MEMORANDUM

OFFICE OF THE VICE PRESIDENT

WASHINGTON

January 20, 1984

MEMORANDUM FOR FAITH WHITTLESEY
JIM CICCONI

FROM: C. Boyden Gray CBG

SUBJECT: 504 regulations and Brad Reynolds

The potential political problem with the 504 regulations arises out of a public perception that Reynolds is applying a different and less stringent standard to the federal government's own facilities (the so-called "federally-conducted" programs) than to public programs funded in part by the government (the so-called "federally-assisted" programs). The issue revolves specifically over the "undue burden" defense that operators can assert to avoid making unreasonable expenditures (such as $1.7 billion subway retrofit of the New York City subway).

In 1981 the Task Force on Regulatory Relief began reviewing the federally assisted program regulations issued by the Carter Administration to implement Section 504's discrimination against the handicapped (the Carter Administration never issued the federally-conducted regulations). The regulations are complicated, because the question is not how to avoid deliberate discrimination, but how to determine how much money must be spent (for ramps, wheelchairs, high-tech vision and hearing aids, etc.) to "accommodate" a handicapped person who is "otherwise qualified" by education, experience and skills for a particular benefit or job.

A very important factor in this determination is the Supreme Court's 1978 decision in the Davis case, which held that a deaf woman was not qualified for a nursing school program and that the state did not have to change its nursing qualifications to allow her admission to the nursing school. The decision also contains dicta to the effect that an operator of a federally-funded program can refuse to make an accommodation if it would "create an undue administrative and financial burden." (The question decided in the Davis case, however, was whether a deaf person can ever be qualified to be a nurse in view of her inability to perform in operations and other important functions without hearing, not whether a school would have to spend extra funds to train a nurse of sharply limited abilities.)

In reviewing the 504 federally-assisted regulations, Reynolds and I tried to negotiate with the handicapped leaders to formulate precise language for the revised 504 regulations that would codify the Davis case. We actually agreed on language, but in the end the handicapped community balked at putting a specific reference to "undue burden" in the regulations because "undue burden" has become such a politically sensitive concept. Accordingly, we all decided ultimately to issue a statement through the Vice-President (attached) that we were leaving the original regulations, as interpreted by the courts, unchanged. This left Reynolds the option to continue to argue in court for a broad reading of the Davis undue burden defense.

Some months later Reynolds issued a suggested model regulation for all of the federal agencies' federally-conducted regulations which they are under court order to propose. This model, and the subsequent regulations which 20 agencies have by now proposed, all contain an "undue burden" defense that does no more than repeat the very brief language from Davis, with the preamble spelling out what the defense means in more detail.

The handicapped community objects to this codification of the undue burden defense. The objection is on perception grounds, since they concede that the defense does no more to curb their benefits under federally-conducted programs than the Davis case - on which the defense is based - already does to the federally assisted programs. In other words, they concede the obvious - that Reynolds is entitled to apply the Davis undue burden concept to federally conducted programs as forcefully as to federally assisted programs, but they resent bitterly his insistence on symbolically and publicly clubbing them over the head with the concept by flagging it explicitly in the text of the federally conducted regulations.

Reynolds' answer is that it is irresponsible, if not impermissible, to refuse to codify a Supreme Court decision in new regulations to which it applies. He has not, however, adequately explained why it is not sufficient simply to refer to Davis in the preamble to the regulations, especially since the new regulations already use the preamble to explain what the regulations' reference to undue burden in fact means. The handicapped community would, I think, accept a reference to Davis in the preamble.

THE VICE PRESIDENT
WASHINGTON

March 21, 1983

Mr. Evan Kemp, Jr.
Executive Director
Disability Rights Center, Inc.
1346 Connecticut Avenue, N.W.
Suite 1124
Washington, D.C. 20036

Dear Evan:

In view of your personal concerns with possible modifications to the Section 504 coordination guidelines under the Rehabilitation Act of 1973, this is to advise you that the Department of Justice and the Presidential Task Force on Regulatory Relief have concluded their review and have decided not to issue a revised set of coordination guidelines.

This decision brings to a close a lengthy regulatory review process during which the Administration examined the existing regulatory structure under Section 504, studied recent judicial precedents and talked extensively with Members of Congress and of the handicapped community. Especially important were the personal views and experience of those most directly affected by these regulations. The comments of handicapped individuals, as well as their families, provided an invaluable insight into the impact of the 504 guidelines.

A full evaluation of all the information brought to bear on this subject prompted the conclusion that extensive change of the existing 504 coordination regulations was not required, and that with respect to those few areas where clarification might be desirable, the courts are currently providing useful guidance and can be expected to continue to do so in the future. In these circumstances, the Administration has decided not to proceed with its planned issuance of a revised set of proposed coordination guidelines.

I would like to thank you for your personal participation in this regulatory review process. Your commitment to equal opportunity for disabled citizens to achieve their full potential as independent, productive citizens is fully shared by this Administration and has the strong personal support of both the President and me. I hope you will continue to keep me informed of any developments in this area of such vital importance to our nation.

Sincerely,

George Bush

Public Law 94-142 and Section 504
and Position of
The President's Committee on Mental Retardation-

WHEREAS, disabled children and adults have historically been denied the right to obtain a meaningful education, appropriate vocational training, and access to basic human services, and have been relegated to a role of dependency and a loss of human dignity; and

WHEREAS, The Education of All Handicapped Children Act, Public Law 94-142, was passed into law to guarantee disabled children a right to a free public education provided in conjunction with specific related services which would allow them to have an equal educational opportunity; and

WHEREAS, Section 504 of the 1973 Rehabilitation Act guarantees that as these disabled children grow into adulthood, they will be provided with equal access to the educational, training, employment, social services, transportation and housing services available to the nondisabled; and

WHEREAS, the implementation of both of these laws through federal regulations over the last five years has resulted in greater opportunities for meaningful educational programs for over 4 million disabled children throughout the country, and uncounted numbers of disabled adults from lives of total dependency and low self-esteem to productive lives through increased employment and training opportunities and expanded avenues to social services and community life; and

WHEREAS, the premise that some disabled persons would not be able to benefit from meaningful educational and training opportunities, and that a determination should be made regarding the extent to which disabled people would either benefit from or contribute to the operations of a program in a manner which would be "socially beneficial" to all parties, speaks to age-old prejudices against the disabled, denies them basic human dignity, and is antithetical to the concept of equal citizenship; and

WHEREAS, these two laws were passed because similar protections were not and are not available through existing states' statutes;

THEREFORE, BE IT RESOLVED that the President's Committee on Mental Retardation reaffirms their strong commitment to retaining the existing laws and regulations pertaining to Public Law 94-142 and Section 504 in substantially their present form, and encourages the President to take a positive and public stand to halt all efforts to change these laws through regulatory and legislative reform that would adversely affect mentally retarded citizens. Through these laws, the way has been cleared for preparing a large segment of our society to moving from lives of dependency to greater independency by becoming tax-paying citizens. Public Law 94-142 and Section 504, and their implementing regulations constitute an investment, rather than a burden, to society.

Friday, June 25, 1982
Washington, D. C.
(18-1)

THE WHITE HOUSE

WASHINGTON

January 19, 1984

MEMORANDUM FOR JAMES CICCONI

FROM: JUDI BUCKALEW

SUBJECT: MEETING PERTAINING TO SECTION 504

I have arranged a meeting to be held on January 20, 1984 at 4:30 p.m. in Jack Courtemanche's office in the Old Executive Office building.

The purpose of the meeting is to bring the White House Staff together with W. Bradford Reynolds to discuss the possibility of altering or withdrawing the Section 504 regulations.

The attendees at the meeting are:

1. Faith Whittlesey
2. Jack Courtemanche
3. W. Bradford Reynolds, Department of Justice
4. James Cicconi, Special Assistant to the President
5. Robert Sweet, Office of Policy Development
6. Paul Simmons, Office of Policy Development
7. Robert Veeder, Office of Management and Budget
8. Boyden Gray, Counsel to the Vice President
9. Dr. William Roper, Office of Policy Development
10. Judi Buckalew

THE WHITE HOUSE

WASHINGTON

January 18, 1984

MEMORANDUM FOR JAMES CICCONI

FROM: JUDI BUCKALEW

SUBJECT: HANDICAPPED COMMUNITES RESPONSE TO RECENT JUSTICE DEPARTMENT 504 REGULATIONS

There has been an outcry from the handicapped community over regulations published by the Justice Department on December 16, 1983. Active and open Nation-wide opposition to these regulations will commence soon, on a level that will equal or surpass the reaction to the Special Education Regulations (P.L. 94-142). The trust of the opposition by the disabled community will focus on the "fairness"issue.

The proposed regulations were issued to implement the 1978 Admendments to Section 504 of the Rehabilitation Act, which extended Section 504 to programs and activities conducted by the Federal Agencies. Section 504 of the Rehabilitation Act is ver brief and essentially states that: "An individual's rights shall not be denied on the basis of a handicapping condition." Since protection of a handicapped citizens rights are not contained in any other piece of legislation, the handicapped community zealously embraces Section 504 and considers it sacrosanct. My point is that this program elicts highly emotional reactions within the disabled community.

The concern is over the issue of "undue burden". Basically the Justice Department is saying that it will support the guarantee contained in Section 504, as long as in doing so, it does no impose any undue burden on the agency.

The determination of undue burden is left to the agency. The Justice Department's decision to implement Section 504 based on a determination of undue burden contradicts a number of things:

1. A promise, made in March, 1983, in writing , from the Vice President that these regulations would not be revised to include undue burden. (See enclosed Letter)

2. A recent court decision (Davis vs Southeastern Community College) that ruled that revisions of the Section 504 regulations were not required, nor did they invalidate Regulations published by the Department of Health and Human Services which did not contain undue burden stipulations.

I am attaching copies of a newsletter that the Disability Rights, Education and Defense Fund recently distributed to it's members. It contains a concise discription of the disabled community's objectives in regard this matter.

As I mentioned earlier, the issue at hand is the unfairness that the disabled feel when undue burden is added. In addition, they feel betrayed since they were promised by the Vice President that the regulations would not be issued.

PRESIDENT'S COMMITTEE ON MENTAL RETARDATION
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of Human Development Services
Washington, D.C. 20201

January 19, 1984

Mr. James Cicconi
Special Assistant to the President
Special Assistant to the Chief
of Staff
The White House
Washington, D. C. 20500

Dear Mr. Cicconi:

It has been brought to my attention that the Department of Justice has recently issued departmental regulations for Section 504 of the Rehabilitation Act of 1973. These regulations are substantially less demanding than those in effect for non-governmental agencies and are due to take effect sometime after the comment period ends in April, 1984.

As you remember there was a great deal of controversy last Spring when the Justice Department was preparing to issue proposed changes in 504 regulations for federally assisted agencies. At that time the Committee passed a Resolution which I have enclosed. We passed this Resolution in June, 1982 and have reaffirmed this position at all subsequent meetings. When it was announced that the proposed changes would not be issued the groups who represent handicapped individuals were indebted to the Administration.

Now they are very concerned again, claiming they have been let down. They believe that not only are the Justice Department's own regulations unfair to handicapped persons, but they set a poor example for what the Administration expects from non-federal agencies.

We believe there is justification for these groups to feel the way they do. We believe the Administration should maintain the same regulations for federal agencies as those in effect for agencies receiving federal assistance. We urge the withdrawal of the Justice Department's proposed regulations on 504.

Another factor which causes additional concern to groups of handicapped people is the phrase "undo burden" when used in reference to making changes to meet the needs of the handicapped. They believe it is an insult to the considered "burdensome." We would urge you to delete this phrase from official Administration use.

Sincerely,

Dorothy C. Clark

(Mrs.) Dorothy C. Clark
First Vice Chairperson

Enclosure

DREDF

Disability Rights Education and Defense Fund, Inc.

LAW, PUBLIC POLICY, TRAINING AND TECHNICAL ASSISTANCE

2032 San Pablo Avenue
Berkeley, California 94702

(415) 644-2555
(TDD) 644-2629

:6 Connecticut Avenue N.W.
Suite 1124
Washington, D.C. 20036

(202) 659-4684
(voice or TDD)

ALERT BULLETIN! ALERT BULLETIN! ALERT BULLETIN!

JUST WHAT YOU ALWAYS WANTED FOR X-MAS!

DEPARTMENT OF JUSTICE PROPOSES UNDUE BURDEN DEFENSE UNDER SECTION 504 FOR FEDERALLY CONDUCTED PROGRAMS ON DECEMBER 16, 1983

WHAT DOES THIS MEAN?

It means that the federal government can refuse to integrate disabled people because some agency official thinks it costs too much or will be too much of an administrative hassle.

Under the heading of Program Accessibility, the proposed regulation states that this requirement: "does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens."

The whole concept of program accessibility is already a compromise to full and equal access. The existing program accessibility requirements in the recipient regulations provide more than enough flexibility. The federal government should be a model of accessibility The undue burden defense encourages the kind of short sightedness which has served to exclude disabled people from participation in society.

WHAT IS A FEDERALLY CONDUCTED PROGRAM?

The "federally-conducted"Section 504 regulations cover the day to day operations of the federal agencies themselves, as well as all programs administered by the agencies for program beneficiaries such as social security, veterans benefits, park services, etc.

In 1978, Section 504 was amended to include the programs and activities conducted by the federal government itself. Previously, Section 504 only applied to programs which received federal financial assistance, such as hospitals, schools, cities, etc. There are currently no Section 504 guidelines or regulations for "federally-conducted"programs. Since the Department of Justice (DOJ) is the lead federal agency under Section 504, it is expected that all of the other federal agencies will publish regulations which are virtually identical to the DOJ regulation proposed on December 16, 1983.

DOES THIS PROPOSED REGULATION ALSO COVER RECIPIENTS OF FINANCIAL ASSISTANCE FROM FEDERAL AGENCIES?

No. The existing Section 504 regulations published in 1977-1978 cover programs and activities which receive federal financial assistance ("recipient regulations"). After an 18-month review the Presidential Task Force on Regulatory Relief concluded that there was no need to revise the Section 504 recipient regulations. The addition of an undue burden defense was specifically rejected.

After receiving thousands of letters from across the country, on March 21, 1983 Vice President Bush announced the halt of the de-regulation campaign and assured the disabled community that the:

> "commitment to equal opportunity for disabled citizens . . . is fully shared by this Administration and has the strong personal support of both the President and me."

THE UNDUE BURDEN DEFENSE IN THE DECEMBER 16, 1983 PROPOSED FEDERALLY-CONDUCTED 504 REGULATION MEANS

EITHER THAT

1) The Department of Justice is imposing less obligation on the Federal government than on the recipients of federal funds

OR

2) Attorney General for "Civil Rights", Brad Reynolds, is taking a second stab at Section 504 by trying to undermine the victory of the disabled community which was announced by the Vice President on March 21, 1983.

IN EITHER CASE IT IS UP TO YOU

to stop this set-back from becoming permanent

WE CAN DO IT --
WE'VE DONE IT BEFORE --

When the Administration threatened to put an undue burden defense in the Section 504 recipient regulations the Administration received thousands of letters from disabled people and friends all over the country.

We need to do the same thing again. We need to let Brad Reynolds and the Reagan Administration know that:

WE ARE STILL WATCHING!

WHAT TO DO

Please send in the attached sample letter, with a copy to the President. (Fill in your interest in the regulations, i.e., I am a disabled person; a parent; an advocate, etc.). Or better yet, write your own and tell the Administration how you or your clients or members could be affected! An analysis of the December 16, 1983 proposed regulations and copies of the regulations themselves are available from DREDF (Berkeley) upon request. DREDF will also prepare official comments which will be available for distribution. The comment period ends on April 16, 1983. But, please, send your protest letter NOW.

W. Bradford Reynolds
Assistant Attorney General
for Civil Rights
U.S. Department of Justice
Washington, D.C. 20013

Dear Mr. Reynolds:

I am
I was shocked and appalled to learn that the Department of Justice has included a broad undue burden defense in the proposed Section 504 regulations for programs and activities conducted by the Department of Justice published on December 16, 1983. In March of this year, I was informed that the Vice President had announced that "the Department of Justice and the Presidential Task Force on Regulatory Relief have concluded their review and have decided not to issue a revised set of Section 504 coordination guidelines."

If it was not necessary to include a broad undue burden defense at that time, then it is not necessary now. Either DOJ is imposing a lesser requirement on the federal government than on recipients of federal aid or you are trying to undermine the important victory for disability civil rights announced by Vice President Bush. Both are unacceptable!

The federally-conducted Section 504 regulations should follow the recipient regulations which you so recently approved. The December 16, 1983 proposal must be withdrawn!

Sincerely,

_____

_____ (address)

_____

cc: President Reagan
White House
Washington, D.C.

DREDF
Disability Rights Education and Defense Fund, Inc.

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DEPARTMENT OF JUSTICE PROPOSES SECTION 504 REGULATION FOR ITS OWN PROGRAMS AND ACTIVITIES WHICH IS WEAKER THAN THE EXISTING SECTION 504 REGULATIONS FOR RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

BACKGROUND

On April 15, 1983, DOJ issued to 91 federal agencies a prototype regulation implementing the 1978 amendments to Section 504 which extended Section 504 to programs and activities conducted by the federal executive agencies and the U.S. Postal Service.* Consistent with this prototype, on December 16, 1983, DOJ published a proposed Section 504 regulation governing the programs and activities of DOJ itself. 48 Fed. Reg. 55996.

The "federally-conducted" regulations are distinct from the recently reaffirmed 1978 Section 504 guidelines covering recipients of federal financial assistance ("recipient regulations"). There are currently no guidelines or regulations governing enforcement and implementation of Section 504 by programs conducted

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* DOJ is under court order to issue "federally-conducted" regulations; Williams v. USA, U.S.D.C. CD Calif. #80-5368-WPG.

by the federal government itself. The 1978 amendments require each agency to publish Section 504 regulations governing its own programs ("federally-conducted" regulations).

As amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub.L. 95-602, 92 Stat. 2982), Section 504 of the 1973 Rehabilitation Act provides that:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*

The DOJ proposed regulation is expected to be adopted verbatim by the other federal agencies, with adjustments in specialized areas of concern to the particular agency. Each federal agency is then expected to publish an agency-specific proposed regulation in the Federal Register for comment.

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* The 1978 amendment language is underlined

The DOJ Prototype Section 504 Regulation for "Federally-Conducted" Programs Provides Less Civil Rights Protection for Disabled People than the Recently Reaffirmed 1978 Section 504 Guidelines for Recipients of Federal Financial Assistance.

The key objection to the DOJ prototype regulation is its incorporation of an across the board "undue administrative or financial burden" defense to program accessibility.* The prototype regulation provides:

> (a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not . . .
>
> (3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such a burden but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity. (28 CFR §39.150(a)(2)**

This language is inconsistent with the recently reaffirmed 1978 Section 504 guidelines for recipients of federal financial

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* This is not a section-by-section analysis of DOJ's prototype rule. Rather, this memorandum sets forth the key policy and political objections to the incorporation of an across the board "undue burden" defense and highlights other major problems.

** Identical language appears in the section entitled Communications (38 CFR §39.160(e)).

assistance. For over 18 months DOJ reviewed the 1978 "recipient" guidelines. Every DOJ draft of revisions to those guidelines contained some formulation of the "undue burden" defense. This was the major rallying point for disabled people who objected strenuously to the incorporation of any undue burden language in the guidelines.

On March 21, 1983, Vice President Bush announced that:

> the Department of Justice and the Presidential Task Force on Regulatory Relief have concluded their review and have decided not to issue a revised set of coordination guidelines.

Vice President Bush assured the disabled community that the:

> commitment to equal opportunity for disabled citizens to achieve their full potential as independent, productive citizens is fully shared by this Administration and has the strong personal support of both the President and me.

Hence, the incorporation of an undue burden defense in the guidelines was rejected by the Administration. This represented the major victory for the disabled community.

In spite of Vice President Bush's announcement, DOJ has incorporated the undue burden language in its "federally-conducted" proposed regulation. As stated by DOJ in the preamble to the proposed regulation:

> This regulation adopts the program accessibility concept found in the existing Section 504 coordination regulation for programs or activities receiving federal assistance (28 CFR 41.56.58, with certain modifications . . . However, Section 39.150 unlike [the federal recipient guidelines] places explicit limits on the agency's obligation to ensure program accessibility (Section 39.150(a)(2)). (Emphasis added. 48 Fed. Feg. 55998).

At a minimum, the two sets of guidelines ("federally-conducted" and "recipient") should be consistent. If anything the federal government should be a model of accessibility, held to more stringent standards than recipients of federal assistance. The federal government must not be allowed to exclude "qualified handicapped" people from its programs because they will be a "burden."

Moreover, Congress clearly intended that the Section 504 regulations governing activities of the federal government should be consistent with the regulations governing recipients of federal assistance. See, 124 Cong. Rec. 13,901 (1978) remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id; 124 Cong. Rec. 13, 897 (remarks of Rep. Brademas); id at 38, 552 (remarks of Rep. Sarasin).

Analysis of Fundamental Alteration and Undue Burden Language

The incorporation of an "undue burden" defense codifies prevalent assumptions and stereotypes that the participation of disabled people will be "burdensome." Undue burden is not

defined. It is left to the whim of agency officials and bureaucrats to decide whose participation will cause an "undue" burden. Any disabled person, through experience, knows what this means--arbitrarily decision making based on ignorance and prejudice. Disabled people are supposed to be "grateful" for any effort made to include them and "understand" when they are excluded. In these hard times, the codification of an undue burden defense will surely be used to bolster arguments that have always been used to exclude disabled people. The lack of guidance encourages fiscal short-sightedness. A short-term "burden" will in most cases be a long-term benefit.

DOJ states in the preamble that the "undue burden" language is in response to Davis v. Southeastern Community College. However, incorporation of the undue burden defense in program accessibility is an overly-broad and wholly unnecessary application of Davis. First, as noted above, after an 18-month review DOJ and the Administration announced that revisions on the Section 504 regulations were not required by Davis. Second, it should be noted that the Supreme Court in Davis did not choose to invalidate the HEW regulations or to require that they be modified. In fact, DOJ published its own recipient regulations which are identical to the 1977 HEW regulations one year after the Davis decision. Third, Davis did not involve a program of the federal government. The federal government should be held to the highest standards of accessibility and non-discrimination.

Finally, the situation in Davis is clearly distinguishable from program accessibility. In Davis, a deaf woman was found not to be qualified because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that if the clinical training requirements were waived, Ms. Davis "would not receive even a rough equivalent of the training a nursing program normally gives". Id at 410.

Program accessibility does not involve the question of qualification. It is a concept which simply assures that disabled people will not be totally barred from participating in or benefitting from a program because it is inaccessible.

The very concept of program accessibility is an implicit cost standard. Program accessibility, by its very nature, is a compromise to full and equal access. A recipient may comply with the existing program accessibility requirements,

> through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate facilities . . . or any other method that results in making its program or activity readily accessible to and usable by handicapped persons. A recipient shall not be required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. 28 C.F.R. Section 41.220(b)(1).

Surely the federal government does not need more flexibility than currently allowed. The overlay of an undue burden defense is a clear signal to the federal agencies that Section 504 requires only limited efforts to accommodate.

Finally, the "fundamental alteration" language of Davis is inappropriately applied across the board in program access. In Dopico v. Goldschmidt, Dec. No. 81-6172 (2nd Cir., Sept. 2, 1982) the Second Circuit correctly distinguished Davis in a transportation context:

> . . . plaintiffs do not seek fundamental changes in the nature of a program by means of alterations in its standards . . . The existing barriers to the "participation" of the wheelchair-bound are incidental to the design of facilities and the allocation of services, rather than being integral to the nature of public transportation itself, just as a flight of stairs is incidental to a law school's construction but has no bearing on the ability of an otherwise qualified handicapped student to study law.

Making a program accessible does not change the fundamental nature of a program. Using this language in program accessibility seriously confuses, expands and distorts its use in the Davis case.

Analysis of New Qualified Handicapped Person Definition

Similarly, Davis is applied over-broadly in a new definition of qualified handicapped person which provides:

28 CFR §39.103

> With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that would result in a fundamental alteration in its nature; . . .

The range of programs that this definition would apply to is unclear. Again, Davis does not require a revision in existing definitions.* Davis involved a situation where the plaintiff had not met stated eligibility standards that the Court ruled were essential to the nature of the clinical training program at issue. The holding was thus fully addressed by the "essential eligibility criteria" standard in the existing Section 504 recipient regulations.

The "fundamental alteration" language codifies the exception rather than the rule. Again, the danger is that this type of codification will reinforce existing stereotypes.

Most importantly, the questions of "qualification" and "modification" should be separate inquiries. A disabled person should be deemed "qualified," if like any other applicant, s/he meets the essential eligibility requirements. At that point, inquiry can be made as to the type of accommodation, if any, which is needed in order for the person to participate in the program. These inquiries must be separated in order to ensure that the disabled applicants' qualifications are fairly evaluated. This two-step process is recognized in the Section 504 recipient regulations on employment. An applicant for employment can be given a physical examination only after an offer has been made.

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* The corresponding definition in the HEW regulations provides: "with respect to post secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."

Without this protection, it would often be impossible for an applicant to show that his/her rejection was based on his/her disability. The same concerns hold true in other areas. Since only "qualified handicapped persons" are protected by Section 504, the person's disability and/or the question of accommodation should not be allowed to enter into this threshold determination.

OTHER PROVISIONS

(A) Definitions (28 CFR §39.103)

Facility

Recipient regulations define facility as "all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property. The underlined language has been omitted. The preamble describes this change as intended "to clarify its coverage." In fact, the omission seems to exclude partially owned or leased facilities from the coverage of the regulation. Partially owned or leased buildings should be covered.

Handicapped Person

The definition of "handicapped person" omits the specific examples of mental and physical impairments contained in the Federal financial assistance regulations. The preamble explains the change as "[i]n the interest of brevity." The change causes unnecessary confusion as to the inclusion in the definition of such conditions as cancer, heart disease, specific learning

disabilities, diabetes, emotional illness, drug addiction, and alcoholism. It is possible to construe the regulations in such a way that these conditions are not covered. At the very least, the preamble should specify that the current definition is intended to be coextensive with the prior regulations.

(B) Self-Evaluation (28 CFR §39.110)

Section 110 of the proposed regulation, dealing with self-evaluation of Section 504 compliance, is weak. It does not make clear whether a written document or record of self-evaluation is necessary. The section does not spell out any of the content of a self-evaluation, e.g., assessment of program accessibility or review of position descriptions and eligibility criteria, that should be performed. The current recipient regulations specify the obligations of recipients to involve disabled people in evaluating "current policies and practices and the effects thereof," "modify . . . any policies and practices that do not meet the requirements of Section 504" and to take "appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to those policies and practices." To have any real effect, at a minimum, the procedures set forth in the recipient regulations should be required.

(C) General Prohibitions (28 CFR §39.130)

Section 130 omits certain provisions of the federal financial assistance regulations concerning aiding or perpetuating discrimination by assisting an agency, organization, or person that discriminates against handicapped persons. 28 CFR §41.51(b)(1)(v) and (b)(3)(iii)(1982). The preamble does not mention this omission. There is no apparent rationale for allowing government agencies to perpetuate discrimination by assisting discriminators when recipients of federal financial assistance are prohibited from doing so.

Section 130(b)(6), dealing with licensing or certification programs, differs from the federal financial assistance regulations that prohibit discrimination "directly or through . . . licensing . . . arrangements." 28 CFR §41.51(b)(1) (1982). The prototype wording provides that "the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part." DOJ should include a prohibition against handicap discrimination in the standards for license or certification eligibility. The United States Supreme Court's decision in Community Television of Southern California v. Gottfried, 103 S.Ct. 885 (1983), permits federal agencies through their proper rulemaking procedures to impose upon prospective licensees a duty not to discriminate against handicapped persons.

(D) Program Accessibility (28 CFR §39.150)

As discussed above, Section 150(a)(2) incorporates very broad defenses of "undue financial and administrative burdens" and "fundamental alterations" to the obligation of making programs accessible. These limitations are not found in the program accessibility requirements of the federal financial assistance regulations. The proposal also omits the language of the federal financial assistance regulations (28 CFR §41.56) providing that no qualified handicapped person will be discriminated against because of a lack of program accessibility. It may appear that the same effect is accomplished by Section 150(a) of the regulation, which requires programs or activities, when viewed in their entirety, to be "readily accessible to and usable by handicapped persons" (this language is drawn from §41.57 of the federal financial assistance regulations). There is, however, a notable difference in the two formulations. The federal financial assistance provision makes it clear that each individual handicapped person is entitled to access to the program or activity. The proposed formulation can be interpreted as more of a general or group accessibility requirement. On its face, it does not clearly guarantee a right to each handicapped person to have access to a particular program or activity. Such an individual accessibility right should be clearly delineated.