has been helpful in assisting DOL in determining jurisdiction in complaints and providing guidance in processing and investigating complaints that present new or novel issues.¹⁸⁷

DRS staff reports that monitoring and evaluating the designated agencies' resources devoted to ADA enforcement efforts is difficult, because these agencies do not maintain separate budgets for this statute.¹⁸⁸ Only a small percentage of cases that DOJ has referred to other Federal agencies have been closed, and DOJ does not require the recipient agencies to provide feedback on the referred cases until they are closed.¹⁸⁹ In addition, DOJ does not record or track ADA complaints that are received directly by other Federal agencies (i.e., cases not referred to other agencies by DOJ).¹⁹⁰ The lack of available information on title II complaints filed with designated agencies other than DOJ or the agencies' enforcement activities has prompted the California Department of Rehabilitation to conclude that "apparently no oversight by DOJ of the enforcement activities of the other 11 Offices of Civil Rights charged with enforcement occurs. We say this because we have no information available from those entities regarding what kinds of enforcement activities they have undertaken."¹⁹¹ Overall, most coordination with other

¹⁸⁶ *Ibid.*, pp. 1-2.

¹⁸⁷ Annabelle T. Lockhart, U.S. Department of Labor, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 23, 1998, Response to letter of March 18, 1998, p. 1.

¹⁸⁸ DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997, pp. 4-5 (statement of Elizabeth Savage, Counsel to Acting Assistant Attorney General for Civil Rights).

¹⁸⁹ DRS Staff, DOJ, interview in Washington, DC, Sept. 3, 1997, pp. 4-5.

¹⁹⁰ *Ibid.*, p. 5.

¹⁹¹ Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Health and Welfare Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, p. 12 (hereafter cited as Martin letter). The Department of Rehabilitation added, "Many of the calls we receive on the technical assistance line concern access and equal treatment

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, p. 7.

¹⁸¹ Nichol interview, p. 4.

¹⁸² Novich interview, p. 4.

¹⁸³ Wodatch interview, p. 7.

¹⁸⁴ Harland interview, p. 3.

¹⁸⁵ Eileen Hanrahan, U.S. Department of Education, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 3, 1998, Response to letter of March 18, 1998, p. 1 (hereafter cited as Hanrahan response).

agencies on title II issues occurs informally (e.g., through telephone contact); no memoranda of understanding or guidelines on coordination have been issued to date.¹⁹² DRS staff believes the title II regulations assign responsibilities to specific agencies and this should serve in place of a memorandum of understanding.¹⁹³ However, if an agency is about to issue a Letter of Finding that seems "ground breaking," generally it will consult with DOJ.¹⁹⁴

Certifying State and Local Building Codes

Under title II of the ADA, State and local governments must follow specific architectural standards in new construction and alteration of their buildings and must relocate programs or remove barriers from inaccessible older facilities.¹⁹⁵ The ADA permits but does not require State and local governments to apply to the Assistant Attorney General for Civil Rights for "certification that their building codes meet or exceed minimum ADA requirements for accessibility and usability of places of public accommo-

dation and commercial facilities."¹⁹⁶ Under section 308 of the ADA, DOJ is authorized to certify, after a public hearing, that these State and local building codes meet or exceed ADA Standards for Accessible Design.¹⁹⁷ In performing this responsibility, DRS staff advise State and local officials on strategies to make their building standards on par with the ADA.¹⁹⁸

The process of certification requires that DRS staff analyze each submitted code thoroughly, provide public notice, and hold public hearings on the proposed certification.¹⁹⁹ On May 20, 1993, DOJ responded to its first request for certification of a State's building accessibility codes.²⁰⁰ DOJ provided the State of Washington with a "side by

in education and transportation. We routinely give out the number for the enforcement offices of those agencies, yet no statistics are available on the number of complaints received, considered to have merit, or resolved." *Ibid.*

¹⁹² DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997, p. 2 (statement of Ruth Lusher, Technical Assistance Program Manager). In 1994, DOJ and EEOC jointly published guidelines on the coordination of complaints concerning employment discrimination under the ADA and section 504 of the Rehabilitation Act of 1973 that may fall within the jurisdiction of more than one agency. See 29 C.F.R. §§ 1640.1-1640.13 (1997).

¹⁹³ Blizzard interview, p. 2.

¹⁹⁴ DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997 p. 2 (statement of Janet Blizzard, Supervisory Attorney).

¹⁹⁵ 28 C.F.R. §§ 35.149-151 (1997); DOJ/CRD, *Guide to Disability Rights Laws*, p. 3. Public entities are not required to make each of their existing facilities accessible. See *id.* § 35.150 (1997). According to DOJ and EEOC, removal of physical barriers, such as stairs, from all existing buildings is not required by ADA, title II, as long as programs and services are made accessible to individuals who cannot use "inaccessible existing facilities." State and local governments can make programs accessible by altering existing facilities; acquiring or constructing additional facilities; or relocating a service or program to an accessible building, including an individual's home. Similarly, a State or local entity can provide an aide to assist a disabled person in obtaining services. See *id.* § 35.150(b) (1997); EEOC and DOJ, *ADA Questions and Answers*, p. 18; and DOJ/CRD, *Title II Highlights*, p. 3.

¹⁹⁶ Deval Patrick, Assistant Attorney General, CRD, DOJ, letter to Sen. Mark Hatfield, re: Building Code Certification (Equivalency to the ADA), May 16, 1995, reprinted in 8 Nat'l Disability L. Rep. (LRP) ¶ 33.

¹⁹⁷ 42 U.S.C. § 12188(b)(ii) (1994); John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Response to Request for Documents No. 1," p. 2; see also DOJ September interview, p. 2. The certification procedure was established as part of the enforcement mechanism for title III to facilitate implementation of the new construction and alteration requirements applicable to public accommodations and commercial facilities. Construction in compliance with a certified code may be offered as evidence of compliance with title III in an ADA enforcement hearing. Code certification has no legal significance for new construction or alterations under title II. DOJ Comments, July 17, 1998, p. 3.

¹⁹⁸ DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 8. The DRS staff also represent the Attorney General in her statutory role as a member of the U.S. Architectural and Transportation Barriers Compliance Board (Access Board), which allows the Section to contribute to the development of ADA building and facilities accessibility guidelines for the entities subject to the Department's regulations and all federally financed buildings. CRD Performance Plan as Mandated by GPRA; 29 U.S.C. § 792(a) (1994) (Attorney General is DOJ representative on Access Board).

The ADA Standards for Accessible Design apply to new construction and alterations, and can also be used to determine the appropriate types of barrier removal in completed facilities. See John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1988, attachment, "Subject: Mission and Functions Statements—Response to Request for Documents No. 5," p. 6. DRS' participation in the development of ADA Standards for Accessible Design requires that the Section staff use innovative methods to solicit comments from corporations, governments, architects, and the disability community.

¹⁹⁹ CRD Performance Plan as Mandated by GPRA.

²⁰⁰ DOJ/CRD, *ADA Status Report* (Apr. 4, 1994) p. 13.

side" analysis of its building standards relative to those of the ADA, and indicated areas of minor discrepancy between Washington's codes and the ADA Standards for Accessible Design.²⁰¹ DOJ considered Washington's facility accessibility codes to be "very progressive" but not quite on par with the ADA.²⁰² In July 1994, DOJ informed the State of Washington that the Department's analysis revealed a few remaining areas in which the State's codes were not fully equivalent to the ADA standards.²⁰³ DOJ stated that once the State corrected the gaps, the State of Washington would receive a preliminary certification of its building codes.²⁰⁴ The State of Washington, in turn, notified DOJ that by November 1994, it expected to modify the facility standards in the areas identified by the Department.²⁰⁵ On March 29, 1995, DOJ certified that the Washington State Regulations for Barrier Free Design met or exceeded the new construction and alteration requirements of the ADA.²⁰⁶ Similarly, before granting certification to the Texas Accessibility Standards, DOJ issued a "preliminary determination" in May 1996, requesting public comment on this provisional certification, and scheduled a second hearing in August 1996.²⁰⁷ After public hearings were held in Austin, Texas, and Washington, D.C., DOJ issued its second State building code certification and declared that Texas' Building Accessibility Standards met or exceeded ADA requirements.²⁰⁸

As of May 1998, DOJ had determined that accessibility codes in Washington, Texas, Maine, and Florida are equivalent to ADA title III requirements for new construction and alterations.²⁰⁹ DRS officials contend that certification furthers the Federal objective of ensuring uniform levels of accessibility for individuals with disabili-

ties throughout the Nation.²¹⁰ In addition, DRS expects that its code certification provision will increase the number of buildings constructed in compliance with the ADA's Standards for Accessible Design and thereby avoid "costly litigation."²¹¹

Complaints Processing Procedures

Under the ADA, individuals who believe that they have been subjected to discrimination on the basis of disability by a public entity such as a State or local government agency are entitled to file a complaint within 180 days from the alleged discriminatory action.²¹² DOJ considers a title II complaint filed on the date it is first filed with any Federal agency.²¹³ A "complete complaint" is a written statement that contains the aggrieved individual's name and address, as well as a detailed description of the public entity's alleged discriminatory action.²¹⁴

DRS and the other designated agencies are charged with receiving, processing, investigating, and resolving complaints of alleged violations under ADA title II, subtitle A.²¹⁵ All complaints must be in writing, unless an alternative procedure is necessary as a "reasonable modification" for an individual with a disability; a person cannot walk in to DRS' offices in Washington, D.C., and file a complaint.²¹⁶ The Disability Rights Section has a standard ADA title II/section 504 complaint form that instructs individuals who perceive that they have been discriminated against by a public entity to provide (a) their name and address and that of the alleged discriminating government entity or organization; (b) the date on which discrimination occurred; (c) a description of the discriminating acts; (d) efforts (if any) made by complainant to resolve the claim through internal grievance

²⁰¹ Ibid.

²⁰² DOJ/CRD, *ADA Quarterly Status Report (July-September 1994)*, p. 8.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*, p. 9.

²⁰⁷ DOJ/CRD, *ADA Quarterly Status Report (April-June 1996)*, p. 10.

²⁰⁸ DOJ/CRD, *ADA Quarterly Status Report (July-September 1996)*, p. 9.

²⁰⁹ DRS June 3, 1998, Response, pp. 13-14.

²¹⁰ CRD Performance Plan as Mandated by GPRA.

²¹¹ Ibid.

²¹² 28 C.F.R. §35.170(a)-(b) (1997).

²¹³ *Id.* § 35.170(b).

²¹⁴ *Id.* § 35.104.

²¹⁵ DOJ/CRD, *Title II Highlights*; DOJ/CRD, *A Guide to Disability Rights Laws*, p. 3; DOJ September interview (statement of Wodatch), pp. 2-3; DOJ/CRD, *ADA Quarterly Status Report (January-March 1995)*, p. 3; USCCR, *Funding Federal Civil Rights Enforcement*, pp. 25, 34; CRD Performance Plan as Mandated by GPRA.

²¹⁶ Whisonant interview, pp. 2-3.

procedures of the public entity or organization; and (e) additional entities (if any), such as the DOJ or other Federal, State, or local civil rights agencies, to which the complaint was filed.²¹⁷ If an incomplete complaint is received and the complainant does not comply with the request for additional information, the Civil Rights Division is entitled to close the complaint.²¹⁸

Complaints raise concerns about jails, prisons, and inmates; State licensing boards; effective communications; access to police departments, town halls, courts, and other public programs and facilities; emergency services; and other issues.²¹⁹ These issues are discussed further in chapter 3.

According to its Section Chief, DRS receives more complaints than staff can handle and many complaints are not "opened" as cases to be investigated.²²⁰ DRS tends to open more cases involving State and local government issues, because the Section is required to do so.²²¹ The Section Chief also said that he would like for staff to be able to respond to all complaints and mentioned the possibility of prioritizing complaints similarly to EEOC's categorized process to improve efficiency. He noted, however, that this would require a change in the Department's implementing regulation for title II of the ADA.²²² DRS staff have attempted to become more efficient in processing more complaints, but limited resources are a continuing constraint. DRS has fewer than 15 investigators to respond to complaints from the entire United States. Although disability rights organizations have suggested that DRS should handle more high profile cases and initiate more litigation against State and local agencies, DRS' position is that a good en-

forcement program has a mix of large and small impact cases.²²³

Mail Process

When mail arrives at DRS, two support staff members open and review it, record the information in the Correspondence Tracking System (CTS) and distribute it.²²⁴ New complaints are distributed by State and placed in the intake file cabinet. Additional information on previously received complaints is given to the person listed in CTS. If the complaint is already in the Case Management System (CMS), then a staff member will update CMS and distribute the complaint to the assigned person in CMS. Any material relating to title II complaints that already have been referred to designated agencies goes to a staff member. Policy requests, certification materials, interagency correspondence, and regulatory issues are given to Certification and Coordination staff. Mail from Members of Congress is routed to the appropriate staff member, logged in, and then distributed for a response. Referrals from other agencies are given to the appropriate staff member to (1) enter into CMS, (2) assign "DJ" (case) numbers, and (3) create a file and distribute to deputies according to teams. Deputies assign the matter to an attorney, issue a right to sue letter or other closing, or return to the appropriate staff for additional investigation.²²⁵

Disability rights professionals have criticized DRS for its inefficiency in responding to complaints.²²⁶ Staff from 5 out of 10 federally funded

²¹⁷ DOJ, CRD, DRS, *Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form* (undated) (hereafter cited as DOJ/CRD, *Title II Discrimination Complaint Form*).

²¹⁸ 28 C.F.R. § 35.171(c)(2) (1997).

²¹⁹ CRD Performance Plan as Mandated by GPR, DOJ September interview, pp. 2 and 4; DOJ November interview, p. 1; and DOJ/CRD, *ADA Quarterly Status Report (April-June 1997)*, pp. 3 and 7; and DOJ/CRD, *ADA Quarterly Status Report (April-June 1996)*, p. 2.

²²⁰ Wodatch interview, p. 5.

²²¹ *Ibid.*, p. 6.

²²² *Ibid.*, p. 5.

²²³ *Ibid.*, p. 5.

²²⁴ Some correspondence, mostly related to ongoing private cases, is received over the Internet and is not recorded in CTS. This mail is reviewed and distributed for appropriate action by another staff member. Mail addressed to a particular person, except the Section Chief, is distributed to that person without being recorded in the CTS. Requests for technical assistance are given to the person in charge of technical assistance and priority mail or mail with court captions are given to deputies or to the assigned attorney if the case is already in the case management system (CMS).

²²⁵ John Wodatch, Chief, DRS, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998, attachment, "Subject: Complaints Processing—DRS Mail Procedure, DRS response to Request for Documents No. 1", pp. 1-2 (hereafter cited as Complaints Processing—DRS Mail Procedure).

²²⁶ See, e.g., Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services,

disability and business technical assistance centers (DBTACs) report that many individuals in their regions have complained about or even given up on DRS' complaint processing system.²²⁷ Another advocate wrote the Commission that as of April 1998 his agency had not received a response from DOJ regarding a complaint filed in 1995.²²⁸

DRS staff has acknowledged that in the past they did not notify complainants that their correspondence had been received or whether DRS would be acting on the complaint. In addition to the anxiety this caused complainants, it negatively affected several areas within DRS. In particular, complainants often would call the information line to ask about the status of their complaints, causing the workload of the phone operators to increase and interfere with their ability to respond to substantive questions.²²⁹ To increase efficiency, DRS staff began to review the complaint processing procedures on a continuing basis. For example, approximately a year and a half ago a new Supervisory Attorney for Investigation and the Supervisory Attorney for Administration overhauled and streamlined intake processing, which led to improvements in the overall complaint processing procedure and reduced backlogs.²³⁰ The basic steps in DRS'

complaint processing procedures are summarized below.²³¹

Intake Process

When DRS receives a complaint, staff notifies the complainant by postcard that DRS has received the complaint.²³² This postcard informs the complainant that within 8-12 weeks DRS will send additional information on the action DRS has decided to take.²³³ If a complaint is "opened" for investigation, the complainant is informed and is asked to sign a Privacy Act release. After this initial contact, DRS does not keep the complainant informed of the progress of the investigation and negotiation.²³⁴ Although the time varies, typically there is a delay of 4 to 8 weeks between the time DRS receives a complaint and when the complainant actually receives a response from DOJ.²³⁵ After the investigation is completed, the complainant is informed of how the complaint was resolved.

An investigator's typical caseload fluctuates between 35 to 55 active cases. Investigators submit monthly reviews to the Supervisory Attorney for Investigation, informing her how soon they anticipate closing cases. This helps the Supervisory Attorney monitor caseloads and determine whether investigators should be given additional cases.²³⁶

DRS investigators receive new complaints from their assigned States at least once a

letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, enclosure, pp. 2, 3 ("The ADA is limited mainly by the inability of those agencies responsible for enforcement to act in an expedient manner. . . . The major policy issue is the slow manner in which ADA complaints are dealt with.") (hereafter cited as Suter letter).

²²⁷ David Esquith, National Institute on Disability and Rehabilitation Research, U.S. Department of Education, interview in Washington, DC, Jan. 8, 1998, addendum to interview, Memorandum from Robin Jones to David Esquith, Jan. 6, 1998, pp. 2-5.

²²⁸ Lawrence Berliner, General Counsel, Connecticut Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, p. 2 ("Our experience with DOJ has been unsatisfactory. Agency personnel and consumers have filed complaints with the DOJ and do not receive letters of confirmation or the results of any DOJ intervention. For example, in one case filed in 1995. . . this agency has received no response from any DOJ official, to date. Consequently we were forced to close the matter in the absence of any DOJ response in almost three years.").

²²⁹ Wodatch interview, p. 5.

²³⁰ Whisonant interview, p. 1; Wolfson interview, p. 1.

²³¹ Complaints Processing—DRS Mail Procedure.

²³² DRS has temporarily stopped mailing postcard notices because some complainants were receiving the DRS response to the complaint before the postcard. DOJ Comments, July 17, 1998, p. 3.

²³³ Eve Hill, Supervisory Attorney, Investigation, DRS, CRD, DOJ, interview in Washington, DC, April 14, 1998, p. 2 (hereafter cited as Hill interview); Whisonant interview; Wolfson interview, p. 3.

²³⁴ Hill interview, p. 3. DRS reviews all incoming complaints. From this review, DRS determines whether the complaint should be opened for a more indepth investigation. Generally, complaints that are not opened for further investigation are closed because they fail to state a claim, they are untimely, or they are already being reviewed by the agency with proper jurisdiction. DOJ Comments, July 17, 1998, p. 2.

²³⁵ Whisonant interview, p. 3.

²³⁶ Wolfson interview, p. 2; Whisonant interview, p. 4.

week.²³⁷ The DRS staff member responsible for intake reviews complaints, summarizes their contents on intake cover sheets, and makes preliminary recommendations for disposition.²³⁸ A staff attorney reviews the recommendations made by investigators, updates CTS, and distributes the complaints to the appropriate staff person. Recommendations involving requests for litigation, such as *amicus* participation or intervention in existing cases, are forwarded to the Deputy Chiefs. Other documents are sent to the Supervisory Attorney for Investigation.²³⁹

The Supervisory Attorney for Investigation reviews the staff attorney's recommendations. Deputy Chiefs further review title III recommendations. If mediation is recommended, the complaint is sent to the Technical Assistance Team. If further investigation is recommended, CTS is updated and the complaints are distributed to support staff for: (1) entry in CMS, (2) assignment of DJ (case) numbers, and (3) creation of case files. Another staff member then generates a privacy release letter to be sent to the complainant. The complainant must sign and return this release letter before DRS will conduct further investigation. Once DRS receives a signed release form the case file is then returned to an investigator. Some cases are then forwarded to the DRS staff attorney who supervises the U.S. Attorney referral process. Other cases are handled by investigators and DRS staff attorneys.²⁴⁰

If the complaint goes through the U.S. attorney referral process, the DRS staff attorney forwards the complaint to a paralegal who then contacts the U.S. attorney.²⁴¹ If the U.S. attorney accepts the complaint, the paralegal then forwards the complaint to the Mail/Dockets staff for: (1) entry into CMS, (2) the assignment of a DJ number, and (3) file creation. The paralegal then forwards the complaint to the U.S. attor-

ney. If the U.S. attorney does not accept the complaint, the paralegal returns the complaint to the Supervisory Attorney for Investigation for reassessment.

Alternate Dispute Resolution/Mediation Process

If a complaint is referred to the mediation referral process, the equal opportunity specialist/program analyst checks to ensure that a mediator will be available and a release for referral to mediation is sent to the complainant.²⁴² If the complainant returns the release, the respondent is notified of the referral, and the complaint is then referred to the Key Bridge Foundation for Education and Research. The Key Bridge Foundation is funded by a technical assistance grant from the Department of Justice to train professional mediators on the requirements of the ADA who can then handle DRS cases. The foundation has trained more than 400 mediators from 42 States and the District of Columbia. All mediators accepted into this mediation program must have the following minimum qualifications:

- Completion of an approved mediation training program
- 2 years experience mediating disputes
- Knowledge of the ADA
- Membership in a recognized (national or State) professional dispute resolution organization²⁴³

Other desired qualifications include prior experience mediating civil rights disputes and familiarity with disability issues and disabilities.²⁴⁴

DRS staff does not directly mediate cases.²⁴⁵ If mediation resolves the complaint, the equal opportunity specialist/program analyst closes the complaint, and CTS is updated to reflect the final disposition accomplished. If mediation does

²³⁷ Complaints Processing—DRS Mail Procedure, p. 2. Since April 1998, new complaints have been distributed to a staff member who reviews and summarizes each new complaint and recommends a disposition. DOJ Comments, July 17, 1998, p. 3.

²³⁸ Whisonant interview, p. 2.

²³⁹ Complaints Processing—DRS Mail Procedure, p. 3.

²⁴⁰ Ibid.

²⁴¹ Ibid., p. 4.

²⁴² Ibid.

²⁴³ John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment, "Preliminary Information Request for the Disability Rights Section, Subject: Complaints Processing, Response to Question No. 1," p. 1 (hereafter cited as Complaints Processing). To learn more about the process of mediating ADA complaints, individuals can examine the Key Bridge Foundation for Education and Research's brochure entitled "Want to Resolve Your ADA Complaint? Consider Mediation."

²⁴⁴ Complaints Processing, p. 1.

²⁴⁵ Hill interview, p. 4.

not resolve the complaint, it goes back to the Supervisory Attorney for Investigation for review.

DRS staff refers cases to mediation to reduce reliance on the formal investigation and litigation process.²⁴⁶ Mediation allows complainants to get results independently, without having to wait for DRS to navigate its case through litigation.²⁴⁷ DRS would not mediate in an area where DRS wants to set precedent or where there is a large imbalance of power between parties.²⁴⁸ Mediation is an informal process where an impartial third party can expeditiously help conflicting parties find mutually agreeable and satisfactory solutions to their differences and reach a resolution, while avoiding the expense and delay frequently associated with formal investigation and litigation.²⁴⁹ According to DOJ, mediation brings parties together to (a) settle their differences through "discussion and problem-solving," and (b) achieve "win-win" solutions rather than compromise.²⁵⁰

To determine which specific title II and title III cases to refer to mediation, DOJ considers the nature of the complaint, the availability of a participating mediator in the complainant's general geographic location, and the ability of the

conflicting parties to participate actively in the mediation process.²⁵¹ Cases most suitable to the mediation process address issues such as barriers to building access, lack of accessible parking, denied access to programs or services, lack of alternate formats of written materials, effective communication (e.g., denial of interpreter services or assistive listening devices), and modification of policies.²⁵²

Although DOJ is prepared to resolve title II complaints and other ADA charges through litigation, the Department attempts initially to settle these discrimination cases through alternative dispute resolution.²⁵³ DOJ's 1997-2002 Strategic Plan explicitly mentions that the Department intends to use alternative dispute resolution where appropriate, to prevent litigation.²⁵⁴ Under title II of the ADA, DOJ is required to negotiate a resolution of complaints before starting litigation. Alternative means of dispute resolution, such as mediation and settlement negotiations, are encouraged to resolve claims that allege public entities discriminated on the basis of disability.²⁵⁵ As a result, many title II claims of discrimination have been resolved through these informal methods.²⁵⁶ During 1998,

²⁴⁶ DOJ/CRD, *A Guide to Disability Rights Laws*, p. 3; CRD Performance Plan as Mandated by GPRA; DOJ, "ADA Mediation Program," Aug. 14, 1997, p. 1 (hereafter cited as DRS, "Description of Mediation"). From the start of the mediation program (1993) to the end of fiscal year 1997, DRS offered 475 complainants the opportunity for mediation. Of the 475 complainants, 289 (61 percent) accepted mediation. Therefore, DRS has referred 289 complaints (2.9 percent) of complaints for mediation. Of the 289 complaints referred for mediation, only 20 complaints involved title II matters. DOJ Comments, July 17, 1998, p. 1.

²⁴⁷ Wodatch interview, pp. 5-6.

²⁴⁸ Hill interview, p. 4.

²⁴⁹ DOJ, "ADA Mediation Program," p. 1; DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 9; and DRS, "Description of Mediation," p. 1. Many ADA disputes can be resolved quickly and with minimal expense via the use of competent "ADA-literate" mediators. See DRS, "Description of Mediation," p. 1.

²⁵⁰ DOJ, "ADA Mediation Program," brochure, no date, p. 1 (hereafter cited as DOJ, ADA brochure). Mediation proceedings are confidential and voluntary for all participants in a particular case. The process usually requires multiple meetings between the conflicting parties and their mediator before an ADA case is resolved. In addition, mediators may hold independent, private sessions with one party. See DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 9 and DOJ, "ADA Mediation Program," p. 1.

²⁵¹ DRS, "Description of Mediation," p. 1; and DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 9. A list of the cities with mediators participating in DOJ's program is available through the Internet. See DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 9. As of September 1997, ADA mediators were located in more than 100 cities and 42 States throughout the Nation. See DOJ, "ADA Mediation Program," and DOJ September interview, p. 3.

²⁵² DOJ/CRD, *ADA Quarterly Status Report (January-March 1997)*, p. 9; DRS, "Description of Mediation," p. 1; DOJ, "ADA Mediation Program," p. 1; and DOJ, ADA brochure, p. 2.

²⁵³ NCD, *ADA Watch—Year One*, p. 37; and DOJ, "ADA Mediation Program," Aug. 14, 1997, p. 1; 28 C.F.R. § 35.176 (1997) (ADR encouraged); *id.* §§ 35.173-174 (designated agency must initiate negotiations with public entity to secure voluntary compliance, before referring matter to Attorney General).

²⁵⁴ DOJ, *Strategic Plan 1997-2002*, p. 13; see also 28 C.F.R. § 35.176 (1997) (ADR encouraged).

²⁵⁵ 28 C.F.R. § 35.176 (1997) provides that "the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, is encouraged to resolve [ADA] disputes."

²⁵⁶ DOJ, "ADA Mediation Program," p. 1.

DRS expects to develop policies and procedures for alternative dispute resolution.²⁵⁷

According to DRS, as of December 31, 1997, 322 complaints had been referred to mediation. In terms of subject matter, 204 of these complaints involved barrier removal issues, 66 involved policy modification issues, and 52 involved effective communication. In terms of outcome, 128 complaints had been successfully resolved, 20 were unsuccessfully mediated, 54 were not mediated (due to death of one party, inability to locate a party, etc.), and 120 were still pending.²⁵⁸ Complainants now appear to be more familiar with mediation than when the program began. DRS sends complainants in the initial stages of a case a brochure to explain mediation. Some complainants now request mediation, and other parties refuse it.²⁵⁹

Disability advocates generally give DOJ's mediation program high marks as a good alternative to litigation and recommend it be publicized more.²⁶⁰ In support of alternate dispute resolution, one advocate wrote that "[t]he present method of investigating each complaint... is ineffective and does not work."²⁶¹

Investigation Process

Cases that are not referred to mediation or the U.S. attorney project are investigated, negotiated, and in some cases litigated by DRS staff. As mentioned above, once a privacy release letter is returned to DRS by a complainant, a DRS investigator can begin a substantive investigation. The investigator first identifies the applicable legal requirements, determines if additional information is needed, identifies additional questions that need to be asked, determines the investigative plan, and recommends appropriate relief.²⁶² The investigator then contacts the re-

spondent(s) by telephone or sends a data request.²⁶³ Respondents are contacted by telephone when: (1) the investigator has all of the needed information, (2) the case is not complex, (3) the respondent is unlikely to dispute the facts, (4) the respondent is likely to cooperate, or (5) the case is likely to be resolved quickly and informally. A data request is sent if: (1) the respondent has a different version of the facts, (2) more information is needed, (3) the investigator thinks the respondent may not cooperate, or (4) DRS is seeking a settlement agreement and/or damages.²⁶⁴ According to one investigator, once he has contacted a respondent, he may not return to the case for weeks or months, depending on his caseload. However, backlogged cases and hot issues such as HIV are given priority.²⁶⁵

Investigators conduct site visits as part of their investigation most often in architectural cases, but also may conduct site visits to determine credibility.²⁶⁶ If a site visit is needed, it can be done at any stage of the investigation once the respondent has been contacted. Onsite investigations are normally not done for title II complaints,²⁶⁷ but one investigator did a site visit for a complaint alleging that a doctor refused to treat a patient with AIDS.²⁶⁸

Investigators can start the negotiation process with respondents either over the telephone or in writing. Often when an entity realizes that DOJ has become involved in a complaint, that entity will quickly provide accommodation as required under the ADA.²⁶⁹ After the investigator has negotiated with a respondent, resolution may be accomplished by (1) a letter of findings with no violation, (2) an informal resolution, or (3) a settlement agreement.²⁷⁰ A letter of resolution can be issued if a respondent already has

²⁵⁷ CRD Performance Plan as Mandated by GPRA.

²⁵⁸ Complaints Processing, p. 2.

²⁵⁹ Hill interview, p. 4.

²⁶⁰ See, e.g., Martin letter, attachment, p. 9 ("There is a need to bring attention and applause to DOJ's Mediation Program. It has been demonstrated that mediation can resolve disputes quickly and satisfactorily, without the expense and delay of formal investigation and litigation. Mediation is one of the best ways to handle ADA complaints.").

²⁶¹ Suter letter, enclosure, p. 3.

²⁶² John Wodatch, Chief, DRS, letter to Frederick D. Isler, March 19, 1998, attachment, "Subject: Complaints Process-

ing—Summary of Steps in a DRS Investigation, DRS response to Request for Documents No. 1", p. 1 (hereafter cited as Complaints Processing—Steps in a DRS Investigation).

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Whisonant interview, p. 3.

²⁶⁶ Hill interview, p. 3.

²⁶⁷ Whisonant interview, p. 3; Wolfson interview, p. 2.

²⁶⁸ Wolfson interview, p. 2.

²⁶⁹ Whisonant interview, p. 3.

²⁷⁰ Ibid., p. 4; see 28 C.F.R. § 35.172(a) (1997) (letter of findings); *id.* § 35.173 (voluntary compliance agreements).

undertaken necessary changes. In cases where respondents will have to take significant action to achieve compliance (such as making architectural modifications), DRS staff will draft a settlement agreement.²⁷¹ In cases resolved through negotiation, the parties are informed of the resolution, any necessary monitoring is performed, and the file is closed. CMS is updated to reflect the final action in the case.

If resolution is not accomplished because the respondent does not agree to what DRS wants and negotiations have deadlocked, then a letter of findings with violation is issued.²⁷² Before DRS issues this letter, it will give the entity several chances either to sign or comply with a settlement agreement.²⁷³ This letter is an indepth analysis of the complaint, investigation, evidence, legal requirements, and DRS' conclusion. This letter also gives the respondent one more chance to accept DRS' offer before the case is referred for litigation. Cases referred for litigation must be reviewed by one of the Deputy Chiefs and the Section Chief and, ultimately by the Assistant Attorney General for Civil Rights before a letter of findings is issued.²⁷⁴

Litigation Process

Under the title II regulations, DRS is authorized to initiate litigation that arises from its own investigations and on referral from the seven designated Federal agencies that investigate and resolve ADA complaints.²⁷⁵ In any ADA complaint, DRS' primary objective is to achieve compliance with the statute.²⁷⁶ In general, DRS aims to educate and negotiate, and litigation is a

final resort.²⁷⁷ However, in any case that goes to court, all resources, including civil penalties and compensatory damages, are used to achieve compliance.²⁷⁸

DRS finds out about private litigation that involves title II issues through a number of sources such as advocacy groups, private attorneys involved in the cases, staff in U.S. attorneys' offices, contacts from public speaking engagements, and other continuing contacts. A senior legal counsel also reviews information from a computer research service and disability and health law publications to compile clippings which are circulated to staff.²⁷⁹ Some DRS staff members expressed that a system which could scan all documents filed in Federal courts to identify and alert DRS to title II cases would be ideal. There is a database in existence; however, not all courts are part of its system.²⁸⁰

As of June 1998, DRS staff had initiated litigation under title II in three cases, intervened as a party in nine lawsuits, and filed 33 *amicus* briefs.²⁸¹ DRS resolves some of the cases it litigates at the time a suit is filed or soon afterwards by means of a negotiated consent decree.²⁸² Consent decrees are monitored and enforced by the Federal court in which they are entered.²⁸³ During the 1990s, DOJ was an initiator, intervenor, and an *amicus curiae* in various title II disputes that were resolved via consent decrees.²⁸⁴

The average caseload of DRS attorneys (including pending litigation and monitoring compliance with settlements or consent decrees) is 46 matters.²⁸⁵ The amount of time it takes for

²⁷¹ Hill interview, p. 3.

²⁷² Complaints Processing—Steps in a DRS Investigation, p. 2.

²⁷³ Whisonant interview, p. 4; see 28 C.F.R. § 35.173 (1997).

²⁷⁴ Complaints Processing—Steps in a DRS Investigation, p. 1.

²⁷⁵ 28 C.F.R. §§ 35.174, 35.190(b)(6), 36.503 (1997). See also CRD Performance Plan as Mandated by GPRA; USCCR, *Funding Federal Civil Rights Enforcement*, pp. 25, 34.

²⁷⁶ DRS Staff, DOJ, interview in Washington, DC, Sept. 3, 1997, p. 3. The goal of the Disability Rights Section is to obtain compliance rather than prove that someone has violated the law. See DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997 (statement of Elizabeth Savage, Counsel to Acting Assistant Attorney General), p. 4.

²⁷⁷ DOJ September interview (statement of Wodatch), p. 3.

²⁷⁸ DOJ September interview (statement of Wodatch), p. 3.

²⁷⁹ Wohlenhaus interview, p. 3; Novich interview, p. 3.

²⁸⁰ Nichol interview, p. 3; Wohlenhaus interview, p. 3.

²⁸¹ DRS June 3, 1998, Response, p. 11.

²⁸² DOJ/CRD, *ADA Quarterly Status Report (April-June 1997)*, p. 4.

²⁸³ *Ibid.* A consent decree is a judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing. Upon approval of such agreement by the court, the government's action against the defendant is dropped. See Joseph Nolan et al., eds., *Blacks Law Dictionary* 410 (6th ed. 1990).

²⁸⁴ DOJ/CRD, *ADA Quarterly Status Reports*, various quarters.

²⁸⁵ DRS June 3, 1998, Response, p. 12.

a complaint to be resolved through negotiation and/or litigation varies dramatically from case to case; however, DRS staff indicate that in some instances it could take more than a year.²⁸⁶ Staff acknowledges this is not ideal, but point out the complaint process has improved much in the past 2 years.²⁸⁷

Members of the disability community have criticized DRS for not litigating enough and negotiating or settling too frequently.²⁸⁸ These critics generally believe that DRS should direct more resources toward establishing legal precedent that will be binding on parties in subsequent cases, whereas mediation typically obtains results for only one party. DRS' Section Chief has responded to this criticism by stating that (1) DRS is constrained by the regulations and by Executive Order 12988 to try to resolve cases before litigating, and (2) many in the disability community do not want mediation because they perceive it as "special treatment" provided under the ADA but not to other groups through other antidiscrimination laws.²⁸⁹

According to DRS staff, although DRS has written *amicus* briefs and has intervened as a colitigant in preexisting private litigation, the Department has initiated litigation against public entities under title II in only three cases.²⁹⁰ DRS staff attribute this to the fact that staff cannot litigate complaints falling under the jurisdiction of any of the designated agencies unless the agencies refer such cases to DRS. Thus

far, DRS has received only a few referrals, which may be a symptom of the designated agencies' lack of knowledge of remedies (damages) available under title II.²⁹¹ DRS staff noted this lack of referrals has hampered the Section's enforcement efforts under title II.²⁹² In areas where DRS has original jurisdiction, like courts, State and local governments tend to comply before DRS seeks approval to litigate.²⁹³

According to DRS' Special Legal Counsel, the Section has obtained favorable rulings in every ADA case it has litigated, with the exception of a few cases involving prisons.²⁹⁴ DRS litigation has brought about positive changes in many areas: clarifying curb cuts, ending unnecessary segregation of persons in institutions, ensuring accessibility to anonymous voting for persons with mobility and sight impairments, and eliminating improper mental health inquiries in professional licensing procedures. DRS has won important court rulings defining what types of disabilities, services, and contexts are covered by or trigger obligations to comply with the ADA. DRS has also successfully obtained consent decrees that have had a major effect in clarifying ADA coverage.²⁹⁵

The Special Legal Counsel further sees a distinction that exists between litigation under the ADA and other statutes, since the ADA is much more open ended. New issues are always surfacing because the law is still being developed.²⁹⁶ In terms of developing ADA caselaw, he emphasized that DRS could achieve results in many more areas if it could litigate in cases currently handled by the designated agencies, which are not being referred to DRS.²⁹⁷

²⁸⁶ Hill interview, p. 2.

²⁸⁷ Nichol interview, p. 2.

²⁸⁸ Wodatch interview, pp. 5-6. According to DRS, after a finding of a violation, resolution can take a variety of forms, including informal or formal settlement agreements, consent decrees (approved by a court), or litigation. A decision to litigate is made only where DRS and individuals or entities in violation of the ADA cannot agree on appropriate remedies or on interpretation of the law. In fact, the title II regulation requires that DRS attempt to reach a voluntary resolution of complaints prior to commencing litigation. Also, section 1(c) of Executive Order No. 12988 requires that before pursuing litigation, DOJ should resolve claims informally through discussions, negotiations, or settlements, whenever feasible. DOJ Comments, July 17, 1998, p. 1. See 28 C.F.R. § 35.174 (1997); Exec. Order No. 12988, 3 C.F.R. 158 (1997).

²⁸⁹ Wodatch interview, pp. 5-6.

²⁹⁰ DRS June 3, 1998, Response, p. 11 and attachments 5 and 7.

²⁹¹ Wodatch interview, pp. 5 and 7; Novich interview, p. 3; Breen interview, p. 2. Designated agencies also may not be familiar with 28 C.F.R. § 35.174 (1997). It provides that "if a public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency *shall* refer the matter to the Attorney General for appropriate action." *Id.* (emphasis added).

²⁹² Novich interview, p. 3; Breen interview, p. 2.

²⁹³ Wodatch interview, p. 6.

²⁹⁴ Breen interview, p. 4.

²⁹⁵ *Ibid.*, pp. 3-4.

²⁹⁶ *Ibid.*, p. 2.

²⁹⁷ *Ibid.*, pp. 3-4.

Analysis of Complaint Processing Data

The Disability Rights Section has two databases, a correspondence tracking system (CTS) and a case management system (CMS). All correspondence received by DRS is entered into and tracked by CTS. Only the correspondence accepted for investigation, mediation, and/or litigation is entered into CMS. DRS considers CTS to be a "pretty good" database, but considers CMS to be "an eighties" database.²⁹⁸ CTS is a pilot program, which originated in DRS, that other sections subsequently have started to use.

DRS does not have the same database capability as EEOC. CMS is outdated and runs on a program that only allows DRS to generate "canned" or predesigned reports.²⁹⁹ The most common standard report DRS staff generates from the CMS database is the "OPENLIST" report, which allows staff to assess the date complaints were opened, types of respondents, number of cases per judicial district or State, and the status of the complaint (open, closed, etc.). The CMS database also can create a list of complaints providing the names of staff assigned to them. These reports are produced quarterly or as requested and made available to DRS supervisors. Other reports the CMS database can generate include lists of closed complaints by title and disposition (outcome) and the number of complaints that have been referred to designated agencies.³⁰⁰

With different software, DRS would be able to perform data trend analysis, which it currently cannot do. DRS staff has discussed the merits of a database that would be more efficient and effective.³⁰¹

According to data received from DRS, a total of 10,065 complaints was entered into DRS' CMS database between fiscal year 1992 and fiscal year 1997.³⁰² This figure is an aggregate of complaints received under titles I, II, and III.³⁰³ Between fiscal year 1993 and fiscal year 1997, the

average number of title II complaints opened was 726. This number excludes complaints referred to other designated agencies. The average number of complaints referred to designated agencies was 590, and the average number of investigations completed, including disposition of referrals, was 503.³⁰⁴

The database appears to have numerous errors. Some of the variables listed in the dataset do not contain values. In some instances, nearly three-fourths of the complaints have data fields that are empty. Reasons for missing data values include: (1) data values just were not entered, (2) the values may not have been known at the time the complaint was entered into CMS and no update was done, and (3) values just were not identified for some cases.³⁰⁵ If DRS ever acquires the capability to perform data analysis, it is crucial that it have a reliable database with as few missing values as possible. The State in which the complaint was filed is the only variable for which there are no missing values.

TABLE 2.1
Top States from Which Complaints Are Filed

State	Complaints	Percentage of all complaints
Total	10,065	100.0
California	1,022	10.2
Florida	701	7.0
New York	673	6.7
Texas	668	6.6
Michigan	423	4.2
Pennsylvania	404	4.0
Colorado	330	3.3
Virginia	326	3.2
Illinois	323	3.2
Ohio	323	3.2
Georgia	285	2.8
11-State total	5,478	54.4

Source: DOJ, DRS, Cordmain Data File.

According to data received from DRS, 11 States accounted for more than half of all title I,

²⁹⁸ Searing interview, p. 3.

²⁹⁹ Ibid., p. 2-3.

³⁰⁰ DRS June 3, 1998, Response, p. 7.

³⁰¹ Searing interview, p. 2.

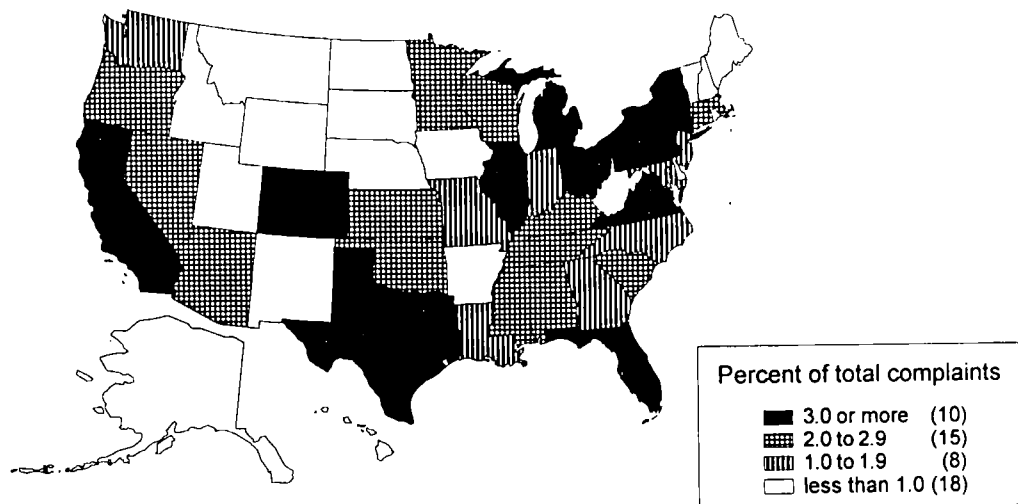
³⁰² DOJ, DRS, Cordmain Data File (hereafter cited as Cordmain data file).

³⁰³ The format of the data does not allow us to separate complaints by title.

³⁰⁴ DRS June 3, 1998, Response, p. 11. Fiscal year 1992 data are not included because the low number of cases not referred would skew the average. Ibid.

³⁰⁵ Shirley Hillgren, Contractor, CRD, DOJ, FAX, p. 1

FIGURE 2.1
Complaints by State



Source: DOJ, DRS, Cordmain Data File.

II, and III complaints entered into CMS between fiscal year 1992 and fiscal year 1997 (table 2.1). More than 10 percent of all DRS complaints came from California, which had a population of well over 31 million people in 1992.³⁰⁶ California also has a history of active disability rights groups.³⁰⁷ New York, Texas, Pennsylvania, and Florida also accounted for a high proportion of complaints (figure 2.1). All four of these States also had relatively large populations of 12 to 18 million people in 1992.³⁰⁸ More complaints come from metropolitan areas, such as big cities like Chicago.³⁰⁹ Communities with independent living

centers are more active in filing title II complaints.³¹⁰

Regionally, the largest proportion of all complaints filed (37 percent) comes from the South, although Southern States such as West Virginia, Delaware, and Arkansas each accounted for less than 1 percent of total complaints (figure 2.1).³¹¹ Only 18 percent of all complaints were filed from the Northeast. Less than 1 percent of all complaints were filed from highly rural northeastern States such as Maine, New Hampshire, and Vermont (figure 2.1). Midwestern States such as Nebraska and Iowa were least likely to have complaints filed (figure 2.1).³¹²

³⁰⁶ Cordmain data file; U.S. Department of Commerce, Bureau of the Census, *County and City Data Book: 1994*, Washington, DC, Table A. States, p. 2. (hereafter cited as *1994 County City Data Book*).

³⁰⁷ Nichol interview, p. 2.

³⁰⁸ *1994 County City Data Book*.

³⁰⁹ Bowen interview, p. 2.

³¹⁰ Nichol interview, p. 2.

³¹¹ Data used in this figure is based on the total number of title I, II, and III complaints.

³¹² Bowen interview, p. 2.

The DRS database shows the disability for 2,315 complaints (table 2.2).³¹³ Slightly more than 30 percent of these complaints were from individuals with a mobility impairment, either ambulatory or nonambulatory. Twenty percent of the complaints were based on the complainants being deaf or on a medical-related basis. Complaints also were filed by persons with other disabilities, such as blindness, hard of hearing, mental illness, and learning disability. Fewer than 1 percent of complaints were from individuals with mental retardation or speech impairment.

Inaccessibility, service delivery, auxiliary aids, government offices, and prisons were some of the issues raised in the complaints filed. Some complaints identified only one issue, but it was possible for a complaint to be

based on several issues.³¹⁴ There were 5,228 title II and title III complaints that raised issues about government buildings, prisons, public buildings, law enforcement, and courts, due in part to their lack of accessibility (figure 2.2).³¹⁵

Issues indicating inaccessibility accounted for 25 percent of complaints. More than 48 percent of complaints filed indicated that service delivery was an issue. Although DRS stated that it has done a lot of work in the area of courthouse accessibility,³¹⁶ nearly 7 percent of complaints indicated courthouses as an issue. Another issue that frequently arises under courthouses is auxiliary aids, such as interpreters, with 7 percent of complaints indicating auxiliary aids as an issue. Professional licensing, an issue that has garnered much attention, is not identified in DRS' database. Most title III complaints were filed against service establishments, places of lodging, and places of exhibition or entertainment. Complaints against these types of public accommodations often are due to individuals not being able to gain access. Nearly 22 percent of 2,657 complaints involved service establishments, 17 percent involved places of lodging, and 16 percent of complaints involved sales or rental establishments.

The types of discrimination for which complainants filed title III cases included policies, existing facilities, and auxiliary aids. Almost 50 percent of 2,665 complainants indicated that existing facilities were a problem.³¹⁷ In terms of existing buildings, DRS has been active in cases involving public places, such as supermarkets and theaters.³¹⁸

TABLE 2.2
Disability of Complainant

Basis	Complaints	Percentage of complaints
Total	2,315	100.0
Alcohol	12	0.5
Blindness	117	5.1
Contagious disease	1	0.0
Deaf	457	19.7
Drugs	1	0.0
Environmental sensitivity	71	3.1
Hard of hearing	135	5.8
HIV/AIDS	85	3.7
Learning disability	95	4.1
Low vision	38	1.6
Medical	452	19.5
Mental illness	142	6.1
Mobility impairment—ambulatory	274	11.8
Mobility impairment—nonambulatory	427	18.4
Mental retardation	2	0.1
Speech impairment	4	0.2
Other disability	2	0.1

Source: DOJ, DRS, Cordmain Data File.

³¹³ Cordmain data file.

³¹⁴ Ibid.

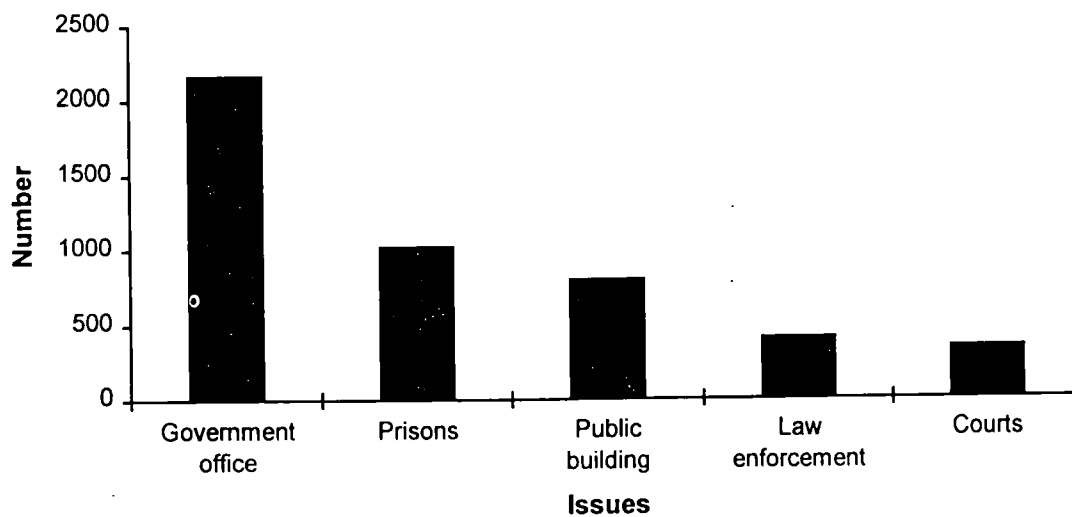
³¹⁵ Ibid.

³¹⁶ Nichol interview, p. 3.

³¹⁷ Cordmain data file.

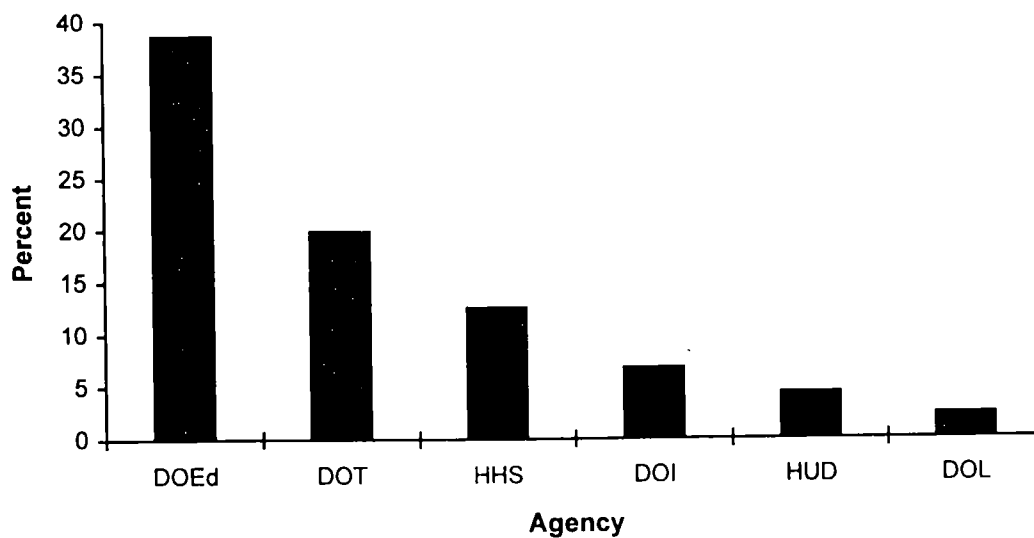
³¹⁸ Wodatch interview, p. 2.

FIGURE 2.2
Issues Addressed in Complaints



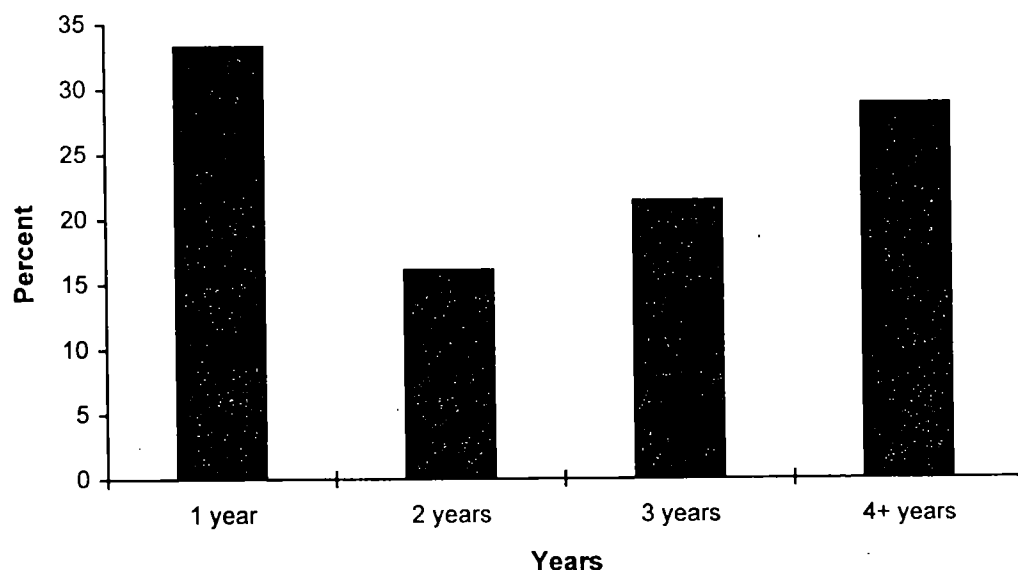
Source: DOJ, DRS, Cordmain Data File.

FIGURE 2.3
Agency to Which Complaints Were Referred



Source: DOJ, DRS, Cordmain Data File.

FIGURE 2.4
Length of Time Complaint Has Remained Open



Source: DOJ, DRS, Cordmain Data File.

DRS referred 1,298 complaints to six of the seven designated agencies.³¹⁹ Nearly 40 percent of these complaints were referred to the U.S. Department of Education and 13 percent were referred to the U.S. Department of Health and Human Services (figure 2.3). Any complaints dealing with education systems, including school buildings other than health-related schools, are referred to the Department of Education. The Department of Health and Human Services receives complaints that

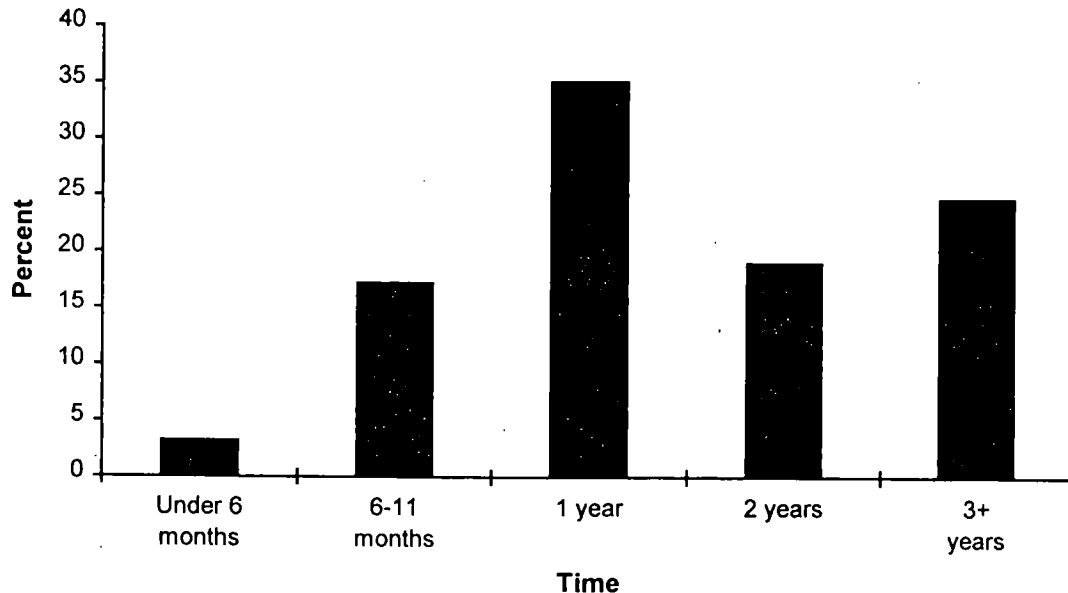
involve health-related schools, preschool and daycare programs, and other health care and social service providers and institutions. According to DRS' data base, the U.S. Department of Agriculture is the only designated agency to which it has not referred complaints.

There is concern that DRS does not open all complaints for investigation due to limited resources, including the short supply of investigative staff. The limited number of investigators also has had a negative effect on how long it takes for a complaint to be resolved. Of the 10,065 complaints entered into DRS' database between fiscal year 1992 and fiscal year 1997, more than 5,444 complaints, accounting for 54 percent of all complaints, were still open as of December 1997.³²⁰ Of the 5,444 complaints

³¹⁹ The number of complaints referred to designated agencies is based on the analysis of DRS' data file. According to a memo from DOJ, DRS has referred 3,366 title II complaints to other designated agencies, which is 49 percent of total title II complaints. If DRS had received complaints that were within the Department of Agriculture's jurisdiction, those complaints would have been referred. DOJ Comments, July 17, 1998. The designated agencies are those charged with overseeing title II compliance of State and local governments.

³²⁰ Cordmain data file.

FIGURE 2.5
Length of Time to Close Complaints



Source: DOJ, DRS, Cordmain Data File.

that remained open, 33 percent had been open for 1 year and 29 percent had been open for 4 or more years (figure 2.4).

DRS indicates that on average more than 18 months passes between the time a complaint is received and when the complaint is investigated and resolved through negotiations or recommended for litigation.³²¹ Some complaints have closed within a couple of months and some complaints have taken more than 5 years to resolve. Among the 4,621 complaints that were closed between fiscal year 1992 and fiscal year 1997, 35 percent were resolved within 1 year (figure 2.5). Although DRS indicated that the time it takes to resolve complaints has decreased, 25 percent of closed complaints took 3 or more years to resolve.³²²

Before DRS established its current group of approximately 15 investigators, the investigative staff was overloaded with too many cases (100 or more).³²³ This and other factors led to a backlog of cases. Some DRS staff feels that investigators are more efficient and effective in resolving complaints if caseloads are limited to less than 60 active cases at any one time.³²⁴ Currently, DRS investigators have average caseloads of 35 to 55 active cases.³²⁵ In addition, each attorney has an average caseload of 46 matters, which includes cases where compliance with consent decrees and settlement agreements is being monitored.

³²¹ Searing interview, p. 5.

³²² Searing interview, p. 5; Cordmain data file.

³²³ Searing interview, p. 5.

³²⁴ Ibid.

³²⁵ Wolfson interview, p. 2; Whisonant interview, p. 4.