ITEM 3

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850

Statutes 1977, Chapter 36
Statutes 1978, Chapter 1403
Statutes 1979, Chapters 282 and 1035
Statutes 1981, Chapter 796
Statutes 1982, Chapter 251
Statutes 1983, Chapter 323
Statutes 1985, Chapter 903
Statutes 1986, Chapter 248
Statutes 1987, Chapters 829 and 998
Statutes 1990, Chapters 1066 and 1206
Statutes 1991, Chapter 626
Statutes 1992, Chapter 1243
Statutes 1995, Chapter 758
Statutes 1999, Chapter 379
Statutes 2001, Chapter 745

Title 5, California Code of Regulations, Sections 54100, 55522, 55602.5, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, 56076

Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*, Issued by the Chancellor's Office, California Community Colleges, January 2, 1997

Disabled Student Programs and Services
(02-TC-22)

West Kern Community College District, Claimant

Table of Contents

Federal Statutes

Federal Regulations

Other Authorities

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

EXHIBIT A

May 20, 2003

RECEIVED

MAY 23 2003

COMMISSION ON
STATE MANDATES

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: TEST CLAIM OF West Kern Community College District
Statutes of 2001 / Chapter 745
Disabled Student Programs and Services

Dear Ms. Higashi:

Enclosed are the original and seven copies of the West Kern Community College District test claim for the above referenced mandate.

I have been appointed by the District as its representative for the test claim. The District requests that all correspondence originating from your office and documents subject to service by other parties be directed to me, with copies to:

William Duncan
Vice President, Administrative Services
West Kern Community College District
29 Emmons Park Drive
Taft, California 93268

The Commission regulations provide for an informal conference of the interested parties

within thirty days. If this meeting is deemed necessary, I request that it be conducted in conjunction with a regularly scheduled Commission hearing.

Sincerely,

Keith B. Petersen

C: William Duncan, Vice President, Administrative Services
West Kern Community College District

COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

RECEIVED
MAY 2 3 2003
COMMISSION ON
STATE MANDATES

TEST CLAIM FORM

Claim No. 02-TC-22

Local Agency or School District Submitting Claim

WEST KERN COMMUNITY COLLEGE DISTRICT

Contact Person

Keith B. Petersen, President
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, California 92117

Telephone Number

Voice: 858-514-8605
Fax: 858-514-8645

Claimant Address

West Kern Community College District
29 Emmons Park Drive
Taft, California 93268

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network
c/o School Services of California
1121 L Street, Suite 1060
Sacramento, CA 95814

Voice: 916-446-7517
Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

Disabled Student Programs and Services

See: Attached

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

William Duncan
Vice President Administrative Services

Telephone No.

(661) 763-7700

Signature of Authorized Representative

x William H. Duncan III

Date

May 15, 2003

Attached Exhibit to Form CSM 2(2/91)
Test Claim Form
Test Claim of West Kern Community College District
Chapter 745, Statutes of 2001

Statutes::

Chapter 745, Statutes of 2001
Chapter 379, Statutes of 1999
Chapter 758, Statutes of 1995
Chapter 1243, Statutes of 1992
Chapter 626, Statutes of 1991
Chapter 1206, Statutes of 1990
Chapter 1066, Statutes of 1990
Chapter 998, Statutes of 1987
Chapter 829, Statutes of 1987
Chapter 248, Statutes of 1986
Chapter 903, Statutes of 1985
Chapter 323, Statutes of 1983
Chapter 251, Statutes of 1982
Chapter 796, Statutes of 1981
Chapter 1035, Statutes of 1979
Chapter 282, Statutes of 1979
Chapter 1403, Statutes of 1978
Chapter 36, Statutes of 1977

Code Sections:

Education Code Section 67300
Education Code Section 67301
Education Code Section 67302
Education Code Section 67310
Education Code Section 67311
Education Code Section 67312
Education Code Section 84850

California Code of Regulations:

Title 5, Section 54100
Title 5, Section 55522
Title 5, Section 55602.5
Title 5, Section 56000
Title 5, Section 56002
Title 5, Section 56004
Title 5, Section 56005
Title 5, Section 56006
Title 5, Section 56008
Title 5, Section 56010
Title 5, Section 56020
Title 5, Section 56022
Title 5, Section 56026
Title 5, Section 56027
Title 5, Section 56028
Title 5, Section 56029
Title 5, Section 56030
Title 5, Section 56032
Title 5, Section 56034
Title 5, Section 56036
Title 5, Section 56038
Title 5, Section 56040
Title 5, Section 56042
Title 5, Section 56044
Title 5, Section 56046
Title 5, Section 56048
Title 5, Section 56050
Title 5, Section 56052
Title 5, Section 56054
Title 5, Section 56060
Title 5, Section 56062
Title 5, Section 56064
Title 5, Section 56066
Title 5, Section 56068
Title 5, Section 56070
Title 5, Section 56072
Title 5, Section 56074
Title 5, Section 56076

Implementing Guidelines For Title 5 Regulations Disabled Student Program and Services

Claim Prepared By:
Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Voice: (858) 514-8605

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	
	No. CSM _____
West Kern Community College District	
	Chapter 745, Statutes of 2001
	Chapter 379, Statutes of 1999
Test Claimant.	Chapter 758, Statutes of 1995
	Chapter 1243, Statutes of 1992
	Chapter 626, Statutes of 1991
	Chapter 1206, Statutes of 1990
	Chapter 1066, Statutes of 1990
	Chapter 998, Statutes of 1987
	Chapter 829, Statutes of 1987
	Chapter 248, Statutes of 1986
	Chapter 903, Statutes of 1985
	Chapter 323, Statutes of 1983
	Chapter 251, Statutes of 1982
	Chapter 796, Statutes of 1981
	Chapter 1035, Statutes of 1979
	Chapter 282, Statutes of 1979
	Chapter 1403, Statutes of 1978
	Chapter 36, Statutes of 1977
	Education Code Section 67300
	Education Code Section 67301
	Education Code Section 67302
	(Continued on Next Page)
	DISABLED STUDENT PROGRAMS AND SERVICES
	TEST CLAIM FILING

)	Education Code Section 67310
)	Education Code Section 67311
)	Education Code Section 67312
)	Education Code Section 84850
)	
)	Title 5, California Code of Regulations, Section 54100
)	Title 5, California Code of Regulations, Section 55522
)	Title 5, California Code of Regulations, Section 55602.5
)	Title 5, California Code of Regulations, Sections 56000 - 56010
)	Title 5, California Code of Regulations, Sections 56020 - 56022
)	Title 5, California Code of Regulations, Sections 56026 - 56076
)	
)	Implementing Guidelines
)	For Title 5 Regulations
)	Disabled Student Program and Services
)	Chancellor's Office
)	California Community Colleges
)	

PART I. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code Section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." West Kern Community College District is a "school district" as defined in

Government Code section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for community college districts to establish and implement policies and procedures for disabled student programs and services for students with disabilities.

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

Chapter 1123, Statutes of 1972, Section 3, added former Education Code Section 18151[2] to provide that the Superintendent of Public Instruction shall apportion to

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[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

[2] Education Code Section 18151, added by Chapter 1123, Statutes of 1972, Section 3:

"(a) The Superintendent of Public Instruction shall apportion to each community college district and to each school district maintaining a community college, for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, and transportation for physically handicapped students 21 years of age or older enrolled at a community college who have demonstrated a financial need for such benefits, an amount not exceeding four hundred dollars ($400) in each fiscal year for each physically handicapped student 21 years of age or older enrolled at a community college who has demonstrated a financial need therefor.

(b) Each district applying for the apportionments authorized by this section shall require each physically handicapped student for whom benefits are to be provided to submit to the community college a statement of his financial condition. The community college shall grant such benefits on the basis of the demonstrated financial need of the applicant therefor. The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining when such financial need exists. The financial status of his parents shall be taken into consideration in determining the financial need of an applicant.

1 each community college district and to each school district maintaining a community
2 college an amount not exceeding four hundred dollars ($400) in each fiscal year for each
3 physically handicapped student 21 years of age or older enrolled at a community college
4 who has demonstrated financial need for the purpose of funding the excess direct
5 district costs of providing special facilities, special educational material, educational
6 assistance, mobility assistance, and transportation. Subdivision (b) provided that each
7 district applying for these apportionments shall require each physically handicapped
8 student for whom benefits were to be provided to submit to the community college a
9 statement of his financial condition. The community college was then to grant such
10 benefits on the basis of the demonstrated financial need of the applicant. The Board of
11 Governors of the California Community Colleges was required to adopt rules and
12 regulations for determining when such financial need existed. The financial status of his
13 parents was to be taken into consideration in determining the financial need of an
14 applicant. Subdivision (c) provided that no community college district or school district
15 maintaining a community college could apply for an apportionment unless it first certified
16 that it had made every reasonable effort to secure federal funds or other state funds for
17 the purpose, and had been unable to secure sufficient funds.
18

(c) No community college district or school district maintaining a community college may apply for an apportionment pursuant to this section unless it first certifies that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds."

SECTION 2. LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

Chapter 1010, Statutes of 1976, Section 2, renumbered[3] Education Code Section 18151 as Education Code Section 84850[4] and amended the section to make technical changes by changing the authority under subsection (a) from the Superintendent of Public Instruction to the Chancellor of the California Community Colleges.

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[3] Former Section 18151, (added by Chapter 1123, Statutes of 1972, Section 3) relating to similar subject matter as Section 84850, was renumbered by Chapter 1010, Statutes of 1976, Section 2.

[4] Education Code Section 84850, added by Chapter 1010, Statutes of 1976, Section 2:

"(a) ~~The Superintendent of Public Instruction~~ The Chancellor of the California Community Colleges shall apportion to each community college district ~~and to each school district maintaining a community college,~~ for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, and transportation for physically handicapped students 21 years of age or older enrolled at a community college who have demonstrated a financial need for such benefits, an amount not exceeding four hundred dollars ($400) in each fiscal year for each physically handicapped student 21 years of age or older enrolled at a community college who has demonstrated a financial need therefor.

(b) Each district applying for the apportionments authorized by this section shall require each physically handicapped student for whom benefits are to be provided to submit to the community college a statement of his financial condition. The community college shall grant such benefits on the basis of the demonstrated financial need of the applicant therefor. The Board of Governors ~~of the California Community Colleges~~ shall adopt rules and regulations for determining when such financial need exists. The financial status of his parents shall be taken into consideration in determining the financial need of an applicant.

(c) No community college district ~~or school district maintaining a community college~~ may apply for an apportionment pursuant to this section unless it first certifies that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds."

1 Chapter 36, Statutes of 1977, Section 635, repealed Education Code Section

2 84850, and Section 535, added a new Education Code Section 84850[5]. New section

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[5] Education Code Section 84850, as added and amended by Chapter 36, Statutes of 1977, Section 535:

"(a) The Chancellor of the California Community Colleges shall apportion to each community college district for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, ~~and~~ transportation, and program developmental services for ~~physically~~ handicapped students ~~21 years of age or older~~ enrolled at a community college as defined in Section 78014, who have demonstrated a ~~financial~~ need for such ~~benefits~~ services, an amount not exceeding ~~four hundred dollars ($400)~~ seven hundred eighty-five dollars ($785) in each fiscal year for each ~~physically~~ such handicapped student ~~21 years of age or older enrolled at a community college who has demonstrated a financial need therefor~~.

(b) ~~Each district applying for the apportionments authorized for this section shall require each physically handicapped student for whom benefits are to be provided to submit to the community college a statement of his financial condition. The community college shall grant such benefits on the basis of the demonstrated financial need of the applicant therefor.~~ The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining ~~when such financial need exists~~ program and service components and appropriation of resources to community college districts pursuant to Section 78014. ~~The financial status of his parents shall be taken into consideration in determining the financial need of an applicant.~~ Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

The chancellor and Director of Rehabilitation shall incorporate suggestions from other interested persons and organizations in the guidelines where feasible and appropriate.

If the chancellor and the Director of Rehabilitation are unable to agree upon any portion or portions of the guidelines, each may submit guidelines to the board of governors, which may base the rules and regulations which it adopts on any combination of guidelines submitted.

(c) ~~No community college district may apply for an apportionment pursuant to this section unless it first certifies that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds.~~ Each community college district receiving an allowance under this section shall

84850 now provides, in subdivision (a), that the Chancellor shall apportion to each community college district an amount not exceeding seven hundred eighty-five dollars ($785) each fiscal year, for the first time for each handicapped student (no longer just

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report to the chancellor on forms and at such times as he shall provide, all expenditures and incomes related to handicapped students for whom such allowances are made. If the chancellor determines that the current expense of educating such students does not equal or exceed the sum of basic state aid and state equalization aid provided in the regular community college foundation program per unit of average daily attendance, the allowance provided under this section and any amount of local tax funds contributed to the foundation program for each such handicapped student in average daily attendance in the district, then the amount of such deficiency shall be withheld from state apportionments to the district in the succeeding fiscal year in accordance with the procedure prescribed in Section 84330.

(d) The chancellor and the Director of Rehabilitation shall review programs for handicapped students funded pursuant to this section and shall report, jointly or separately, their findings and recommendations to the Legislature not later than February 15, 1978. The report shall include recommendations relative to appropriate levels of support for programs and services for handicapped students and further improvements in funding procedures.

(e) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to twice the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78014; provided, however, that any allocations made pursuant to this subdivision (e) shall not result in an increase in the total amount of funds allocated pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b).

(f) In the event that requests for apportionments exceed the amount of state funds statutorily available, the chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established and approved by the chancellor and the Director of Rehabilitation pursuant to this section. State apportionments shall be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

(g) The chancellor's office and the Department of Rehabilitation shall jointly develop guidelines governing expenditures relating to handicapped students to prevent duplication in states expenditures for such students."

1 the "physically" handicapped), for the first time without regard to age (no longer for those
2 21 years of age or older), who for the first time has demonstrated *any* need (no longer
3 limited to just financial need) for such services. Subdivision (b) now provides that the
4 Board of Governors of the California Community Colleges shall adopt rules and
5 regulations for determining program and service components and appropriation of
6 resources to community college districts pursuant to Section 78014. New subsection (c)
7 provides that each community college district receiving an allowance under this section
8 shall, for the first time, report to the chancellor, on forms and at such times as he shall
9 provide, all expenditures and incomes related to handicapped students for whom such
10 allowances are made. Subsection (e) provided that, notwithstanding subdivision (a), the
11 chancellor may, upon recommendation of the Director of Rehabilitation, allocate
12 amounts up to twice the amount authorized in subdivision (a) to provide for the excess
13 costs of educational services for severely disabled students; provided, however, that
14 any allocations shall not result in an increase in the total amount of funds allocated
15 pursuant to this section. Allocations in excess of seven hundred eighty-five dollars
16 ($785) per student would be provided only to programs identified by the chancellor and
17 the Director of Rehabilitation in accordance with rules and regulations adopted pursuant
18 to subdivision (b). Subdivision (f) provided that in the event requests for apportionments
19 exceeded the amount of state funds statutorily available, the chancellor would apportion
20 the statutorily available funds among community college districts applying for such funds
21 in accordance with guidelines established and approved by the chancellor and the

Director of Rehabilitation pursuant to this section. State apportionments would be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

Chapter 1403, Statutes of 1978, Section 3, amended Education Code Section 84850[6], subdivision (e), to change the amount allocated by the chancellor to provide for excess costs of educational services for severely disabled students from twice to three times the amount of seven hundred eighty-five dollars ($785) per year, per student allocated under subdivision (a).

Chapter 282, Statutes of 1979, Section 40, repealed Education Code Section 84850, effective July 24, 1979. Chapter 1035, Statutes of 1979, Section 25, added a new Education Code Section 84850 to Article 6, Chapter 5, Part 50 of the Education Code, effective September 26, 1979. A minor technical change was made to subdivision (e).

Chapter 796, Statutes of 1981, Section 2, added Chapter 14 (commencing with

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[6] Education Code Section 84850, as amended by Chapter 1403, Statutes of 1978, Section 3:

"(e) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to ~~twice~~ three times the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78014; provided, however, that any allocations made pursuant to this subdivision (e) shall not result in an increase in the total amount of funds allocated pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b)."

1 Section 67300) of Part 40 of the Education Code.

2 Chapter 796, Statutes of 1981, Section 2, added Education Code Section 67300[7]
3 to provide that services for disabled students provided by the California Community
4 Colleges shall conform to the level and quality of those services provided by the
5 Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this
6 chapter requires the California Community Colleges to provide the services for disabled
7 students in the same manner as those services were provided by the Department of
8 Rehabilitation. The Board of Governors of the California Community Colleges was
9 required, by January 15, 1982, to adopt regulations to implement this chapter.

10 Chapter 251, Statutes of 1982, Section 32, amended Education Code Section
11 84850[8], subdivision (b), to eliminate certain duties imposed upon the chancellor and

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[7] Education Code Section 67300, added by Chapter 796, Statutes of 1981, Section 2:

"Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter."

[8] Education Code Section 84850, as amended by Chapter 251, Statutes of 1982, Section 32:

Director of Rehabilitation. Subdivision (d) was deleted and subdivisions (e) through (g) were re-lettered as subdivisions (d) through (f) respectively.

Chapter 323, Statutes of 1983, Section 23.8, added Education Code Section 67301[9] to provide that, notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are

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"(b) The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining program and service components and appropriation of resources to community college districts pursuant to Section 78014. Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

~~The chancellor and Director of Rehabilitation shall incorporate suggestions from other interested persons and organizations in the guidelines where feasible and appropriate.~~

~~If the chancellor and the Director of Rehabilitation are unable to agree upon any portion or portions of the guidelines, each may submit guidelines to the board of governors, which may base the rules and regulations which it adopts on any combination of guidelines submitted.~~ . . .

(d) ~~The chancellor and the Director of Rehabilitation shall review programs for handicapped students funded pursuant to this section and shall report, jointly or separately, their findings and recommendations to the Legislature not later than February 15, 1978. The report shall include recommendations relative to appropriate levels of support for programs and services for handicapped students and further improvements in funding procedures.~~"

[9] Education Code Section 67301, added by Chapter 323, Statutes of 1983, Section 23.8:

"Notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and the policies and procedures of the Department of Rehabilitation."

1 administered in full compliance with applicable federal and state laws and regulations
2 and the policies and procedures of the Department of Rehabilitation. These funds are
3 not received by the district, but are paid to the Department of Rehabilitation.
4 Chapter 903, Statutes of 1985, Section 1, amended Education Code Section
5 67300[10] to add a provision requiring that blind students attending community colleges
6 under the sponsorship of the Department of Rehabilitation to have all reader services
7 provided directly by the Department of Rehabilitation. The amendment also added a
8 sunset date of July 1, 1988.

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[10] Education Code Section 67300, added by Chapter 796, Statutes of 1981, Section 2, as amended by Chapter 903, Statutes of 1985, Section 1:

"Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California community colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law.

This section shall remain in effect only until July 1, 1988, and as of that date is repealed, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date."

Chapter 903, Statutes of 1985, Section 2, added a new Education Code Section 67300[11] to take effect on July 1, 1988 which eliminated the requirement that blind students attending community colleges under the sponsorship of the Department of Rehabilitation receive reader services directly by the Department of Rehabilitation.

Chapter 248, Statutes of 1986, Section 34, amended Education Code Section 67300 (with a sunset date of July 1, 1988) to make technical changes.

Chapter 248, Statutes of 1986, Section 35, amended Education Code Section 67300 (with an effective date of July 1, 1988) to make technical changes.

Chapter 56, Statutes of 1987, Section 44, amended Education Code Section 67300[12] (with an operative date of July 1, 1988) to make a technical change.

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[11] Education Code Section 67300, added by Chapter 903, Statutes of 1985, Section 2:

"Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter.

This section shall become effective on July 1, 1988, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date."

[12] Education Code Section 67300, added by Chapter 903, Statutes of 1985, Section 2, as amended by Chapter 56, Statutes of 1987, Section 44:

1 Chapter 829, Statutes of 1987, Section 1, added Chapter 14.2 to Part 40,

2 Division 5, Title 3, of the Education Code, "State Funded Disabled Student Programs

3 and Services."

4 Chapter 829, Statutes of 1987, Section 1, added Education Code Section

5 67310[13] to state and declare that equal access to public postsecondary education is

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"Services for disabled students provided by the California community colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California community colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

This section shall become ~~effective~~ operative on July 1, 1988, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date."

[13] Education Code Section 67310, added by Chapter 829, Statutes of 1987, Section 1:

"(a) The Legislature finds and declares that equal access to public postsecondary education is essential for the full integration of persons with disabilities into the social, political, and economic mainstream of California. The Legislature recognizes the historic underrepresentation of disabled students in postsecondary programs and the need for equitable efforts that enhance the enrollment and retention of disabled students in public colleges and universities in California.

(b) The Legislature recognizes its responsibility to provide and adequately fund postsecondary programs and services for disabled students attending a public postsecondary institution.

(c) To meet this responsibility, the Legislature sets forth the following principles for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities:

(1) The state funded activity shall be consistent with the stated purpose of

essential for the full integration of persons with disabilities into the social, political and economic mainstream of California. Subdivision (c) provides that state programs and services must: (1) be consistent with the stated purpose of programs and services for disabled students provided by the California Community Colleges; (2) not duplicate services or instruction available to all students; (3) be directly related to the functional limitations of the verifiable disabilities of the students to be served; (4) be directly related to disabled students' full access to and participation in the educational process; (5) have

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programs and services for disabled students provided by the California Community Colleges, the California State University, or the University of California, as governed by the statutes, regulations, and guidelines of the community colleges, state university, or the University of California.

(2) The state funded activity shall not duplicate services or instruction that are available to all students, either on campus or in the community.

(3) The state funded activity shall be directly related to the functional limitations of the verifiable disabilities of the students to be served.

(4) The state funded activity shall be directly related to these students' full access to and participation in the educational process.

(5) The state funded activity shall have as its goals the independence of disabled students and the maximum integration of these students with other students.

(6) The state funded activity shall be provided in the most integrated setting possible, consistent with state and federal law, state policy and funding requirements, and missions and policies of the postsecondary segment, and shall be based on identified student needs.

(d) It is the intent of the Legislature that, through the state budget process, the public postsecondary institutions request, and the state provide, funds to cover the actual cost of providing services and instruction, consistent with the principles set forth in subdivision (c), to disabled students in their respective postsecondary institutions.

(e) All public postsecondary education institutions shall continue to utilize other available resources to support programs and services for disabled students as well as maintain their current level of funding from other sources whenever possible.

(f) Pursuant to Section 67312, postsecondary institutions shall demonstrate institutional accountability and clear program effectiveness evaluations for services to students with disabilities."

1 as its goals the independence of disabled students and the maximum integration of

2 these students with other students; and (6) be provided in the most integrated setting

3 possible.

4 Chapter 829, Statutes of 1987, Section 1, added Education Code Section

5 67311[14] to provide that funds allocated for disabled student programs and services be

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[14] Education Code Section 67311, added by Chapter 829, Statutes of 1987, Section 1:

"It is the desire and intent of the Legislature that, as appropriate for each postsecondary segment, funds for disabled student programs and services be based on the following three categories of costs:

(a) Fixed costs associated with the ongoing administration and operation of the services and programs. These fixed costs are basic ongoing administrative and operational costs of campus programs that are relatively consistent in frequency from year-to-year, such as:

(1) Access to, and arrangements for, adaptive educational equipment, materials, and supplies required by disabled students.

(2) Job placement and development services related to the transition from school to employment.

(3) Liaisons with campus and community agencies, including referral and followup services to these agencies on behalf of disabled students.

(4) On-campus and off-campus registration assistance, including priority enrollment, applications for financial aid, and related college services.

(5) Special parking, including on-campus parking registration, temporary parking permit arrangements, and application assistance for students who do not have state handicapped placards or license plates.

(6) Supplemental specialized orientation to acquaint students with the campus environment.

(7) Activities to coordinate and administer specialized services and instruction.

(8) Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

The baseline cost of these services shall be determined by the respective system and fully funded with annual adjustments for inflation and salary range changes, to the extent funds are provided.

(b) Continuing variable costs that fluctuate with changes in the number of

students or the unit load of students. These continuing variable costs are costs for services that vary in frequency depending on the needs of students, such as:

(1) Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities.

(2) On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities.

(3) Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both.

(4) Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students.

(5) Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students.

(6) Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable modes.

(7) Services to facilitate the repair of equipment and learning assistance devices.

(8) Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students.

(9) Speech services, provided by licensed speech or language pathologists for students with verified speech disabilities.

(10) Test taking facilitation, including adapting tests for and proctoring test taking by, disabled students.

(11) Transcription services, including, but not limited to, the provision of Braille and print materials.

(12) Specialized tutoring services not otherwise provided by the institution.

(13) Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

State funds may be provided annually for the cost of these services on an actual-cost basis, including wages for the individuals providing these services and expenses for attendant supplies. Each institution shall be responsible for documenting its costs to the appropriate state agencies.

(c) One-time variable costs associated with the purchase or replacement of equipment. One-time variable costs are one-time expenditures for the purchase of

1 based on three categories of costs: (a) fixed costs associated with the ongoing
2 administration and operation of the services and programs; (b) continuing variable costs
3 for services that fluctuate with changes in the number of students or the unit load of
4 students; and (c) one-time variable costs associated with the purchase or replacement
5 of equipment. Examples of fixed costs were set forth as:

6 (1) Access to, and arrangements for, adaptive educational equipment, materials,
7 and supplies required by disabled students;

8 (2) Job placement and development services related to the transition from school
9 to employment;

10 (3) Liaisons with campus and community agencies, including referral and followup
11 services to these agencies on behalf of disabled students;

12 (4) On-campus and off-campus registration assistance, including priority
13 enrollment, applications for financial aid, and related college services;

14 (5) Special parking, including on-campus parking registration, temporary parking
15 permit arrangements, and application assistance for students who do not have
16 state handicapped placards or license plates;

17 (6) Supplemental specialized orientation to acquaint students with the campus
18 environment;

19 (7) Activities to coordinate and administer specialized services and instruction;

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supplies or the repair of equipment, such as adapted educational materials and vehicles. State funds shall be provided for these expenses on an actual cost basis as documented by each institution."

and

(8) Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

Examples of continuing variable costs were set forth as:

(1) Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities;

(2) On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities;

(3) Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both;

(4) Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students;

(5) Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students;

(6) Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable

modes;

(7) Services to facilitate the repair of equipment and learning assistance devices;

(8) Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students;

(9) Speech services, provided by licensed speech or language pathologists for students with verified speech disabilities;

(10) Test taking facilitation, including adapting tests for and proctoring test taking by, disabled students;

(11) Transcription services, including, but not limited to, the provision of Braille and print materials;

(12) Specialized tutoring services not otherwise provided by the institution;

(13) Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

One time variable costs include one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles.

Chapter 829, Statutes of 1987, Section 1, added Education Code Section 67312[15]. Subdivision (a) requires the Board of Governors of the California Community

[15] Education Code Section 67312, added by Chapter 829, Statutes of 1987, Section 1:

"(a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the

1 Colleges to (1) develop procedures for allocating funds under this chapter, (2) adopt
2 rules and regulations necessary to operate programs funded under this chapter, (3)
3 work with the California Postsecondary Education Commission and other interested
4 parties to coordinate the planning and development of programs for students with
5 disabilities, and (4) develop and implement, in consultation with students and staff, a

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Regents of the University of California may do the following:

(1) Work with the California Postsecondary Education Commission and the Department of Finance to develop formulas or procedures for allocating funds authorized under this chapter.

(2) Adopt rules and regulations necessary to the operation of programs funded pursuant to this chapter.

(3) Maintain the present intersegmental efforts to work with the California Postsecondary Education Commission and other interested parties, to coordinate the planning and development of programs for students with disabilities, including, but not limited to, the establishment of common definitions for students with disabilities and uniform formats for reports required under this chapter.

(4) Develop and implement, in consultation with students and staff, a system for evaluating state-funded programs and services for disabled students on each campus at least every five years. At a minimum, these systems shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, and data on the implementation of the program and physical accessibility requirements of Section 794 of Title 29 of the Federal Rehabilitation Act of 1973.

(b) Commencing in January 1990, and every two years thereafter, the Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, submit a report to the Governor, the education policy committees of the Legislature, and the California Postsecondary Education Commission on the evaluations developed pursuant to subdivision (a). These biennial reports shall also include a review on a campus-by-campus basis of the enrollment, retention, transition, and graduation rates of disabled students.

(c) The California Postsecondary Education Commission shall review these reports and submit its comments and recommendations to the Governor and education policy committees of the Legislature."

1 system for evaluating state-funded programs and services for disabled students on each
2 campus at least every five years.

3 Chapter 998, Statutes of 1987, Section 1, amended Education Code Section
4 67300[16] (with a sunset date of July 1, 1998) to delete the sunset date and to make other
5 technical changes.

6 Chapter 998, Statutes of 1987, Section 2, repealed Education Code Section
7 67300 (with an operative date of July 1, 1988).

8 Chapter 1066, Statutes of 1990, Section 1, added Education Code Section

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[16] Education Code Section 67300, added by Chapter 796, Statutes of 1981, Section 2, as amended by Chapter 248, Statutes of 1986, Section 34:

"Services for disabled students provided by the California community colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California community colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California community colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.

~~This section shall remain in effect only until July 1, 1988, and as of that date is repealed, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date.~~"

1 67311.5[17]. Subdivision (a) requires the Board of Governors of the California Community

[17] Education Code Section 67311.5, added by Chapter 1066, Statutes of 1990, Section 1:

"(a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by subdivision (a) of Section 22511.5 of, and subdivision (a) of Section 22511.9 of, the Vehicle Code, including authorization to park for unlimited periods in restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by subdivision (a) of Section 22511.5 of, and subdivision (a) of Section 22511.9 of, the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require

1 Colleges to adopt rules and regulations prescribing parking requirements similar to those
2 provided in Section 22511.5 of the Vehicle Code and all other applicable sections of the
3 Vehicle Code relating to parking exemptions for disabled persons. These rules and
4 regulations must include authorization to park for unlimited periods in restricted parking
5 zones and to park in any metered parking space without being required to pay any
6 parking meter fee. The adopted regulations must authorize parking, with the display of a
7 valid parking permit, at campus facilities and grounds by students with disabilities and by
8 those persons providing transportation services to students with disabilities. Subdivision
9 (b) requires parking rules and regulations that shall include free visitor parking for

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the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

The Trustees of the California State University shall, and the Regents of the University of California may, report the findings of these audits to the Legislature of the Governor.

(d) This section shall not apply to the University of California unless the Regents of the University of California, by resolution, make that provision applicable."

disabled persons. A Community College District with a facility controlled by a mechanical gate must provide accommodations for any person with a disability who is prevented from operating the mechanical gate controls. Subdivision (c) requires the Board of Governors to establish procedures for conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available parking spaces for use by students with disabilities.

Chapter 1206, Statutes of 1990, Section 4, repealed Education Code Section 84850 and Section 5, added a new Education Code Section 84850[18] to Article 6,

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[18] Education Code Section 84850, added by Chapter 1206, Statutes of 1990, Section 5:

"(a) The Board of Governors of the California Community Colleges shall adopt rules and regulations for the administration and funding of educational programs and support services to be provided to disabled students by community college districts pursuant to Chapter 14.2 (commencing with Section 67310) of Part 40.

(b) As used in this section, "disabled students" are persons with exceptional needs enrolled at a community college who, because of a verified disability, cannot fully benefit from classes, activities, and services regularly provided by the college without specific additional specialized services or educational programs.

(c) The regulations adopted by the board of governors shall provide for the apportionment of funds to each community college district to offset the direct excess cost of providing specialized support services or instruction, or both, to disabled students enrolled in state-supported educational programs or courses. Direct excess costs are those actual fixed, variable, and one-time costs, as defined in Section 67312, which exceed the combined total of the following:

(1) The average cost to the district of providing services to nondisabled students times the number of students served by disabled student programs and services.

(2) The indirect cost to the district of providing facilities and support for the administration of disabled student programs and services.

(3) The revenue derived from average daily attendance in special classes.

1 Chapter 5, Part 50, Division 7, of Title 3 of the Education Code. Subdivision (a) requires
2 the Board of Governors of the California Community Colleges to adopt rules and
3 regulations for the administration and funding of educational programs and support
4 services provided to disabled students by Community College Districts pursuant to
5 Chapter 14.2 (commencing with Education Code Section 67310). Subdivision (b)
6 defines "disabled students" as persons with exceptional needs enrolled at a community
7 college who cannot fully benefit from class, activities and services regularly provided
8 without specific additional educational services and programs. Subdivision (c) requires
9 that the regulations adopted by the Board of Governors provide for apportionment of
10 funds to each Community College District to offset the direct excess cost of providing
11 specialized support services or instruction to disabled students enrolled in state-
12 supported educational programs and courses. "Direct excess costs" are those fixed,
13 variable and one-time costs as defined in Education Code Section 67312 that exceed
14 the combined total of the following:
15 (1) The average cost to the district of providing services to nondisabled students

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(4) Any other funds for serving disabled students which the district receives from federal, state, or local sources.

(d) As a condition of receiving funds pursuant to this section, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require.

(e) The board of governors may authorize the chancellor, consistent with the requirements the board may impose, to designate up to 3 percent of the funds allocated pursuant to this section for program development and program accountability."

times the number of students served by disabled student programs and services;

(2) The indirect cost to the district of providing facilities and support for the administration of disabled student programs and services;

(3) The revenue derived from average daily attendance in special classes; and

(4) Any other funds for serving disabled students which the district receives from federal, state, or local sources.

Subdivision (d) requires, as a condition of receiving funds, that each Community College District certify that reasonable efforts have been made to utilize all funds from federal, state or local sources which are available for serving disabled students. Subdivision (e) allows the Board of Governors to authorize the Chancellor to designate up to 3 percent of the allocable funds for program development and program accountability.

Chapter 626, Statutes of 1991, Section 1, amended Education Code Section 67300 to make technical changes.

Chapter 1243, Statutes of 1992, Section 4, amended Education Code Section 67311.5 to make technical changes.

Chapter 758, Statutes of 1995, Section 52, repealed Education Code Section 67300, and Section 54, added a new Education Code Section 67300[19] which differs only

[19] Education Code Section 67300, added by Chapter 758, Statutes of 1995, Section 54, but relating to substantially similar subject matter as former Section 67300 repealed by Chapter 758, Statutes of 1995, Section 52:

"Services for disabled students provided by the California Community Colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services

1 by technical changes.

2 Chapter 758, Statutes of 1995, Section 52, repealed Education Code Section

3 67301, Section 53 repealed Education Code Section 67311.5, and Section 54 added a

4 new Education Code Section 67301[20] which is substantially similar to former Section

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provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may~~, by January 15, 1982,~~ adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section ~~67301~~ 67305, blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section."

[20] Education Code Section 67301, added by Chapter 758, Statutes of 1995, Section 54, but relating to substantially similar subject matter as former Section 67311.5 repealed by Chapter 758, Statutes of 1995, Section 53:

"(a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by Section 295.5 of the Vehicle Code, and disabled veterans, as defined by Section 295.7 of the Vehicle Code. The rules and regulations shall include authorization to park for unlimited periods in time-restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee or to display a parking permit other than pursuant to Section 5007 or 22511.55 of the Vehicle Code, provided those spaces are otherwise available for use by the general public. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as

otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by Section 295.5 of the Vehicle Code, or disabled veteran, as defined by Section 295.7 of the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of

1 67311.5, except that the exclusion granted to the University of California is not found in
2 new section 67301.
3 Chapter 758, Statutes of 1995, Section 54, added Education Code Section
4 67305[21] which is substantially similar to former Section 67301.
5 Chapter 758, Statutes of 1995, Section 53, repealed Education Code Section
6 67310, and Section 54, added a new Education Code Section 67310 which is
7 substantially similar to former Section 67310.
8 Chapter 758, Statutes of 1995, Section 53, repealed Education Code Section
9 67311, and Section 54, added a new Education Code Section 67311 which is
10 substantially similar to former Section 67311.
11 Chapter 758, Statutes of 1995, Section 53, repealed Education Code Section
12 67312, and Section 54, added a new Education Code Section 67312 which is

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the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

The Trustees of the California State University shall, and the Regents of the University of California may, report the findings of these audits to the Legislature of the Governor.

~~(d) This section shall not apply to the University of California unless the Regents of the University of California, by resolution, make that provision applicable.~~"

[21] Education Code Section 67305, added by Chapter 758, Statutes of 1995, Section 54:

"Notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and the policies and procedures of the Department of Rehabilitation."

1 substantially similar to former Section 67312.

2 Chapter 379, Statutes of 1999, Section 1, added[22] Education Code Section

3 67302[23] to require a community college seeking printed instructional materials

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[22] Former Section 67302, (added by Chapter 626, Statutes of 1991, Section 2) relating to reader services was repealed by Chapter 758, Statutes of 1995, Section 52.

[23] Education Code Section 67302, added by Chapter 379, Statutes of 1999, Section 1:

"(a) An individual, firm, partnership or corporation that publishes or manufactures printed instructional materials for students attending the University of California, the California State University, or a California Community College, shall provide to the university, college, or particular campus of the university or college, for use by students attending the University of California, the California State University, or a California Community College, any printed instructional material in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary. The computer files or electronic versions of the printed instructional material shall be provided to the university, college, or particular campus of the university or college at no additional cost and in a timely manner, upon receipt of a written request that does all of the following:

(1) Certifies that the university, college, or particular campus of the university or college has purchased the printed instructional material for use by a student with a disability or that a student with a disability attending or registered to attend that university, college, or particular campus of the university or college has purchased the printed instructional material.

(2) Certifies that the student has a disability that prevents him or her from using standard instructional materials.

(3) Certifies that the printed instructional material is for use by the student in connection with a course in which he or she is registered or enrolled at the university, college, or particular campus of the university or college.

(4) Is signed by the coordinator of services for students with disabilities at the university, college, or particular campus of the university or college or by the campus or college official responsible for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the university, college, or particular campus of the university or college.

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(b) An individual, firm, partnership or corporation specified in subdivision (a) may also require that, in addition to the conditions enumerated above, the request shall include a statement signed by the student agreeing to both of the following:

(1) He or she will use the electronic copy of the printed instructional material in specialized format solely for his or her own educational purposes.

(2) He or she will not copy or duplicate the printed instructional material for use by others.

(c) If a college or university permits a student to directly use the electronic version of an instructional material, the disk or file shall be copy-protected or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(d) An individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College shall provide computer files or other electronic versions of the nonprinted instructional materials for use by students attending the University of California, the California State University, or a California Community College, subject to the same conditions set forth in subdivisions (a) and (b) for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials that is compatible with braille translation and speech synthesis software.

(e) For purposes of this section:

(1) "Instructional material or materials" means textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student's success in a course of study in which a student with a disability is enrolled. The determination of which materials are "required or essential to student success" shall be made by the instructor of the course in consultation with the official making the request pursuant to paragraph (4) of subdivision (a) in accordance with guidelines issued pursuant to subdivision (i). "Instructional material or materials" does not include nontextual mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities.

(2) "Printed instructional material or materials" means instructional material or materials in book or other printed form.

(3) "Nonprinted instructional materials" means instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource,

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including, but not necessarily limited to, software programs, video disks, and video and audio tapes.

(4) "Structural integrity" means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. "Structural integrity" need not include nontextual elements such as pictures, illustrations, graphs, or charts. If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible.

(5) "Specialized format" means braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities.

(f) Nothing in this section shall be construed to prohibit a university, college, or particular campus of the university or college from assisting a student with a disability by using the electronic version of printed instructional material provided pursuant to this section solely to transcribe or arrange for the transcription of the printed instructional material into braille. In the event a transcription is made, the campus or college shall have the right to share the braille copy of the printed instructional material with other students with disabilities.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials pursuant to this section. If a segment establishes a center or centers, each of the following shall apply:

(1) The colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material made pursuant to paragraph (4) of subdivision (a) to the center, which shall transmit the request to the publisher or manufacturer.

(2) If there is more than one center, each center shall make every effort to coordinate requests within its segment.

(3) The publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center.

(4) If a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made.

1 in an electronic format to provide to an individual, firm, partnership or corporation that
2 publishes or manufactures printed instructional materials a written request including the
3 following: (1) certification that the community college has purchased the printed
4 instructional materials for use by a student with a disability or that a student with a
5 disability attending a college or college campus has purchased the printed instructional
6 materials; (2) certification that the student has a disability that prevents him or her from
7 using standard instructional materials; (3) certification that the printed instructional
8 material is for use by the student in connection with a course in which he or she is
9 registered or enrolled at the college or college campus; and (4) signature by the
10 coordinator of services for students with disabilities at the college or college campus or
11 the college official responsible for monitoring compliance with the Americans with

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(h) Nothing in this section shall be deemed to authorize any use of instructional materials that would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(i) The governing boards of the California Community Colleges, the California State University, and the University of California shall each adopt guidelines consistent with this section for its implementation and administration. At a minimum, the guidelines shall address all of the following:

(1) The designation of materials deemed "required or essential to student success."

(2) The determination of the availability of technology for the conversion of nonprinted materials pursuant to subdivision (d) and the conversion of mathematics and science materials pursuant to paragraph (4) of subdivision (e).

(3) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (a) and (b).

(4) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(j) Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code."

Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the college or college campus. Subdivision (c) requires that if the college permits a student to directly use the electronic version of an instructional material, the disk or file must be copy-protected or the college shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.). Under Subdivision (g), if the Chancellor of the California Community Colleges establishes one or more centers within his respective segments to process requests for electronic versions of instructional materials pursuant to this section, then each of the following shall apply: (1) the colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material to the center, which shall transmit the request to the publisher or manufacturer; (2) if there is more than one center, each center shall make every effort to coordinate requests within its segment; (3) the publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center; and (4) if a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made. Subdivision (i) requires the governing boards of the California Community Colleges to adopt guidelines consistent with this section for its implementation and administration that, at the minimum, address the following: (1) the designation of materials deemed "required or essential to student success"; (2) the

1 determination of the availability of technology for the conversion of nonprinted materials;
2 (3) the procedures and standards relating to distribution of files and materials; and (4)
3 other matters as are deemed necessary or appropriate to carry out the purposes of this
4 section. Subdivision (j) states that if the community college fails to comply with the
5 requirements of this section it shall be a violation of Section 54.1 of the Civil Code.
6 Chapter 745, Statutes of 2001, Section 33, amended Education Code Section
7 67301 to make a technical change.
8 CALIFORNIA CODE OF REGULATIONS
9 Title 5, California Code of Regulations, Section 55522[24], operative July 6, 1990,
10 for the first time, required Community College Districts, where necessary, to make

[24] Title 5, California Code of Regulations, Section 55522, filed June 5, 1990 and operative July 6, 1990:

"Matriculation services for ethnic and language minority students and students with disabilities, shall be appropriate to their needs, and community college districts shall, where necessary, make modifications in the matriculation process or use alternative instruments, methods or procedures to accommodate the needs of such students. Districts may require students requesting such accommodations to provide proof of need. Extended Opportunity Programs and Services (EOPS) and Disabled Students Programs and Services (DSPS) are authorized, consistent with the provisions of chapter 1 (commencing with section 56000) and chapter 2.5 (commencing with section 56200) of division 7 of this part, to provide specialized matriculation services and modified or alternative matriculation services to their respective student populations. Notwithstanding this authorization, participation in the EOPS and DSPS programs is voluntary and no student may be denied necessary accommodations in the assessment process because he or she chooses not to use specialized matriculation services provided by these programs. Modified or alternative matriculation services for limited or non-English-speaking students may be provided in English as a Second Language programs."

modifications in the matriculation process or use alternate instruments, methods or procedures to accommodate ethnic and language minority students, and students with disabilities. Disabled Students Programs and Services ("DSPS") was authorized to provide specialized matriculation services and modified or alternative matriculation services to their student population.

Title 5, California Code of Regulations, Section 54100[25], operative February 18,

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[25] Title 5, California Code of Regulations, Section 54100, filed January 1, 1992 and operative February 18, 1992:

"(a) Each community college district which provides parking shall, consistent with the requirements of this section and Education Code Sections 66260 and 67311.5, provide parking at each of its colleges or centers to students with disabilities and those providing transportation for such students.

(b) For purposes of this section, "students with disabilities" are those who have enrolled at the college and:

(1) qualify as disabled persons or disabled veterans pursuant to Section 22511.5 of the Vehicle Code; or

(2) are entitled to special parking provided through Disabled Student Programs and Services pursuant to Subchapter 1 (commencing with Section 56000) of Chapter 7 of this Division.

(c) Students with disabilities using parking provided under this section may be required to display a distinguishing license plate or placard issued by the Department of Motor Vehicles pursuant to Section 22511.5 of the Vehicle Code or a special sticker issued by the college authorizing parking in spaces designated for persons with disabilities.

(d) Students with disabilities may be required to pay parking permit fees imposed pursuant to Education Code Section 72247. Students with disabilities shall not be required to pay any other charge, or be subjected to any time limitation or other restriction not specified herein, when parking in any of the following areas:

(1) any restricted zone described in subdivision (e) of Section 21458 of the Vehicle Code;

(2) any street upon which preferential parking privileges and height limits have been given pursuant to Section 22507 of the Vehicle Code;

(3) any parking zone that is restricted as to the length of time parking is permitted as indicated by a sign erected pursuant to a local ordinance;

1992, required community colleges to provide parking at each campus or center for their students with disabilities and those providing transportation for such students. Subdivision (e) requires that specially designated parking be made available in those parking areas which are most accessible to facilities which the district finds are most used by students. Subdivision (f) requires that community colleges post conspicuous notices that parking are available to students with disabilities. When access to parking is controlled by a mechanical gate, subdivision (g) requires community colleges to provide accommodations for students with disabilities who are unable to operate the mechanical gate controls.

The controlling regulations for Special Programs is found in Title 5, California Code of Regulations, Chapter 7, Subchapter 1 - Disabled Student Programs and

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(4) any metered zone; or

(5) any space in any lot or area otherwise designated for use by faculty, staff, administrators, or visitors.

(e) Parking specifically designated for persons with disabilities pursuant to Section 7102 of Title 24 of the California Code of Regulations shall be available to students with disabilities, and those providing transportation to such persons, in those parking areas which are most accessible to facilities which the district finds are most used by students.

(f) Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for such students.

(g) When parking provided pursuant to this section is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by an attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district.

(h) Revenue form parking fees collected pursuant to Education Code Section 72247 may be used to offset the costs of implementing this section."

1 Services, Sections 56000 through 56076. The Chancellor's Office of the California
2 Community Colleges has also published and promulgated Executive Orders entitled
3 "Implementing Guidelines for Title 5 Regulations - Disabled Student Programs and
4 Services" (hereinafter "Implementing Guidelines"), a copy of which is attached hereto as
5 Exhibit 5 and is incorporated herein be reference. References to the "Implementing
6 Guidelines" will be made after each Regulation section along with any additional
7 program or documentation requirements set forth therein.
8 Article 1, commencing with Section 56000, provides general provisions and
9 definitions. Section 56000[28] requires Community College Districts offering support to
10 students with disabilities through Disabled Student Programs and Services ("DSPS"),

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[28] Title 5, California Code of Regulations, Section 56000, filed February 4, 1993 and operative March 6, 1993:

"This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code Sections 67310-12 and 84850.

Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter. Any support services or instruction funded, in whole or in part, under the authority of this subchapter must:

(a) not duplicate services or instruction which are otherwise available to all students;

(b) be directly related to the educational limitations of the verified disabilities of the students to be served;

(c) be directly related to the students' participation in the educational process;

(d) promote the maximum independence and integration of students with disabilities; and

(e) support participation of students with disabilities in educational activities consistent with the mission of the community colleges as set forth in Education Code Section 66701."

1 pursuant to Education Code Sections 67310 through 67312 and 84850, to meet the
2 requirements of the Subchapter. Any support services or instruction funded must: (1)
3 not duplicate services or instructions otherwise available to students; (2) relate directly
4 to the educational limitations of the students with verified disabilities; (3) relate directly to
5 the students' participation in the educational process; (4) promote the maximum
6 integration and independence of the students with disabilities; and (5) support the
7 participation of students with disabilities in programs as consistent with the mission of
8 the community colleges. See: "Implementing Guidelines" for Section 56000.
9 Documentation of the fact that the requirements of the section have been satisfied with
10 respect to any particular student should be reflected in his or her Student Education
11 Contract. The fact that these requirements are satisfied by the DSPS program as a
12 whole is to be documented through the special class approval process (Section 56028)
13 and through the college's program plan (Section 56046).
14 Section 56002[27] defines the terms "student with a disability" or "disabled student"
15 as an individual enrolled at a community college who has a verified impairment which
16 limits one or more major life activities, as defined in 28 C.F.R. 35.104, and which

[27] Title 5, California Code of Regulations, Section 56002, filed February 4, 1993 and operative March 6, 1993:

"A "student with a disability" or "disabled student" is a person enrolled at a community college who has a verified impairment which limits one or more major life activities, as defined in 28 C.F.R. 35.104, and which imposes an educational limitation as defined in Section 56004. For purposes of reporting to the Chancellor under Section 56030, students with disabilities shall be reported in the categories described in Sections 56032-44."

imposes an "educational limitation" as defined in Section 56004. For the purpose of reporting to the Chancellor, students with disabilities shall be reported in the categories set forth in Sections 56032 through 56044. See: "Implementing Guidelines" for Section 56002. Documentation that students meet disability criteria should be available in the student's files, and should include (1) a signed application for services and verification of enrollment at the community college, (2) verification of disability and identification of education limitation(s) due to the disability, (3) a SEC, and (4) documentation of services provided.

Section 56004[28] defines the term "educational limitation" as a disability related functional limitation in the educational setting which prevents a student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction. See: "Implementing Guidelines" for Section 56004. Documentation that services and accommodations are directly related to the student's educational limitation should be available in the student's file.

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[28] Title 5, California Code of Regulations, Section 56004, filed February 4, 1993 and operative March 6, 1993:

"As used in this subchapter, "educational limitation" means disability related functional limitation in the educational setting. This occurs when the limitation prevents the student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction as defined in Section 56005."

1 Section 56005[29] defines the term "support services or instruction" as any one or
2 more of the services listed in Section 56026, special class instruction authorized under
3 Section 56028, or both. See: "Implementing Guidelines" for Section 56005 where
4 support services or instruction is defined to mean any service or classroom instruction
5 that is above and beyond the regular services or instruction offered by the college.
6 Documentation that the support services or instruction are related to the student's
7 education limitation should be part of the SEC.
8 Section 56006[30] requires that the student with a disability must have an

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[29] Title 5, California Code of Regulations, Section 56005, filed February 4, 1993 and operative March 6, 1993:

"As used in this subchapter, "support services or instruction" means any one or more of the services listed in Section 56026, special class instruction authorized under Section 56028, or both."

[30] Title 5, California Code of Regulations, Section 56006, filed February 4, 1993 and operative March 6, 1993:

"(a) In order to be eligible for support services or instruction authorized under this chapter, a student with a disability must have an impairment which is verified pursuant to subdivision (b) which results in an educational limitation identified pursuant to subdivision (c) of this section.

(b) The existence of an impairment may be verified, using procedures prescribed by the Chancellor, by one of the following means:

(1) observation by DSPS professional staff with review by the DSPS coordinator;

(2) assessment by appropriate DSPS professional staff; or

(3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS.

(c) The student's educational limitations must be identified by appropriate DSPS professional staff and described in the Student Education Contract (SEC) required pursuant to Section 56022. Eligibility for each service provided must be directly related to an educational limitation consistent with Section 56000(b) and Section 56004."

impairment which is verified in order for the student to be eligible for support services or instruction. Subdivision (b) requires that the existence of an impairment may be verified by using one of the following means: (1) observation by DSPS professional staff with review by the DSPS coordinator; (2) assessment by appropriate DSPS professional staff; or (3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS. Subdivision (c) requires that the student's "educational limitation" be identified by appropriate DSPS professional staff and described in the Student Education Contract ("SEC") required by Section 56022. Eligibility for each service provided must be directly related to an educational limitation consistent with Sections 56000(b) and 56004. See: "Implementing Guidelines" for Section 56006 which provides that the requirements for verification of disability apply to all students receiving DSPS services or instruction which includes students served at off-campus community-based facilities, such as hospital sites or shelter workshops. The community college is required to advise the facility of its responsibility to provide accurate information for verification. Documentation should include that a verification of disability form be placed in each student's file and should be signed by the appropriate professional or agency representative.

Section 56008[31] provides for the rights of students with disabilities. Participation

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[31] Title 5, California Code of Regulations, Section 56008, filed February 4, 1993 and operative March 6, 1993:

1 by students with disabilities in DSPS shall be entirely voluntary. A student receiving
2 support services or instruction authorized under this Subchapter shall not be precluded
3 from also participating in any other course, program or activity offered by the college. All
4 records maintained by DSPS personnel pertaining to students with disabilities shall be
5 protected from disclosure and subject to all other requirements for the handling of
6 student records found in Subchapter 2 (commencing with Section 54600) of Chapter 5.
7 See: "Implementing Guidelines" for Section 56008 which provides that if a student
8 requests accommodations that impact the delivery of instruction and/or the instructor,
9 the instructor has a right to know the student's educational limitations and the
10 appropriate accommodation, but only with the student's permission. Documentation
11 requires the release of information form to be in the student's file and signed by the
12 student if any information is released regarding the student's disability.
13 Section 56010[32] describes the responsibilities of students with disabilities

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"(a) Participation by students with disabilities in Disabled Student Programs and Services shall be entirely voluntary.

(b) Receiving support services or instruction authorized under this subchapter shall not preclude a student from also participating in any other course, program or activity offered by the college.

(c) All records maintained by DSPS personnel pertaining to students with disabilities shall be protected from disclosure and shall be subject to all other requirements for handling of student records as provided in Subchapter 2 (commencing with Section 54600) of Chapter 5 of this Division."

[32] Title 5, California Code of Regulations, Section 56010, filed February 4, 1993 and operative March 6, 1993:

"(a) Students receiving support services or instruction under this subchapter shall:

receiving support services and instruction pursuant to this subchapter. Subdivision (a) requires students to: (1) comply with the student code of conduct adopted by the college and all other applicable statutes and regulations outlining student conduct; (2) be responsible in using DSPS services and comply with written instructions and policies adopted by DSPS; and (3) make measurable progress toward goals established in the student's "SEC" or, when enrolled in a regular college course, meet academic standards established by the college. Subdivision (b) provides that a District may adopt a written policy for the suspension or termination of DSPS services where a student fails to comply with requirements (2) or (3) and requires the District to give a copy of the policy to a student upon first applying for services from DSPS. The written policy shall provide for written notice prior to suspension or termination of services and an opportunity to appeal the decision. See: "Implementing Guidelines" for Section 56010 which provides

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(1) comply with the student code of conduct adopted by the college and all other applicable statutes and regulations to student conduct;

(2) be responsible in their use of DSPS services and adhere to written service provision policies adopted by DSPS; and

(3) make measurable progress toward the goals established in the student's Student Educational Contract or, when the student is enrolled in a regular college course, meet academic standards established by the college pursuant to Subchapter 8 (commencing with Section 55750) of Chapter 6 of this Division.

(b) A district may adopt a written policy providing for the suspension or termination of DSPS services where a student fails to comply with subdivisions (a)(2) or (a)(3) of this section. Such policies shall provide for written notice to the student prior to the suspension or termination and shall afford the student an opportunity to appeal the decision. Each student shall be given a copy of this policy upon first applying for services from DSPS."

1 that the community college shall also provide the student with a written notice of the
2 resolution arrived at during the appeal process or a final notice for the suspension or
3 termination of services. Documentation requires that verification that the student was
4 notified of all policies dealing with the rights and responsibilities in receiving DSPS
5 services be in the student's file along with a copy of all notices sent to the student about
6 the student's abuse of DSPS services, all documents of the appeal process, and a copy
7 of the notification of the outcome of any appeal.

8 Article 2, commencing with Section 56020, provides regulations pertaining to
9 DSPS services. Section 56020[33] requires each Community College District to employ
10 reasonable means to inform all students and staff about the support services or
11 instruction available through the DSPS program.

12 Section 56022[34] requires a Student Education Contract ("SEC") be established,

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[33] Title 5, California Code of Regulations, Section 56020, filed February 4, 1993 and operative March 6, 1993:

"Each community college district receiving funds pursuant to this subchapter shall employ reasonable means to inform all students and staff about the support services or instruction available through the DSPS program."

[34] Title 5, California Code of Regulations, Section 56022, filed February 4, 1993 and operative March 6, 1993:

"A Student Educational Contract (SEC) is a plan to address specific needs of the student. An SEC must be established upon initiation of DSPS services and shall be reviewed and updated annually for every student with a disability participating in DSPS. The SEC specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The SEC shall be reviewed annually by a DSPS professional staff person to determine whether the student has made progress

upon the initiation of DSPS services, to address the specific needs of the student. The "SEC" shall specify those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The SEC is required to be reviewed annually by a DSPS professional staff person to determine whether the student has made progress toward his or her stated goals(s). See: "Implementing Guidelines" for Section 56022 which provides that the annual review process should determine the student's progress and should include an up–to-date copy of the student's class schedule, delineation of services provided, an indication that a DSPS professional staff has reviewed the SEC and determined that measurable progress has been made, and the signature of the student showing agreement. Documentation requires an up-to-date SEC for the current year, signed by the student and the DSPS professional staff be available in the file of each student receiving services through the DSPS office. Also, students in noncredit special classes should have included in their SEC a detailed description of the criteria used to evaluate the student's measurable progress.

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toward his/her stated goals(s).

Whenever possible the SEC shall serve as the Student Educational Plan (SEP) and shall meet the requirements set forth in Section 55525 of this division. In addition, for students in noncredit special classes, each SEC shall include, but need not be limited to a description of the criteria used to evaluate the student's progress."

1 Section 56026[35] defines "support services" as those specialized services

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[35] Title 5, California Code of Regulations, Section 56026, filed February 4, 1993 and operative March 6, 1993:

"Support services are those specialized services available to students with disabilities as defined in Section 56002, which are in addition to the regular services provided to all students. Such services enable students to participate in regular activities, programs and classes offered by the college. They may include, but need not be limited to:

(a) Basic fixed cost administrative services associated with the ongoing administration and operation of the DSPS program. These services include:

(1) Access to and arrangements for adaptive educational equipment, materials and supplies required by students with disabilities;

(2) Job placement and development services related to transition to employment;

(3) Liaison with campus and/or community agencies, including referral to campus or community agencies and follow-up services;

(4) Registration assistance relating to on or off-campus college registration, including priority enrollment assistance, application for financial aid and related college services;

(5) Special parking, including on-campus parking registration or, while an application for the State handicapped placard or license plate is pending, provision of a temporary parking permit.

(6) Supplemental specialized orientation to acquaint students with environmental aspects of the college and community.

(b) Continuing variable cost services which fluctuate with changes in the number of students or the unit load of the students. These services include, but are not limited to:

(1) Test-taking facilitation, including arrangement, proctoring and modification of test and test administration for students with disabilities;

(2) Assessment, including both individual and group assessment not otherwise provided by the college to determine functional educational and vocational levels or to verify specific disabilities;

(3) Counseling, including specialized academic, vocational, personal, and peer counseling services specifically for students with disabilities, not duplicated by ongoing general counseling services available to all students;

(4) Interpreter services, including manual and oral interpreting for hearing-impaired students;

(5) mobility ability assistance (on-campus), including manual or motorized transportation to and from college courses and related educational activities;

available to students with disabilities as defined in Section 56002, which are in addition to the regular services provided to all students. "Support services" include, but need not be limited to:

(a) basic fixed cost administrative services associated with the ongoing administration and operation of the DSPS programs, including (1) access to and arrangements for adaptive educational equipment, materials and supplies required by students with disabilities, (2) job placement and development services, (3) liaison with and referral to campus or community agencies, (4) registration assistance, (5) special parking, and (6) specialized orientation;

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(6) notetaker services, to provide assistance to students with disabilities in the classroom;

(7) reader services, including the coordination and provision of services for students with disabilities in the instructional setting;

(8) speech services provided by a licensed speech/language pathologist for students with verified speech disabilities;

(9) transcription services, including, but not limited to, the provision of braille and print materials;

(10) transportation assistance (off-campus), only if not otherwise provided by the college to all students, where public accessible transportation is unavailable, and is deemed inadequate by the Chancellor's Office;

(11) specialized tutoring services not otherwise provided by the college;

(12) outreach activities designed to recruit potential students with disabilities to the college;

(13) accommodations for participation in co-curricular activities directly related to the student's enrollment in state-funded educational courses or programs; and

(14) repair of adaptive equipment donated to the DSPS program or purchased with funds provided under this subchapter.

(c) One-time variable costs for purchase of DSPS equipment, such as adapted educational equipment, materials, supplies and transportation vehicles."

(b) continuing variable cost services which fluctuate with changes in the number of students or the unit load of the students, including (1) test-taking facilitation, (2) individual and group assessment, (3) specialized and peer counseling, (4) manual and oral interpreter services, (5) on-campus mobility assistance, (6) classroom notetaker services, (7) reader services, (8) speech services, (9) off-campus transportation services and assistance, (10) specialized tutoring services, (11) outreach and recruiting activities, (12) accommodations for participation in co-curricular activities, and (13) repair of adaptive equipment; and

(c) One-time variable costs for purchase of DSPS equipment, such as adapted educational equipment, materials, supplies and transportation vehicles.

See also: "Implementation Guidelines" for Section 56026.

Section 56027[36] requires each Community College District to establish policies and procedures for responding in a timely manner to accommodation requests involving academic adjustments. The procedure shall provide for an individualized review of each request and shall permit the Section 504 Coordinator to make an interim decision

[36] Title 5, California Code of Regulations, Section 56027, filed February 4, 1993 and operative March 6, 1993:

"Each community college district receiving funding pursuant to this subchapter shall establish a policy and procedure for responding to, in a timely manner consistent with Section 53203 of this division, accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the Section 504 Coordinator, or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution."

pending a final resolution. See: "Implementing Guidelines" for Section 56027 which notes that it is the district or college that decides whether local Board approval for a policy dealing with academic accommodations be obtained. Documentation requires that the written policy must be accessible to students, faculty and staff of the college.

Section 56028[37] defines "special classes" as instructional activities designed to address the educational limitations of students with disabilities who would be unable to

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[37] Title 5, California Code of Regulations, Section 56028, filed February 4, 1993 and operative March 6, 1993:

"Special classes are instructional activities designed to address the educational limitations of students with disabilities who would be unable to substantially benefit from regular college classes even with appropriate support services or accommodations. Such classes generate revenue based on the number of full-time equivalent students (FTES) enrolled in the classes.

Such classes shall be open to enrollment of students who do not have disabilities, however, to qualify as a special class, a majority of those enrolled in the class must be students with disabilities.

Special classes offered for credit or noncredit shall meet the applicable requirements for degree credit, non-degree credit, or noncredit set forth in Sections 55002 and 55705.5 of this part. In addition, special classes shall:

(a) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire the skills necessary to complete their educational objectives;

(b) Employ instructors who meet minimum qualifications set forth in Section 53414 of this Division.

(c) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities. Curriculum committees responsible for reviewing and/or recommending special class offerings shall have or obtain the expertise appropriate for determining whether the requirements of this section are satisfied; and

(d) Utilize student/instructor ratios determined to be appropriate by the District given the educational limitations of the students with disabilities enrolled in each class. Class size should not be so large as to impede measurable progress or to endanger the well-being and safety of students or staff."

1 substantially benefit from regular college classes even with appropriate support services
2 or accommodations. To qualify as a special class, a majority of those enrolled in the
3 class must be students with disabilities. These special classes shall (a) be designed to
4 enable students with disabilities to compensate for educational limitations and/or acquire
5 the skills necessary to complete their educational objectives; (b) employ instructors who
6 meet the minimum qualifications set forth in Section 53414 of this Division; (c) utilize
7 curriculum, instructional methods, or materials specifically designed to address the
8 educational limitations of students with disabilities and curriculum committees
9 responsible for reviewing and/or recommending special class offerings shall have or
10 obtain the expertise appropriate for determining whether the requirements of this section
11 are satisfied; and (d) utilize student/instructor ratios determined to be appropriate by the
12 District given the educational limitations of the students with disabilities enrolled in each
13 class. Class size should not be so large as to impede measurable progress or to
14 endanger the well-being and safety of students or staff. See: "Implementing Guidelines"
15 for Section 56028 which provides that special class curriculum must go through a review
16 process for approval as established by the district and the Chancellor's Office.
17 Documentation requires verification of course approval by the college curriculum
18 committee for each special class offered that is available in the Instructional Dean's or
19 other designated staff person's office, which should be accessible to the DSPS
20 coordinator. In addition, the college or district personnel/credentials office should have
21 minimum qualifications on file for all DSPS staff teaching special classes. Information

1 documenting that special classes meet the criteria specified will be required as part of
2 the DSPS Program Plan.

3 Section 56029[38] allows students with disabilities to repeat their enrollment in
4 "special classes" to accommodate their educational limitations. Community college
5 districts are required to adopt policies and procedures providing for "special class"
6 repetition to: (1) further the student's continuing success; (2) enable the student to enroll
7 in other regular or special classes; or (3) further the student's goals. See: "Implementing
8 Guidelines" for Section 56029. Documentation requires each district to establish
9 procedures for tracking repetitions and a process for students to invoke special class
10 course repeatability accommodation on a case-by-case basis and the DSPS program is
11 required to monitor the information to assure that the requirements of the Section are
12 met.

13 Article 3, commencing with Section 56030, regulates Reports, Plans and Program

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[38] Title 5, California Code of Regulations, Section 56029, filed February 4, 1993 and operative March 6, 1993:

"Repetition of special classes is subject to the provisions of Sections 55761-63 and 58161 of this division. However, districts are authorized to permit additional repetitions of special classes to provide an accommodation to a student's educational limitations pursuant to state and federal nondiscrimination laws. Districts shall develop policies and procedures providing for repetition under the follow circumstances:

(a) When continuing success of the student in other general and/or special classes is dependent on additional repetitions of a specific class;

(b) When additional repetitions of a specific special class are essential to completing a student's preparation for enrollment into other regular or special classes; or

(c) When the student has a student educational contract which involves a goal other than completion of the special class in question and repetition of the course will further achievement of that goal."

1 Requirements. Section 56030[39] requires each Community College District receiving
2 DSPS funding to submit reports, including budget and fiscal reports, as required by the
3 Chancellor. When submitting these reports, the Community College Districts are
4 required to use the disability categories set forth in Sections 56032 through 56044. See:
5 "Implementing Guidelines" for Section 56030 which also requires community colleges to
6 submit revised reports to correct errors on these reports as necessary and requires
7 DSPS staff to attend inservice training for the compilation of this data. Documentation
8 requires community colleges to maintain up-to-date files of the completed reports in the
9 DSPS Office and the Business Office.

10 Section 56032[40] defines "physical disability" as a visual, mobility or orthopedic
11 impairment. See: "Implementing Guidelines" for Section 56032 which provides that
12 "visual impairment" can be verified by a physician, a licensed vision professional or

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[39] Title 5, California Code of Regulations, Section 56030, filed February 4, 1993 and operative March 6, 1993:

"Each community college district receiving funding pursuant to this subchapter shall submit such reports (including budget and fiscal reports described in Article 4) as the Chancellor may require. When submitting such reports, districts shall use the disability categories set forth in Sections 56032-44 and shall conform to the reporting format, procedures, and deadlines the Chancellor may additionally prescribe."

[40] Title 5, California Code of Regulations, Section 56032, filed February 4, 1993 and operative March 6, 1993:

"Physical disability means a visual, mobility or orthopedic impairment.
(a) Visual impairment means total or partial loss of sight.
(b) Mobility or orthopedic impairment means a serious limitation in locomotion or motor function."

through documentation from a referring agency, while, a "mobility impairment" can be verified, if possible, by the personal observation of a DSPS professional staff member with the DSPS coordinator review, by documentation from a physician, or by the documentation of the referring agency if the verification is done by a physician. Documentation requires community colleges to maintain files that contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the appropriate professional.

Section 56034[41] defines "communication disability" as an impairment in the processes of speech, language or hearing. See: "Implementing Guidelines" for Section 56034 which provides that "hearing impairment" can be verified by an appropriate hearing professional or through documentation from a referring agency that obtains verification from a medical doctor or other licensed ear professional. This disability can be verified by a DSPS staff member only if that person has the appropriate license. The "Implementing Guidelines" provides that "speech impairment" can be verified by a

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[41] Title 5, California Code of Regulations, Section 56034, filed February 4, 1993 and operative March 6, 1993:

"Communication disability is defined as an impairment in the processes of speech, language or hearing.

(a) Hearing impairment means a total or partial loss of hearing function which impedes the communication process essential to language, educational, social and/or cultural interactions.

(b) Speech and language impairments mean one or more speech/language disorders of voice, articulation, rhythm and/or the receptive and expressive processes of language."

1 licensed speech professional or through documentation from a referring agency that
2 obtains its verification from a licensed speech professional. This disability can be
3 verified by a DSPS staff member only if that person has the appropriate license.
4 Documentation requires that files contain verification of disability which identified the
5 particular disability, the education limitation(s) resulting from the disability, and how the
6 student's educational performance is impeded. The verification must be signed by the
7 appropriate professional.

8 Section 56036[42] defines "learning disability" as a persistent condition of presumed
9 neurological dysfunction which may exist with other disabling conditions and continues
10 despite instruction in standard classroom situations. See: "Implementing Guidelines" for
11 Section 56036 which provides that this disability can only be verified in one of three
12 ways: (1) by a learning disability professional using the California Community College
13 Learning Disability Eligibility Model, or (2) a DSPS learning disability specialist may
14 professionally certify if assessment documentation from a referring agency is deemed to

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[42] Title 5, California Code of Regulations, Section 56036, filed February 4, 1993 and operative March 6, 1993:

"Learning disability is defined as a persistent condition of presumed neurological dysfunction which may exist with other disabling conditions. This dysfunction continues despite instruction in standard classroom situations. To be categorized as learning disabled, a student must exhibit:

(a) Average to above-average intellectual ability;
(b) Severe processing deficit(s);
(c) Severe aptitude-achievement discrepancy(ies); and
(d) Measured achievement in an instructional or employment setting."

meet the requirements of the California Community College Learning Disability Eligibility Model, or (3) from documentation sent by a referring agency that has entered into an interagency agreement with the state Chancellor's Office and includes the identification of the particular type of learning disability the student has and what the functional limitation the disability imposes on the student. Documentation requires that files contain verification of disability which identifies the particular learning disability, the educational limitation(s) resulting from that disability, and how the student's educational performance is impeded. The verification must be signed by an appropriate licensed professional.

Section 56038[43] defines "acquired brain impairment" as a verified deficit in brain functioning which results in a total or partial loss of cognitive, communicative, motor, psycho-social, and/or sensory-perceptual abilities. See: "Implementing Guidelines" for Section 56038 which provides that it is the responsibility of the colleges to define acquired brain impairment in a manner which meets regulatory requirements. Documentation requires that files contain verification of disability which identifies the particular disability, educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the

[43] Title 5, California Code of Regulations, Section 56038, filed February 4, 1993 and operative March 6, 1993:

"Acquired brain impairment means a verified deficit in brain functioning which results in a total or partial loss of cognitive, communicative, motor, psycho-social, and/or sensory-perceptual abilities."

1 appropriate professional.

2 Section 56040[44] defines "developmentally delayed learner" as a student who
3 exhibits below average intellectual functioning and potential for measurable achievement
4 in instructional and employment settings. See: "Implementing Guidelines" for Section
5 56040 which sets forth three standards, of which, the student must meet one to be
6 classified as a developmentally delayed learner and provides that this disability can be
7 verified by the DSPS coordinator or a DDL specialist using documentation from a
8 referring agency. Special classes, if provided, may be offered either on or off-campus.
9 Documentation requires that files contain verification of disability which identifies the
10 particular disability, the educational limitation(s) resulting from the disability, and how the
11 student's educational performance in impeded.

12 Section 56042[45] defines "psychological disabilities," with several limitations, as a

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[44] Title 5, California Code of Regulations, Section 56040, filed February 4, 1993 and operative March 6, 1993:

"The developmentally delayed learner is a student who exhibits the following:
(a) below average intellectual functioning; and
(b) potential for measurable achievement in instructional and employment settings."

[45] Title 5, California Code of Regulations, Section 56042, filed February 4, 1993 and operative March 6, 1993:

"(a) Psychological disability means a persistent psychological or psychiatric disorder, or emotional or mental illness.
(b) For purposes of this subchapter, the following conditions are not psychological disabilities:
(1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual

1 persistent psychological or psychiatric disorder, or emotional or mental illness.
2 Subdivision (c) provides that in developing the allocation formula required under Section
3 56072, the Chancellor shall assign a zero weight to students with psychological
4 disabilities until such time as the state budget provides additional funds to serve this
5 population. See: "Implementing Guidelines" for Section 56042 which provides that a
6 psychological disability can be verified by a professional with the appropriate license, or
7 by documentation of a referring agency if its verification was done by a professional with
8 the appropriate license. This disability can be verified by a DSPS staff member only if
9 that person is an appropriately licensed professional such as a licensed medical doctor,
10 a licensed clinical psychologist or psychiatrist, a licensed Marriage, Family, and Child
Counselor, or a licensed clinical social worker. Documentation requires that verification
12 documents from the licensed professional include either the DSM and/or ICD disorder
13 code or the name of the disorder and the license number of the professional.
14 Section 56044[46] defines "other disabilities" as including students with disabilities

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behavior disorders;
(2) compulsive gambling, kleptomania, or pyromania; and
(3) psychoactive substance abuse disorders resulting from current illegal use of drugs.
(c) In developing the allocation formula required under Section 56072, the Chancellor shall assign a zero weight to students with psychological disabilities until such time as the state budget provides additional funds to serve this population."

[46] Title 5, California Code of Regulations, Section 56044, filed February 4, 1993 and operative March 6, 1993:

"This category includes all students with disabilities, as defined in Section 56002, who do not fall into any of the categories described in Sections 56032-42, but who

1 who do not fall into any of the categories specified in Sections 56032 through 56042, but
2 still indicate a need for support services or instruction pursuant to Sections 56026 and
3 56028. See: "Implementing Guidelines" for Section 56044 which gives examples of
4 "other disabilities" to include conditions having limited strength, vitality, or alertness due
5 to chronic or acute health problems, such as environmental disabilities, heart conditions,
6 tuberculosis, nephritis, sickle cell anemia, hemophilia, leukemia, epilepsy, acquired
7 immune deficiency syndrome (AIDS), diabetes, etc. This disability must be verified by
8 an appropriate licensed professional or through documentation from a referring agency
9 that obtains its verification from an appropriate licensed professional. A DSPS staff
10 member can verify this disability only if that person is an appropriately licensed
11 professional. Documentation requires that files contain verification of disability which
12 identifies the particular disability, the education limitation(s) resulting from the disability,
13 and how the student's educational performance is impeded. The verification must be
14 signed by the appropriate professional.

15 Section 56046[47] requires each Community College District to submit to the

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indicate a need for support services or instruction provided pursuant to Sections 56026 and 56028."

[47] Title 5, California Code of Regulations, Section 56046, filed February 4, 1993 and operative March 6, 1993:

"(a) Each district receiving funding pursuant to this subchapter shall submit to the Chancellor, at such times as the Chancellor shall designate, a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the District and the Chancellor. Expenditures of funds appropriated pursuant to this subchapter must conform to the approved plan.

Chancellor, at times designated, a DSPS program plan and updates for each college within the district in a format prescribed by the Chancellor. The DSPS program's plans shall at least contain (1) the long-term goals of the program, (2) the short-term measurable objectives of the program, (3) the activities to be undertaken to achieve these goals and objectives, and (4) the methods used for evaluating the program. Expenditures of funds must conform to the approved plan. See: "Implementing Guidelines" for Section 56046. Documentation requires that copies of the plan should be kept on file in the college DSPS office together with the letter of approval by the state Chancellor's Office.

Section 56048[48] requires that persons employed pursuant to this subchapter as

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(b) Each district shall submit updates to its program plan to the Chancellor upon request.

(c) The program plan shall be in the form prescribed by the Chancellor and shall contain at least all of the following:

(1) long-term goals of the DSPS program;

(2) the short-term measurable objectives of the program;

(3) the activities to be undertaken to accomplish the goals and objectives; and

(4) a description of the methods used for program evaluation."

[48] Title 5, California Code of Regulations, Section 56048, filed February 4, 1993 and operative March 6, 1993:

"(a) Persons employed pursuant to this subchapter as counselors or instructors of students with disabilities shall meet minimum qualifications set forth in Section 53414 of Subchapter 4 of Chapter 4 of this Division.

(b) Each district receiving funds pursuant to this subchapter shall designate a DSPS Coordinator for each college in the district. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day-to-day operation of DSPS. The designated Coordinator must meet the minimum qualifications for a DSPS counselor or instructor set forth in Section 53414(a) through (d) or meet the

1 counselors or instructors of students with disabilities shall meet minimum qualifications
2 set forth in Section 53414[49] and each District is required to designate a DSPS
3 Coordinator for each college in the District. This coordinator will be responsible for the
4 day-to-day operation of the DSPS, and must meet certain qualifications. Districts may
5 also employ classified and/or paraprofessional support staff who shall function under the
6 direction of a DSPS counselor, instructor, or coordinator. See: "Implementing
7 Guidelines" for Section 56048. Documentation should indicate that the DSPS
8 coordinator, DSPS counselor and DSPS instructor meet the minimum qualifications as
9 set forth in Section 53414(a) through (d) with the DSPS coordinator meeting the
10 additional minimum qualifications set forth in section 56048(b).

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minimum qualifications for an educational administrator set forth in Section 53420 and, in addition, have two (2) years full-time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) instruction or counseling or both in a higher education program for students with disabilities;

(2) administration of a program for students with disabilities in an institution of higher education;

(3) teaching, counseling or administration in secondary education, working predominantly or exclusively in programs for students with disabilities; or

(4) administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominantly or exclusively related to persons with disabilities.

(c) Districts receiving funding pursuant to this subchapter may also employ classified and/or paraprofessional support staff. Support staff shall function under the direction of a DSPS counselor, instructor, or Coordinator as appropriate for the support services or instruction being provided."

[49] The minimum qualifications for counselors, instructors, and designated DSPS Coordinators is the subject of another Test Claim.

Section 56050[50] requires each Community College District receiving DSPS funding to establish an advisory committee at each college in the district consisting of students with disabilities and representatives of the disability community and agencies or organizations serving persons with disabilities. These committees are required to meet at least once a year. See: "Implementing Guidelines" for Section 56050. Documentation requires a roster of committee members which indicates the affiliation of the member and dates and minutes of the meetings.

Section 56052[51] requires the Chancellor to conduct evaluations of the DSPS programs to determine their effectiveness at least once every five years. The evaluation shall, at a minimum, provide for the gathering of outcome data, staff and student

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[50] Title 5, California Code of Regulations, Section 56050, filed February 4, 1993 and operative March 6, 1993:

"Each district receiving funds pursuant to this subchapter shall establish, at each college in the district, an advisory committee which shall meet not less than once per year.

The advisory committee shall, at a minimum, include student [sic] with disabilities and representatives of the disability community and agencies or organizations serving persons with disabilities."

[51] Title 5, California Code of Regulations, Section 56052, filed February 4, 1993 and operative March 6, 1993:

" The Chancellor shall conduct evaluations of DSPS programs to determine their effectiveness. Each college shall be evaluated at least once every five years. The evaluation shall at a minimum, provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of the Americans with Disabilities Act (42 USC 12101 et seq.), Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), compliance with Education Code Section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code Section 84850."

1 perceptions of program effectiveness, access requirements of law, compliance with
2 Education Code Section 67311.5 with respect to parking for persons with disabilities,
3 and data on the implementation of the program as outlined in Education Code Section
4 84850. See: "Implementing Guidelines" for Section 56052 which provides that colleges
5 may be required to provide a variety of information to the evaluation team, such as
6 budgets, DSPS Program Plans, the college's Section 504 and ADA self-evaluation,
7 organizational charts, advisory committee membership rosters, etc. Documentation
8 requires that the evaluation report be kept in the DSPS office for public inspection.
9 Section 56054[52] requires each Community College District to cooperate with the
10 Chancellor in accomplishing "special projects." These projects may include: task force
11 meetings, research studies, model programs, conferences, training seminars, and other
12 activities. See: "Implementing Guidelines" for Section 56054. Documentation of special
13 projects shall be maintained by the Chancellor's Office.
14 Article 4, commencing with Section 56060, regulates Funding and Accountability.

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[52] Title 5, California Code of Regulations, Section 56054, filed February 4, 1993 and operative March 6, 1993:

"(a) Community college districts receiving funding pursuant to this subchapter shall cooperate to the maximum extent possible with the Chancellor in carrying out special projects. Such projects may include, but are not limited to, task force meetings, research studies, model programs, conferences, training seminars, and other activities designed to foster program development and accountability. Such special projects shall be funded from the three percent set aside authorized pursuant to Education Code Section 84850(e).

(b) Where such special projects fund services to students, such students need not meet the eligibility criteria otherwise required under this subchapter, but such students shall meet any eligibility requirements which the Chancellor may prescribe."

Section 56060[53] provides that a Community College District shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess costs, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs. See: "Implementing Guidelines" for Section 56060 which provides that if a multi-college district wants a redistribution of allocated funds to their individual colleges, the district must request prior written approval from the state Chancellor's Office which includes an appropriate justification for the redistribution. When requested, documentation requires that each college in the district should maintain on file the written justification along with the Chancellor's Office response.

Section 56062[54] provides that a Community College District will be deemed to have "provided support services or instruction" to a student with a disability, as required by Section 56060, if the student is enrolled in a special class or is enrolled in a regular

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[53] Title 5, California Code of Regulations, Section 56060, filed February 4, 1993 and operative March 6, 1993:

"Any community college district shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess cost, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs."

[54] Title 5, California Code of Regulations, Section 56062, filed February 4, 1993 and operative March 6, 1993:

"A community college district will be deemed to have "provided support services or instruction" to a student with a disability, as required by Section 56060, if the student is enrolled in a special class or is enrolled in a regular class and received four or more service contracts per year with the DSPS program."

class and received four or more service contracts per year with the DSPS program. See: "Implementing Guidelines" for Section 56062. Documentation requires that each college maintain a file for each student reported to the state for funding which contains a college transcript of general as well as special classes and/or independent study in which the student is enrolled, amount and type of special services received, and verification of disability information.

Section 56064[55] defines "direct excess costs" as those actual fixed, variable, and one-time costs (not including indirect administrative costs, as defined in Section 56068) for providing support services or instruction, as defined in Sections 56026 and 56028, which exceed the combined total of the following: (a) the average cost to the district of providing comparable services to nondisabled students times the number of students receiving such services from DSPS; (b) the revenue derived from special classes; and (c) any other funds for serving students with disabilities which the district receives from

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[55] Title 5, California Code of Regulations, Section 56064, filed February 4, 1993 and operative March 6, 1993:

"Direct excess costs are those actual fixed, variable, and one-time costs (not including indirect administrative costs, as defined in Section 56068) for providing support services or instruction, as defined in Sections 56026 and 56028, which exceed the combined total of the following:

(a) the average cost to the district of providing comparable services (as defined in Section 56066) to nondisabled students times the number of students receiving such services from DSPS;

(b) the revenue derived from special classes as provided in Section 56070; and

(c) any other funds for serving students with disabilities which the district receives from federal, state, or local sources other than discretionary district funds."

other sources. See: "Implementing Guidelines" for Section 56064. Documentation requires that colleges maintain income and expenditures by accounting codes in such a format that they can complete the DSPS End-of-Year report as developed by the Chancellor's Office. The information in the report includes total costs of the DSPS program, but not indirect administrative costs as defined in Section 56068.

Section 56066[56] defines "comparable services." Districts which claim reimbursement for direct excess costs for "comparable services" are required to certify

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[56] Title 5, California Code of Regulations, Section 56066, filed February 4, 1993 and operative March 6, 1993:

"(a) As used in Section 56064, "comparable services" are those services which are comparable to services available from a college to its nondisabled students. These services include, but are not limited to:

(1) job placement and development as described in Section 56026(a)(2);
(2) registration assistance as described in Section 56026(a)(4);
(3) special parking as described in Section 56026(a)(5);
(4) assessment as described in Section 56026(b)(2);
(5) counseling as described in Section 56026(b)(3);
(6) tutoring as described in Section 56062(b)(11); and
(7) outreach as described in Section 56026(b)(12).

(b) Districts which claim reimbursement for direct excess costs for comparable services as defined in subdivision (a) must, for each college in the district:

(1) certify that the service in question is not offered to nondisabled students; or

(2) collect and report to the Chancellor, on forms prescribed by the Chancellor, data showing the number of new and the number of continuing students with disabilities enrolled in credit courses who received one or more such services, in whole or in part, from DSPS.

(c) The Chancellor shall adjust the allocation of each district by the number, if any, of students reported pursuant to subdivision (b)(2), times the applicable credit student services funding rates for new and continuing students calculated pursuant to Article 4 (commencing with Section 58730) of Subchapter 4 of Chapter 9 of this Division."

1 for each community college in the district that the services in question are not offered to
2 nondisabled students, or collect and report to the Chancellor data showing the number
3 of new and the number of continuing students with disabilities enrolled in credit courses
4 who received such services.

5 Section 56068[57] defines the term "indirect administrative costs," as used in
6 Section 56064, as any administrative overhead or operational cost, including but not
7 limited to: (a) college administrative support costs, such as staff of the college business
8 office, bookstore, reproduction center, etc.; (b) administrative salaries and benefits, with

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[57] Title 5, California Code of Regulations, Section 56068, filed February 4, 1993 and operative March 6, 1993:

"As used in Section 56064, the term "indirect administrative costs" means any administrative overhead or operational cost, including but not limited to, the following:

(a) college administrative support costs, such as staff of the college business office, bookstore, reproduction center, etc.;

(b) administrative salaries and benefits, with the exception of the DSPS Coordinator;

(c) indirect costs, such as heat, light, power, telephone, FAX, gasoline and janitorial;

(d) costs of construction, except for removal or modification of minor architectural barriers;

(e) staff travel costs for other than DSPS-related activities or functions;

(f) costs for on- and off-campus space and plant maintenance;

(g) the cost of office furniture (e.g., desks, bookcases, filing cabinets, etc.);

(h) costs of dues or memberships for DSPS staff;

(I) rent of off-campus space;

(j) costs for legal matters, election campaigns or audit expenses;

(k) building costs, even if the new building were for exclusive use of DSPS;

(l) books or other resource material purchases for the general or main library; or

(m) equipment which is not, in whole or part, adapted for use by students with disabilities."

the exception of the DSPS Coordinator; (c) indirect costs, such as heat, light, power, telephone, FAX, gasoline and janitorial; (d) costs of construction, except for removal or modification of minor architectural barriers; (e) staff travel costs for other than DSPS-related activities or functions; (f) costs for on- and off-campus space and plant maintenance; (g) the cost of office furniture (e.g., desks, bookcases, filing cabinets, etc.); (h) costs of dues or memberships for DSPS staff; (I) rent of off-campus space; (j) costs for legal matters, election campaigns or audit expenses; (k) building costs, even if the new building were for exclusive use of DSPS; (l) books or other resource material purchases for the general or main library; or (m) equipment which is not, in whole or part, adapted for use by students with disabilities. Community Colleges are not reimbursed for any of these "indirect administrative costs" even if directly related to providing services to disabled students. See: "Implementing Guidelines" for Section 56068.

Section 56070[56] provides the formula for calculating the revenue from special

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[56] Title 5, California Code of Regulations, Section 56070, filed February 4, 1993 and operative March 6, 1993:

"(a) For purposes of Section 56064 (b), the revenue derived from special classes, for fiscal year 1995-96 and all subsequent years, shall be calculated by adding together the following:

(1) the FTES instructional non-credit rate times the number of units of FTES in noncredit special classes; and

(2) the FTES instructional credit rate, not including indirect administrative costs, times the number of units of FTES in credit special classes for each college in the District.

(b) In implementing this section, the Chancellor shall insure that increases or decreases in the amount of special class revenue attributed to a district solely as a

1 classes, as defined in Section 56064. Community College Districts are required to use
2 revenue from special classes for support services or instruction and not for indirect
3 administrative costs. See: "Implementing Guidelines" for Section 56070.
4 Documentation requires that special classes must be identified as a special class on the
5 district's overall FTES report and all sections of these special classes have to be
6 identified as a special section in the district's MIS system.
7 Section 56072[59] requires the Chancellor to adopt an allocation formula to make

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result of the adoption of the "disaggregate" method of calculation described in subdivision (A) shall be spread evenly over a three (3) year phase-in period ending with full implementation for fiscal year 1995-96.

(c) Revenue from special classes shall be used for provision of support services or instruction pursuant to Section 56026 and 56028 and shall not be used for indirect administrative costs as defined in Section 56068."

[59] Title 5, California Code of Regulations, Section 56072, filed February 4, 1993 and operative March 6, 1993:

"(a) The Chancellor shall adopt an allocation formula which is consistent with the requirements of this subchapter. The Chancellor shall use this formula to make advance allocations of funding provided pursuant to Section 56060 to each community college district consistent with the district's approved DSPS program plan and the requirements of this Article.

(b) A portion, not to exceed 10 percent, of the allocation may be based on the amount of federal, state, local, or district discretionary funds which the district has devoted to serving students with disabilities. Provided, however, that in no event shall any district be entitled to receive funding which exceeds the direct excess cost, as defined in Section 56064, of providing support services or instruction to student with disabilities.

(c) Each district shall submit such enrollment and budget reports as the Chancellor may require.

(d) The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the reports required pursuant to subdivision (c).

(e) The Chancellor may, based on audit findings or enrollment/budget reports, adjust the allocation of any district to compensate for over or under-allocated amounts in

advance funding available to each Community College District consistent with their adopted and approved DSPS program plan and each district is required to submit enrollment and budget reports as the Chancellor may require. The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the Community College Districts' reports. Upon review, the Chancellor may adjust the allocation of funding to each district to compensate for over or under-allocated amounts currently and retroactively for three years. See: "Implementing Guidelines" for Section 56072. Documentation requires the district to maintain a clear audit trail for its enrollment and budget reports.

Section 56074[60] requires each Community College District to separately account for all funds provided and to certify through fiscal and accounting reports that all funds were expended in accordance with the requirements of this subchapter. See: "Implementing Guidelines" for Section 56074. Documentation requires that the district keep on file the accounting codes used for the DSPS program.

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the current fiscal year or any of the three immediately preceding fiscal years."

[60] Title 5, California Code of Regulations, Section 56074, filed February 4, 1993 and operative March 6, 1993:

"Each community college district shall establish a unique budget identifier code to separately account for all funds provided pursuant to this subchapter. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of this subchapter."

1 Section 56076[61] requires, as a condition of receiving funds pursuant to this
2 subchapter, that each Community College District certify that reasonable efforts have
3 been made to utilize all funds from federal, state, or local sources available for serving
4 students with disabilities. See: "Implementing Guidelines" for Section 56076.
5 Documentation requires that the district keep on file the sources and amounts of other
6 income the program receives.
7 Title 5, California Code of Regulations, Section 55602.5[62], operative October 6,
8 1994, provides that, not withstanding any provision in the Education Code to the

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[61] Title 5, California Code of Regulations, Section 56076, filed February 4, 1993 and operative March 6, 1993:

"As a condition of receiving funds pursuant to this subchapter, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities."

[62] Title 5, California Code of Regulations, Section 55602.5, filed September 6, 1994 and operative October 6, 1994:

"Notwithstanding any provision in the Education Code to the contrary, the governing board of a community college district and a proprietary or nonprofit organization, a public entity, or a proprietary or nonprofit private corporation may enter into a contract for the education of community college students whose capacity to function is impaired by physical deficiency or injury in vocational education classes to be conducted for such students by the proprietary or nonprofit organization, the public entity, or the proprietary or nonprofit private corporation maintaining the vocational education classes. All instruction pursuant to this Section shall be approved of and supervised by the governing board of the community college district and shall be conducted by academic employees. The full-time equivalent student of such community college students attending classes under the provisions of this Section shall be credited to the community college district, and college credit may be granted to students who satisfactorily complete the course of instruction in such classes."

contrary, the Board of Governors of each Community College District may enter into a contract with designated third parties for the education of community college students whose capacity to function is impaired by physical deficiency or injury in vocational education classes. All instruction shall be approved and supervised by the Board of Governors, and each full-time student shall receive community college credit for the satisfactory completion of the course.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Implementing Guidelines for Title 5 Regulations - Disabled Student Programs and Services of the Chancellor of the California Community Colleges (incorporated in its entirety by this reference) are "Executive Orders" as defined in Government Code Section 17516[63] and together with the Education Code Sections and the Title 5

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63 Government Code Section 17516, added by Chapter 1459, Statutes of 1984, Section 1:

"'Executive Order' means any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.

(b) Any officer or official serving at the pleasure of the Governor.

(c) Any agency, department, board, or commission of state government.

'Executive Order' does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. 'Major' means either a new treatment facility or an addition to an existing

1 Regulations referenced in this test claim result in community college districts incurring
2 costs mandated by the state, as defined in Government Code Section 17514[64], by
3 creating new state-mandated duties related to the uniquely governmental function of
4 providing public education and services to students and these statutes apply to school
5 districts and do not apply generally to all residents and entities in the state[65].

6 The new duties mandated by the state upon community colleges require state
7 reimbursement of the direct and indirect costs of labor, material and supplies, data
8 processing services and software, contracted services and consultants, equipment and
9 capital assets, staff and student training and travel to implement the following
10 requirements:

11 A) To adopt and implement procedures, and periodically update those

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facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."

[64] Government Code Section 17514, as added by Chapter 1459/84:

"'Costs mandated by the state' means any increases costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

[65] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155; 275 Cal.Rptr. 449:

"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. V. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

procedures, pursuant to requirements of Education Code Section 84850, subdivision (a), and Subchapter 1 of Chapter 7, Title 5, California Code of Regulations, Section 56000 and the "Implementing Guidelines" for Section 56000. In offering support services or instruction through Disabled Student Programs and Services (DSPS) on and/or off campus, districts are required to:

(1) Not duplicate services or instruction otherwise available to all students, pursuant to Education Code Section 67310, subdivision (c)(2) and Title 5, California Code of Regulations, Section 56000, subdivision (a);

(2) To provide support services or instruction directly related to the educational limitations of the verified disabilities of the students to be served, pursuant to Education Code Section 67310, subdivision (c)(3) and Title 5, California Code of Regulations, Section 56000, subdivision (b);

(3) To provide support services or instruction directly related to the students' participation in the educational process, pursuant to Education Code Section 67310, subdivision (c)(4) and Title 5, California Code of Regulations, Section 56000, subdivision (c);

(4) To provide support services or instruction which promotes the maximum independence and integration of students with disabilities,

pursuant to Education Code Section 67310, subdivision (c)(5)(6) and Title 5, California Code of Regulations, Section 56000, subdivision (d); and

(5) To provide support services or instruction which supports the participation of students with disabilities in educational activities consistent with the mission of community colleges, pursuant to Education Code Section 67310, subdivision (c)(1) and Title 5, California Code of Regulations, Section 56000, subdivision (e).

B) To make modifications in the matriculation process or use alternate instruments, methods or procedures to accommodate the needs of disabled students, pursuant to Title 5, California Code of Regulations, Section 55522.

C) At the time of a student's application for support services or instruction, to verify that the student has an impairment which results in an educational limitation, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (a) and the "Implementing Guidelines" for Section 56006. The verification shall be made by:

(1) Observation by DSPS professional staff with a review by the DSPS coordinator, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (b)(1); or

(2) Assessment by appropriate DSPS professional staff, pursuant to

Title 5, California Code of Regulations, Section 56006, subdivision (b)(2); or

(3) Review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (b)(3).

D) At the time of a student's application for support services or instruction, to identify the student's educational limitations by appropriate DSPS professional staff and describe those limitations in the Student Education Contract (SEC), pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (c) and the "Implementing Guidelines" for Section 56006.

E) To define each student's disability as a "physical disability" (as defined in Section 56032), a "communication disability" (as defined in Section 56034), a "learning disability" (as defined in Section 56036), an "acquired brain impairment" (as defined in Section 56038), "developmentally delayed learner" (as defined in Section 56040), a "psychological disability" (as defined in Section 56042) and/or "other disability" (as defined in Section 56044), pursuant to Title 5, California Code of Regulations, Section 56002.

(1) Pursuant to the "Implementing Guidelines" for Section 56032, a "physical disability" can be a visual impairment which must be

verified by a physician, a licensed vision professional or through documentation from a referring agency.

(2) Pursuant to the "Implementing Guidelines" for Section 56032, a "physical disability" can be a mobility impairment which can be verified, if possible, by the personal observation of a DSPS professional staff member with a DSPS coordinator review, by documentation from a physician, or by the documentation of a referring agency if its verification is done by a physician.

(3) Pursuant to the "Implementing Guidelines" for Section 56032, community colleges are required to maintain files that contain signed verifications of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's education performance is impeded.

(4) Pursuant to the "Implementing Guidelines" for Section 56034, a "communication disability" can be a hearing impairment which must be verified by an appropriate hearing professional or through documentation from a referring agency which contains verification by a medical doctor or other licensed ear professional.

(5) Pursuant to the "Implementing Guidelines" for Section 56034, a "communication disability" can be a speech impairment which must be verified by a licensed speech professional or through

documentation from a referring agency which contains verification from a licensed speech professional. A "communication disability" can be verified by a DSPS staff member only if that member has the appropriate license.

(6) Pursuant to the "Implementing Guidelines" for Section 56034, community colleges are required to maintain files that contain signed verifications of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's education performance is impeded.

(7) Pursuant to the "Implementing Guidelines" for Section 56036, "learning disabilities" shall be verified only by (i) a learning disability professional using the California Community College Learning Disability Eligibility Model, (ii) a DSPS learning disability specialist if assessment documentation from a referring agency is deemed to meet the requirements of that model, or (iii) from documentation sent by a referring agency that has entered into an interagency agreement with the state Chancellor's Office.

(8) Pursuant to the "Implementing Guidelines" for Section 56038, "acquired brain impairment" requires community colleges to define the disability in a manner which meets regulatory requirements.

(9) Pursuant to the "Implementing Guidelines" for Section 56040,

a "developmentally delayed learner" must meet one of three described standards to be so classified and that this disability can be verified by the DSPS coordinator or a DDL specialist.

(10) Pursuant to the "Implementing Guidelines" for Section 56042, a "psychological disability" can be verified only by a professional with the appropriate license or by documentation of a referring agency if its verification was done by a professional with an appropriate license. A DSPS staff member can verify this disability only if that member is an appropriately licensed professional. Community colleges are required to document this disability with signed verifications by the appropriate professionals which includes the DSM and/or ICD code or the name of the disorder.

(11) Pursuant to the "Implementing Guidelines" for Section 56044, verification as "other disability" can only be made by an appropriately licensed professional or through documentation from a referring agency that obtained its verification from an appropriate licensed professional. A DSPS staff member may only verify this disability if that member is an appropriately licensed professional.

F) To establish a Student Education Contract (SEC) upon the initiation of DSPS services, and to review and update each SEC annually, which specifies those regular and/or special classes and support services

identified and agreed upon by both the student and DSPS professional staff to meet that student's specific educational needs, pursuant to Title 5, California Code of Regulations, Section 56022.

(1) Pursuant to the "Implementing Guidelines" for Section 56022, the the annual review should determine the student's progress and include an up-to-date copy of the student's class schedule, delineation of services provided, an indication that a DSPS professional staff member has reviewed the SEC and determined that measurable progress has been made, and the signature of the student acknowledging agreement.

(2) Pursuant to the "Implementing Guidelines" for Section 56022, an up-to-date SEC for the current year, signed by the student and the DSPS professional shall be maintained in the file of each student receiving DSPS services.

(3) Pursuant to the "Implementing Guidelines" for Section 56022, students in noncredit special classes should have included in their SEC a detailed description of the criteria used to evaluate the student's measurable progress.

G) To employ reasonable means to inform all students about the support services or instruction available through the DSPS program, pursuant to Title 5, California Code of Regulations, Section 56020.

H) To offer disabled students support services to enable them to participate in regular activities, programs and classes, pursuant to Title 5, California Code of Regulations, Section 56026, and the "Implementing Guidelines" for Section 56026. These support services include, but are not limited to:

(a) Basic fixed cost administrative services, pursuant to Education Code Section 67311, subdivision (a), and Title 5, California Code of Regulations, Section 56026, subdivision (a), including:

(1) Access to, and arrangements for, adaptive educational equipment, materials and supplies;

(2) Job placement and development services related to transition to employment;

(3) Liaison with campus and/or community agencies and follow-up services;

(4) Registration assistance, including priority enrollment assistance, and applications for financial aid and related college services;

(5) Special parking, including on-campus parking registration and the provision of temporary parking permits;

(6) Supplemental specialized orientation; and

(b) Continuing variable cost services, pursuant to Education Code

Section 67311, subdivision (b), and Title 5, California Code of Regulations, Section 56026, subdivision (b), including:

(1) Test taking facilitation, including the arrangement for, proctoring and modification of tests and test administration;

(2) Both individual and group assessment, not otherwise provided, to determine functional educational and vocational levels or to verify specific disabilities;

(3) Counseling, including specialized academic, vocational, personal and peer counseling services, not generally available to all students;

(4) Manual and oral interpreter services for hearing-impaired students;

(5) On-campus mobility ability assistance, including manual or motorized transportation to and from college courses and related educational activities;

(6) Note taker services in the classroom;

(7) Reader services;

(8) Speech services provided by a licensed speech/language pathologist;

(9) Transcription services, including the provision of braille and print materials;

(10) Off-campus transportation services, where public accessible transportation is not available, when not provided to all students;

(11) Specialized tutoring services;

(12) Outreach activities designed to recruit potential students with disabilities;

(13) Accommodations for participation in co-curricular activities; and

(14) Repair of adaptive equipment; and

(c) One-time variable costs for the purchase of DSPS equipment, pursuant to Education Code Section 67311, subdivision (c), and Title 5, California Code of Regulations, Section 56026, subdivision (c), such as adapted educational equipment, materials and supplies and transportation vehicles.

I) To provide services for disabled students to conform, at a minimum, to the level and quality of those services provided by the Department of Rehabilitation prior to July 1, 1981, pursuant to Education Code Section 67300.

J) When seeking printed instructional materials in an electronic format, to provide to the publisher or manufacturer a written request including:

(1) certification that the material is for use by a student with a

disability;

(2) that the disability prevents the student from using standard instructional materials;

(3) that the material is for use in connection with a course for which the student is registered or enrolled; and

(4) be signed by the coordinator of services for students with disabilities, pursuant to Education Code Section 67302, subdivision (a). To copy protect disks or files when used by disabled students pursuant to Education Code Section 67302, subdivision (c). When the Chancellor has established one or more centers to process requests for electronic versions of instructional materials, to submit requests for such material through that center, pursuant to Education Code Section 67302, subdivision (g).

K) To establish policies and procedures, and to periodically update those policies and procedures, for responding in a timely manner to accommodation requests involving academic adjustment, which shall provide for an individualized review of each request and permit an interim decision by the Section 504 coordinator, pursuant to Title 5, California Code of Regulations, Section 56027. Pursuant to the "Implementing Guidelines" for Section 56027, the written policy must be accessible to students, faculty and staff of the college.

L) To provide special classes designed to address the educational limitations of students with disabilities who would not be able to substantially benefit from regular college classes, even with appropriate support services and accommodations, pursuant to Education Code Section 84850, subdivision (b), and Title 5, California Code of Regulations, Section 56028 and the "Implementing Guidelines" for Section 56028. These special classes shall:

(1) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire skills necessary to complete their educational objectives, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (a);

(2) Employ instructors who meet minimum qualifications, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (b). Pursuant to the "Implementing Guidelines" for Section 56028, the community colleges are required to keep the minimum qualifications for all DSPS staff teaching special classes on file in the personnel/credentials office;

(3) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (c). Pursuant to the "Implementing Guidelines" for Section 56028, all special class curriculum must go

through a review process for approval and verification of course approval by the college curriculum committee shall be retained in the Instructional Dean's office;

(4) To appoint curriculum committees who have or obtain the expertise appropriate for determining whether the requirements of the section are satisfied, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (c);

(5) To utilize student/instructor ratios determined to be appropriate by the district given the educational limitations of the students with disabilities enrolled in each class, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (d); and

(6) To limit class sizes so as to not impede measurable progress or to endanger the well-being and safety of students and staff, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (d).

M) To develop policies and procedures, and periodically update those policies and procedures, to provide for repetition of special classes when (a) continuing success in other general and/or special classes is dependent upon the repetition of the class, (b) when repetitions are essential to completing a student's preparation for enrollment in other regular or special classes, or (c) when the student has a SEC which

involves a goal other than completion of the special class in question and repetition of the course will further achieve that goal, pursuant to Title 5, California Code of Regulations, Section 56029. Pursuant to the "Implementing Guidelines" for Section 56029:

(1) Each college district shall establish procedures for tracking repetitions;

(2) Each college district shall establish a process for students to invoke special class course repeatability accommodation on a case-by-case basis; and

(3) Each DSPS program is required to monitor the information to assure that the requirements of the section are met.

N) To adopt and implement a written policy, and to periodically update that policy, for the suspension or termination of DSPS services to a student where a student fails to be responsible in his or her use of DSPS services or fails to make measurable progress toward the goals in his or her SEC. The policy shall provide for written notice prior to suspension or termination and shall afford the student an opportunity to appeal the decision, pursuant to Title 5, California Code of Regulations, Section 56010, subdivision (b)

(1) Pursuant to the "Implementing Guidelines" for Section 56010, the college must also provide the student with a written notice of the

resolution arrived at during the appeal process or a final notice for the suspension or termination of services.

(2) Pursuant to the "Implementing Guidelines" for Section 56010, the college is required to establish and maintain files verifying that the student was notified of all policies dealing with the rights and responsibilities in receiving DSPS services, along with a copy of all notices sent to the student, documents of the appeal process, and a copy of the notification of outcome.

O) To protect all records pertaining to students with disabilities from disclosure and comply with all other requirements for the handling of student records found in Subchapter 2, pursuant to Title 5, California Code of Regulations, Section 56008, subdivision (c). Pursuant to the "Implementing Guidelines" for Section 56008:

(1) If a student requests accommodations that impact the delivery of instruction and/or the instructor, the instructor has a right to know the student's educational limitations and the appropriate accommodation;

(2) The educational limitations and the appropriate accommodation can only be disclosed to the instructor with the student's permission; and

(3) If information is disclosed, a signed release of information form

must be maintained in the student's file.

P) To adopt and implement rules and regulations to provide parking at each campus or center for students with disabilities and those providing transportation for those students, pursuant to Education Code Sections 67301 and 67311.5, and Title 5, California Code of Regulations, Sections 54100, subdivision (a) and 56026(a)(5) and the "Implementing Guidelines" for Section 56026, including:

(1) Other than permit fees imposed pursuant to Education Code 72247, to waive any restrictions, fines or meter fees, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (d);

(2) To provide specially designated parking for disabled students in areas which are most accessible to facilities and most used by students, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (e);

(3) To post conspicuous notices that parking is available to students with disabilities and for persons providing transportation to those students, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (f);

(4) When access to parking is controlled by a mechanical gate, to provide accommodations for students with disabilities who are

unable to operate the mechanical gate controls, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (g).

Q) To provide information biennially to the Board of Governors, as requested, in consultation with students and staff, such as a campus-by-campus basis of enrollment, retention, transition and graduation rates of disabled students, pursuant to Education Code Section 67312, subdivision (b).

R) To submit reports, including budget and fiscal reports, as required by the Chancellor, using the disability categories set forth in Sections 56032 through 56044 (see: paragraph "E", above), pursuant to Title 5, California Code of Regulations, Section 56030. Pursuant to the "Implementing Guidelines" for Section 56030:

(1) Revised reports are required, as necessary, to correct errors; and

(2) DSPS staff are required to attend inservice training for the compilation of this data.

S) To prepare and submit at times and on forms designated by the Chancellor, a DSPS program plan and updates for each college in the district which contain (1) the long term goals of the program, (2) the short-term measurable objectives of the program, (3) the activities to be undertaken to accomplish those goals and objectives, and (4) a description of the methods used for program evaluation, pursuant to Title 5, California Code of Regulations, Section 56046. The "Implementing Guidelines" for

Section 56046 requires that copies of the plan shall be kept on file in the DSPS office together with the letter of approval by the state Chancellor's Office.

T) To designate a qualified DSPS Coordinator for each college in the district who is responsible for the day-to-day operations of the DSPS and who shall direct all counselors, instructors, and classified and/or paraprofessional support staff, pursuant to Title 5, California Code of Regulations, Section 56048, subdivision (b). Pursuant to the "Implementing Guidelines" for Section 56048, the DSPS coordinator, DSPS counselor and the DSPS instructors shall meet the minimum requirements of Section 53414(a) through (d) with the DSPS coordinator meeting the additional minimum requirements set forth in section 56048(b).

U) To establish an advisory committee at each college in the district consisting of students with disabilities, representatives of the disability community, and agencies or organizations serving persons with disabilities which shall meet at least once a year, pursuant to Title 5, California Code of Regulations, Section 56050. Pursuant to the "Implementing Guidelines" for Section 56050, the community colleges are required to maintain a file containing a roster of committee members which indicates the affiliation of each member, and the dates and minutes of meetings.

V) To cooperate with, and assist, the Chancellor in evaluations of the DSPS

programs, including the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of law, compliance with laws with respect to parking for persons with disabilities, and data on the implementation of the program, pursuant to Title 5, California Code of Regulations, Section 56052. Pursuant to the "Implementing Guidelines" for Section 56052, colleges, upon request, will be required to provide a variety of information to the evaluation team and the evaluation report must be kept in the DSPS office for public inspection.

W) To cooperate with the Chancellor in accomplishing "special projects" which may include task force meetings, research studies, model programs, conferences, training seminars and other activities, pursuant to Title 5, California Code of Regulations, Section 56054 and the "Implementing Guidelines" for Section 56054.

X) To establish, and update from time to time, specialized accounting procedures to determine "direct excess costs" (as defined in Education Code Section 84850, subdivision (c), and Section 56064) and costs in excess thereof for providing support services or instruction to students with disabilities, pursuant to Title 5, California Code of Regulations, Section 56060. Pursuant to the "Implementing Guidelines" for Section 56050, if a multi-college district wants a redistribution of allocated funds to their individual colleges, the district must request prior written approval

from the state Chancellor's Office. The procedures to determine "direct excess costs" are required to:

(1) Track students enrolled in special classes, or those enrolled in regular class and who received four or more service contracts per year, pursuant to Title 5, California Code of Regulations, Section 56062. Pursuant to the "Implementing Guidelines" for Section 56062, colleges are required to maintain a file for each student reported to the state for funding which contains a college transcript of general as well as special classes and/or independent study;

(2) To calculate "direct excess costs" for the actual fixed, variable, and one-time costs (not including indirect administrative costs) for providing support services or instruction, pursuant to Education Code Section 84850, subdivision (c), and Title 5, California Code of Regulations, Section 56064. The "Implementing Guidelines" for Section 56064 requires that colleges maintain income and expenditures by accounting codes in such a format that they can complete the DSPS End-of-Year report developed by the Chancellor's Office.

(3) To calculate indirect administrative costs (as defined in Section 56068) for both exclusionary purposes and for cost accounting purposes, pursuant to Title 5, California Code of Regulations,

Section 56064.

(4) To either certify for each community college in the district that the costs for comparable services claimed are not offered to nondisabled students, or collect and report data showing the number of new and the number of continuing students with disabilities enrolled in credit courses who received one or more such services, in whole or in part, from DSPS, pursuant to Title 5, California Code of Regulations, Section 56066, subdivision (b).

(5) To calculate the revenue from special classes and to use such revenue solely for support services or instruction and not for indirect administrative costs, pursuant to Title 5, California Code of Regulations, Section 56070. Pursuant to the "Implementing Guidelines" for Section 56070, the special classes must be identified as a special class on the district's overall FTES report and all sections of these special reports have to be identified in the district's MIS system.

(6) To submit enrollment and budget reports, as the Chancellor may require, when adopting an allocation to make advance funding available, pursuant to Title 5, California Code of Regulations, Section 56072, subdivision (c).

(7) To assist and supply information when the Chancellor provides

audits of the district's enrollment and budget reports, pursuant to Title 5, California Code of Regulations, Section 56072, subdivision (d). Pursuant to the "Implementing Guidelines" for Section 56072, the district is required to maintain a clear audit trail of its enrollment and budget reports.

(8) To establish and utilize an unique budget identifier code to separately account for all funds provided and to certify through fiscal and accounting reports that all funds were expended in accordance with the requirements of the subchapter, pursuant to Title 5, California Code of Regulations, Section 56074 and the "Implementing Guidelines" for Section 56074.

(9) Pursuant to Education Code Section 84850, Subdivision (c), reporting to the Chancellor, on forms and at such times as directed, all expenditures and income related to handicapped students for whom allowances are made.

Y) To determine and certify that reasonable efforts have been made to utilize all funds from federal, state and local sources available for serving students with disabilities, pursuant to Education Code Sections 67310, subdivision (e), and 84850, subdivision (d), and Title 5, California Code of Regulations, Section 56076 and the "Implementing Guidelines" for Section 56076.

1 Z) To enter into contracts, when necessary, with third parties for the
2 education of students whose capacity to function is impaired by physical
3 deficiency or injury in vocational education classes, pursuant to Title 5,
4 California Code of Regulations, Section 55602.5.

5 SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

6 None of the Government Code Section 17556[66] statutory exceptions to a finding

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[66] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute

of costs mandated by the state apply to this test claim. Note, that to the extent community college districts may have previously performed functions similar to those mandated by the referenced code sections, Title 5 Regulations and Executive Orders, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse community college districts when these activities became mandated.[67]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

Some revenue may be received or attributable from the apportionment of funds[68], special classes[69], federal and state vocational rehabilitation funds[70], and proceeds from parking fees charged to students[71]. To the extent actually appropriated and/or received, such revenue will reduce the costs incurred by these mandated duties.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title

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relating directly to the enforcement of the crime or infraction."

[67] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

[68] Education Code Section 84850, Subdivision (c).

[69] Title 5, California Code of Regulations, Section 56028.

[70] Education Code Section 67305.

[71] Education Code Section 67301.

2, California Code of Regulations:

Exhibit 1: Declaration of Jeff Ross
Director of DSPS
West Kern Community College District

Exhibit 2: Copies of Statutes Cited

Chapter 745, Statutes of 2001

Chapter 379, Statutes of 1999

Chapter 758, Statutes of 1995

Chapter 1243, Statutes of 1992

Chapter 626, Statutes of 1991

Chapter 1206, Statutes of 1990

Chapter 1066, Statutes of 1990

Chapter 998, Statutes of 1987

Chapter 829, Statutes of 1987

Chapter 248, Statutes of 1986

Chapter 903, Statutes of 1985

Chapter 323, Statutes of 1983

Chapter 251, Statutes of 1982

Chapter 796, Statutes of 1981

Chapter 1035, Statutes of 1979

Chapter 282, Statutes of 1979

Chapter 1403, Statutes of 1978

1 Chapter 36, Statutes of 1977

2 Exhibit 3: Copies of Code Sections Cited

3 Education Code Section 67300

4 Education Code Section 67301

5 Education Code Section 67302

6 Education Code Section 67310

7 Education Code Section 67311

8 Education Code Section 67312

9 Education Code Section 84850

10 Exhibit 4: Copies of Regulations Cited

11 Title 5, California Code of Regulations, Section 54100

12 Title 5, California Code of Regulations, Section 55522

13 Title 5, California Code of Regulations, Section 55602.5

14 Title 5, California Code of Regulations, Sections 56000 - 56010

15 Title 5, California Code of Regulations, Sections 56020 - 56022

16 Title 5, California Code of Regulations, Sections 56026 - 56076

17 Exhibit 5: Implementing Guidelines For Title 5 Regulations -

18 Disabled Student Programs and Services

19 Chancellor's Office

20 California Community Colleges

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on May 15, 2003, at Taft, California by:

William Duncan
Vice President Administrative Services

Voice: (661) 763-7700
Fax: (661) 763-7705

PART VI. APPOINTMENT OF REPRESENTATIVE

West Kern Community College District appoints Keith B. Petersen, SixTen and Associates and Associates, as its representative for this test claim.

William Duncan
Vice President Administrative Services

5/15/03
Date

EXHIBIT 1
DECLARATION

DECLARATION OF JEFF ROSS

WEST KERN COMMUNITY COLLEGE DISTRICT

Test Claim of West Kern Community College District

COSM No. _____

Chapter 745, Statutes of 2001
Chapter 379, Statutes of 1999
Chapter 758, Statutes of 1995
Chapter 1243, Statutes of 1992
Chapter 626, Statutes of 1991
Chapter 1206, Statutes of 1990
Chapter 1066, Statutes of 1990
Chapter 998, Statutes of 1987
Chapter 829, Statutes of 1987
Chapter 248, Statutes of 1986
Chapter 903, Statutes of 1985
Chapter 323, Statutes of 1983
Chapter 251, Statutes of 1982
Chapter 796, Statutes of 1981
Chapter 1035, Statutes of 1979
Chapter 282, Statutes of 1979
Chapter 1403, Statutes of 1978
Chapter 36, Statutes of 1977

Education Code Section 67300
Education Code Section 67301
Education Code Section 67302
Education Code Section 67310
Education Code Section 67311
Education Code Section 67312
Education Code Section 84850

Title 5, California Code of Regulations, Section 54100
Title 5, California Code of Regulations, Section 55522
Title 5, California Code of Regulations, Section 55602.5
Title 5, California Code of Regulations, Sections 56000 - 56010
Title 5, California Code of Regulations, Sections 56020 - 56022
Title 5, California Code of Regulations, Sections 56026 - 56076

(Continued on Next Page)

Implementing Guidelines For Title 5 Regulations - Disabled Student Program and Services - Chancellor's Office California Community Colleges

Disabled Student Programs and Services

I, Jeff Ross, Director of Disabled Student Programs and Services, West Kern Community College District, make the following declaration and statement.

In my capacity as Director of Disabled Student Programs and Services, I am responsible for the Disabled Student Program and Services for the district. I am familiar with the provisions and requirements of the statutes, Education Code Sections and Title 5 Regulations enumerated above.

These Education Code sections require the West Kern Community College District to:

A) To adopt and implement procedures, and periodically update those procedures, pursuant to requirements of Education Code Section 84850, subdivision (a), and Subchapter 1 of Chapter 7, Title 5, California Code of Regulations, Section 56000 and the "Implementing Guidelines" for Section 56000. In offering support services or instruction through Disabled Student Programs and Services (DSPS) on and/or off campus, districts are required to:

(1) Not duplicate services or instruction otherwise available to all students, pursuant to Education Code Section 67310, subdivision (c)(2) and Title 5, California Code of Regulations, Section 56000,

subdivision (a);

(2) To provide support services or instruction directly related to the educational limitations of the verified disabilities of the students to be served, pursuant to Education Code Section 67310, subdivision (c)(3) and Title 5, California Code of Regulations, Section 56000, subdivision (b);

(3) To provide support services or instruction directly related to the students' participation in the educational process, pursuant to Education Code Section 67310, subdivision (c)(4) and Title 5, California Code of Regulations, Section 56000, subdivision (c);

(4) To provide support services or instruction which promotes the maximum independence and integration of students with disabilities, pursuant to Education Code Section 67310, subdivision (c)(5)(6) and Title 5, California Code of Regulations, Section 56000, subdivision (d); and

(5) To provide support services or instruction which supports the participation of students with disabilities in educational activities consistent with the mission of community colleges, pursuant to Education Code Section 67310, subdivision (c)(1) and Title 5, California Code of Regulations, Section 56000, subdivision (e).

B) To make modifications in the matriculation process or use alternate

instruments, methods or procedures to accommodate the needs of disabled students, pursuant to Title 5, California Code of Regulations, Section 55522.

C) At the time of a student's application for support services or instruction, to verify that the student has an impairment which results in an educational limitation, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (a) and the "Implementing Guidelines" for Section 56006. The verification shall be made by:

(1) Observation by DSPS professional staff with a review by the DSPS coordinator, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (b)(1); or

(2) Assessment by appropriate DSPS professional staff, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (b)(2); or

(3) Review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS, pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (b)(3).

D) At the time of a student's application for support services or instruction, to identify the student's educational limitations by appropriate DSPS professional staff and describe those limitations in the Student Education

Contract (SEC), pursuant to Title 5, California Code of Regulations, Section 56006, subdivision (c) and the "Implementing Guidelines" for Section 56006.

E) To define each student's disability as a "physical disability" (as defined in Section 56032), a "communication disability" (as defined in Section 56034), a "learning disability" (as defined in Section 56036), an "acquired brain impairment" (as defined in Section 56038), "developmentally delayed learner" (as defined in Section 56040), a "psychological disability" (as defined in Section 56042) and/or "other disability" (as defined in Section 56044), pursuant to Title 5, California Code of Regulations, Section 56002.

(1) Pursuant to the "Implementing Guidelines" for Section 56032, a "physical disability" can be a visual impairment which must be verified by a physician; a licensed vision professional or through documentation from a referring agency.

(2) Pursuant to the "Implementing Guidelines" for Section 56032, a "physical disability" can be a mobility impairment which can be verified, if possible, by the personal observation of a DSPS professional staff member with a DSPS coordinator review, by documentation from a physician, or by the documentation of a referring agency if its verification is done by a physician.

(3) Pursuant to the "Implementing Guidelines" for Section 56032,

community colleges are required to maintain files that contain signed verifications of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's education performance is impeded.

(4) Pursuant to the "Implementing Guidelines" for Section 56034, a "communication disability" can be a hearing impairment which must be verified by an appropriate hearing professional or through documentation from a referring agency which contains verification by a medical doctor or other licensed ear professional.

(5) Pursuant to the "Implementing Guidelines" for Section 56034, a "communication disability" can be a speech impairment which must be verified by a licensed speech professional or through documentation from a referring agency which contains verification from a licensed speech professional. A "communication disability" can be verified by a DSPS staff member only if that member has the appropriate license.

(6) Pursuant to the "Implementing Guidelines" for Section 56034, community colleges are required to maintain files that contain signed verifications of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's education performance is impeded.

(7) Pursuant to the "Implementing Guidelines" for Section 56036, "learning disabilities" shall be verified only by (i) a learning disability professional using the California Community College Learning Disability Eligibility Model, (ii) a DSPS learning disability specialist if assessment documentation from a referring agency is deemed to meet the requirements of that model, or (iii) from documentation sent by a referring agency that has entered into an interagency agreement with the state Chancellor's Office.

(8) Pursuant to the "Implementing Guidelines" for Section 56038, "acquired brain impairment" requires community colleges to define the disability in a manner which meets regulatory requirements.

(9) Pursuant to the "Implementing Guidelines" for Section 56040, a "developmentally delayed learner" must meet one of three described standards to be so classified and that this disability can be verified by the DSPS coordinator or a DDL specialist.

(10) Pursuant to the "Implementing Guidelines" for Section 56042, a "psychological disability" can be verified only by a professional with the appropriate license or by documentation of a referring agency if its verification was done by a professional with an appropriate license. A DSPS staff member can verify this disability only if that member is an appropriately licensed professional.

Community colleges are required to document this disability with signed verifications by the appropriate professionals which includes the DSM and/or ICD code or the name of the disorder.

(11) Pursuant to the "Implementing Guidelines" for Section 56044, verification as "other disability" can only be made by an appropriately licensed professional or through documentation from a referring agency that obtained its verification from an appropriate licensed professional. A DSPS staff member may only verify this disability if that member is an appropriately licensed professional.

F) To establish a Student Education Contract (SEC) upon the initiation of DSPS services, and to review and update each SEC annually, which specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff to meet that student's specific educational needs, pursuant to Title 5, California Code of Regulations, Section 56022.

(1) Pursuant to the "Implementing Guidelines" for Section 56022, the the annual review should determine the student's progress and include an up-to-date copy of the student's class schedule, delineation of services provided, an indication that a DSPS professional staff member has reviewed the SEC and determined that measurable progress has been made, and the signature of the

student acknowledging agreement.

(2) Pursuant to the "Implementing Guidelines" for Section 56022, an up-to-date SEC for the current year, signed by the student and the DSPS professional shall be maintained in the file of each student receiving DSPS services.

(3) Pursuant to the "Implementing Guidelines" for Section 56022, students in noncredit special classes should have included in their SEC a detailed description of the criteria used to evaluate the student's measurable progress.

G) To employ reasonable means to inform all students about the support services or instruction available through the DSPS program, pursuant to Title 5, California Code of Regulations, Section 56020.

H) To offer disabled students support services to enable them to participate in regular activities, programs and classes, pursuant to Title 5, California Code of Regulations, Section 56026, and the "Implementing Guidelines" for Section 56026. These support services include, but are not limited to:

(a) Basic fixed cost administrative services, pursuant to Education Code Section 67311, subdivision (a), and Title 5, California Code of Regulations, Section 56026, subdivision (a), including:

(1) Access to, and arrangements for, adaptive educational

equipment, materials and supplies;

(2) Job placement and development services related to transition to employment;

(3) Liaison with campus and/or community agencies and follow-up services;

(4) Registration assistance, including priority enrollment assistance, and applications for financial aid and related college services;

(5) Special parking, including on-campus parking registration and the provision of temporary parking permits;

(6) Supplemental specialized orientation; and

(b) Continuing variable cost services, pursuant to Education Code Section 67311, subdivision (b), and Title 5, California Code of Regulations, Section 56026, subdivision (b), including:

(1) Test taking facilitation, including the arrangement for, proctoring and modification of tests and test administration;

(2) Both individual and group assessment, not otherwise provided, to determine functional educational and vocational levels or to verify specific disabilities;

(3) Counseling, including specialized academic, vocational, personal and peer counseling services, not generally available to all

students;

(4) Manual and oral interpreter services for hearing-impaired students;

(5) On-campus mobility ability assistance, including manual or motorized transportation to and from college courses and related educational activities;

(6) Note taker services in the classroom;

(7) Reader services;

(8) Speech services provided by a licensed speech/language pathologist;

(9) Transcription services, including the provision of braille and print materials;

(10) Off-campus transportation services, where public accessible transportation is not available, when not provided to all students;

(11) Specialized tutoring services;

(12) Outreach activities designed to recruit potential students with disabilities;

(13) Accommodations for participation in co-curricular activities; and

(14) Repair of adaptive equipment; and

(c) One-time variable costs for the purchase of DSPS equipment, pursuant to Education Code Section 67311, subdivision (c), and Title 5, California Code of Regulations, Section 56026, subdivision (c), such as adapted educational equipment, materials and supplies and transportation vehicles.

I) To provide services for disabled students to conform, at a minimum, to the level and quality of those services provided by the Department of Rehabilitation prior to July 1, 1981, pursuant to Education Code Section 67300.

J) When seeking printed instructional materials in an electronic format, to provide to the publisher or manufacturer a written request including:

(1) certification that the material is for use by a student with a disability;

(2) that the disability prevents the student from using standard instructional materials;

(3) that the material is for use in connection with a course for which the student is registered or enrolled; and

(4) be signed by the coordinator of services for students with disabilities, pursuant to Education Code Section 67302, subdivision (a).

To copy protect disks or files when used by disabled students pursuant to Education Code Section 67302, subdivision (c). When the Chancellor has

established one or more centers to process requests for electronic versions of instructional materials, to submit requests for such material through that center, pursuant to Education Code Section 67302, subdivision (g).

K) To establish policies and procedures, and to periodically update those policies and procedures, for responding in a timely manner to accommodation requests involving academic adjustment, which shall provide for an individualized review of each request and permit an interim decision by the Section 504 coordinator, pursuant to Title 5, California Code of Regulations, Section 56027. Pursuant to the "Implementing Guidelines" for Section 56027, the written policy must be accessible to students, faculty and staff of the college.

L) To provide special classes designed to address the educational limitations of students with disabilities who would not be able to substantially benefit from regular college classes, even with appropriate support services and accommodations, pursuant to Education Code Section 84850, subdivision (b), and Title 5, California Code of Regulations, Section 56028 and the "Implementing Guidelines" for Section 56028. These special classes shall:

(1) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire skills necessary to complete their educational objectives, pursuant to Title 5, California Code of

Regulations, Section 56028, subdivision (a);

(2) Employ instructors who meet minimum qualifications, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (b). Pursuant to the "Implementing Guidelines" for Section 56028, the community colleges are required to keep the minimum qualifications for all DSPS staff teaching special classes on file in the personnel/credentials office;

(3) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (c). Pursuant to the "Implementing Guidelines" for Section 56028, all special class curriculum must go through a review process for approval and verification of course approval by the college curriculum committee shall be retained in the Instructional Dean's office;

(4) To appoint curriculum committees who have or obtain the expertise appropriate for determining whether the requirements of the section are satisfied, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (c);

(5) To utilize student/instructor ratios determined to be appropriate by the district given the educational limitations of the students with

disabilities enrolled in each class, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (d); and

(6) To limit class sizes so as to not impede measurable progress or to endanger the well-being and safety of students and staff, pursuant to Title 5, California Code of Regulations, Section 56028, subdivision (d).

M) To develop policies and procedures, and periodically update those policies and procedures, to provide for repetition of special classes when (a) continuing success in other general and/or special classes is dependent upon the repetition of the class, (b) when repetitions are essential to completing a student's preparation for enrollment in other regular or special classes, or (c) when the student has a SEC which involves a goal other than completion of the special class in question and repetition of the course will further achieve that goal, pursuant to Title 5, California Code of Regulations, Section 56029. Pursuant to the "Implementing Guidelines" for Section 56029:

(1) Each college district shall establish procedures for tracking repetitions;

(2) Each college district shall establish a process for students to invoke special class course repeatability accommodation on a case-by-case basis; and

(3) Each DSPS program is required to monitor the information to assure that the requirements of the section are met.

N) To adopt and implement a written policy, and to periodically update that policy, for the suspension or termination of DSPS services to a student where a student fails to be responsible in his or her use of DSPS services or fails to make measurable progress toward the goals in his or her SEC. The policy shall provide for written notice prior to suspension or termination and shall afford the student an opportunity to appeal the decision, pursuant to Title 5, California Code of Regulations, Section 56010, subdivision (b)

(1) Pursuant to the "Implementing Guidelines" for Section 56010, the college must also provide the student with a written notice of the resolution arrived at during the appeal process or a final notice for the suspension or termination of services.

(2) Pursuant to the "Implementing Guidelines" for Section 56010, the college is required to establish and maintain files verifying that the student was notified of all policies dealing with the rights and responsibilities in receiving DSPS services, along with a copy of all notices sent to the student, documents of the appeal process, and a copy of the notification of outcome.

O) To protect all records pertaining to students with disabilities from

disclosure and comply with all other requirements for the handling of student records found in Subchapter 2, pursuant to Title 5, California Code of Regulations, Section 56008, subdivision (c). Pursuant to the "Implementing Guidelines" for Section 56008:

(1) If a student requests accommodations that impact the delivery of instruction and/or the instructor, the instructor has a right to know the student's educational limitations and the appropriate accommodation;

(2) The educational limitations and the appropriate accommodation can only be disclosed to the instructor with the student's permission; and

(3) If information is disclosed, a signed release of information form must be maintained in the student's file.

P) To adopt and implement rules and regulations to provide parking at each campus or center for students with disabilities and those providing transportation for those students, pursuant to Education Code Sections 67301 and 67311.5, and Title 5, California Code of Regulations, Sections 54100, subdivision (a) and 56026(a)(5) and the "Implementing Guidelines" for Section 56026, including:

(1) Other than permit fees imposed pursuant to Education Code 72247, to waive any restrictions, fines or meter fees, pursuant to

Title 5, California Code of Regulations, Section 54100, subdivision (d);

(2) To provide specially designated parking for disabled students in areas which are most accessible to facilities and most used by students, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (e);

(3) To post conspicuous notices that parking is available to students with disabilities and for persons providing transportation to those students, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (f);

(4) When access to parking is controlled by a mechanical gate, to provide accommodations for students with disabilities who are unable to operate the mechanical gate controls, pursuant to Title 5, California Code of Regulations, Section 54100, subdivision (g).

Q) To provide information biennially to the Board of Governors, as requested, in consultation with students and staff, such as a campus-by-campus basis of enrollment, retention, transition and graduation rates of disabled students, pursuant to Education Code Section 67312, subdivision (b).

R) To submit reports, including budget and fiscal reports, as required by the Chancellor, using the disability categories set forth in Sections 56032 through 56044 (see: paragraph "E", above), pursuant to Title 5, California

Code of Regulations, Section 56030. Pursuant to the "Implementing Guidelines" for Section 56030:

(1) Revised reports are required, as necessary, to correct errors; and

(2) DSPS staff are required to attend inservice training for the compilation of this data.

S) To prepare and submit at times and on forms designated by the Chancellor, a DSPS program plan and updates for each college in the district which contain (1) the long term goals of the program, (2) the short-term measurable objectives of the program, (3) the activities to be undertaken to accomplish those goals and objectives, and (4) a description of the methods used for program evaluation, pursuant to Title 5, California Code of Regulations, Section 56046. The "Implementing Guidelines" for Section 56046 requires that copies of the plan shall be kept on file in the DSPS office together with the letter of approval by the state Chancellor's Office.

T) To designate a qualified DSPS Coordinator for each college in the district who is responsible for the day-to-day operations of the DSPS and who shall direct all counselors, instructors, and classified and/or paraprofessional support staff, pursuant to Title 5, California Code of Regulations, Section 56048, subdivision (b). Pursuant to the "Implementing Guidelines" for Section 56048, the DSPS coordinator,

DSPS counselor and the DSPS instructors shall meet the minimum requirements of Section 53414(a) through (d) with the DSPS coordinator meeting the additional minimum requirements set forth in section 56048(b).

U) To establish an advisory committee at each college in the district consisting of students with disabilities, representatives of the disability community, and agencies or organizations serving persons with disabilities which shall meet at least once a year, pursuant to Title 5, California Code of Regulations, Section 56050. Pursuant to the "Implementing Guidelines" for Section 56050, the community colleges are required to maintain a file containing a roster of committee members which indicates the affiliation of each member, and the dates and minutes of meetings.

V) To cooperate with, and assist, the Chancellor in evaluations of the DSPS programs, including the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of law, compliance with laws with respect to parking for persons with disabilities, and data on the implementation of the program, pursuant to Title 5, California Code of Regulations, Section 56052. Pursuant to the "Implementing Guidelines" for Section 56052, colleges, upon request, will be required to provide a variety of information to the evaluation team and the evaluation report must be kept in the DSPS office for public inspection.

W) To cooperate with the Chancellor in accomplishing "special projects"

which may include task force meetings, research studies, model programs, conferences, training seminars and other activities, pursuant to Title 5, California Code of Regulations, Section 56054 and the "Implementing Guidelines" for Section 56054.

X) To establish, and update from time to time, specialized accounting procedures to determine "direct excess costs" (as defined in Education Code Section 84850, subdivision (c), and Section 56064) and costs in excess thereof for providing support services or instruction to students with disabilities, pursuant to Title 5, California Code of Regulations, Section 56060. Pursuant to the "Implementing Guidelines" for Section 56050, if a multi-college district wants a redistribution of allocated funds to their individual colleges, the district must request prior written approval from the state Chancellor's Office. The procedures to determine "direct excess costs" are required to:

(1) Track students enrolled in special classes, or those enrolled in regular class and who received four or more service contracts per year, pursuant to Title 5, California Code of Regulations, Section 56062. Pursuant to the "Implementing Guidelines" for Section 56062, colleges are required to maintain a file for each student reported to the state for funding which contains a college transcript of general as well as special classes and/or independent study;

(2) To calculate "direct excess costs" for the actual fixed, variable, and one-time costs (not including indirect administrative costs) for providing support services or instruction, pursuant to Education Code Section 84850, subdivision (c), and Title 5, California Code of Regulations, Section 56064. The "Implementing Guidelines" for Section 56064 requires that colleges maintain income and expenditures by accounting codes in such a format that they can complete the DSPS End-of-Year report developed by the Chancellor's Office.

(3) To calculate indirect administrative costs (as defined in Section 56068) for both exclusionary purposes and for cost accounting purposes, pursuant to Title 5, California Code of Regulations, Section 56064.

(4) To either certify for each community college in the district that the costs for comparable services claimed are not offered to nondisabled students, or collect and report data showing the number of new and the number of continuing students with disabilities enrolled in credit courses who received one or more such services, in whole or in part, from DSPS, pursuant to Title 5, California Code of Regulations, Section 56066, subdivision (b).

(5) To calculate the revenue from special classes and to use such

revenue solely for support services or instruction and not for indirect administrative costs, pursuant to Title 5, California Code of Regulations, Section 56070. Pursuant to the "Implementing Guidelines" for Section 56070, the special classes must be identified as a special class on the district's overall FTES report and all sections of these special reports have to be identified in the district's MIS system.

(6) To submit enrollment and budget reports, as the Chancellor may require, when adopting an allocation to make advance funding available, pursuant to Title 5, California Code of Regulations, Section 56072, subdivision (c).

(7) To assist and supply information when the Chancellor provides audits of the district's enrollment and budget reports, pursuant to Title 5, California Code of Regulations, Section 56072, subdivision (d). Pursuant to the "Implementing Guidelines" for Section 56072, the district is required to maintain a clear audit trail of its enrollment and budget reports.

(8) To establish and utilize an unique budget identifier code to separately account for all funds provided and to certify through fiscal and accounting reports that all funds were expended in accordance with the requirements of the subchapter, pursuant to

Title 5, California Code of Regulations, Section 56074 and the "Implementing Guidelines" for Section 56074.

(9) Pursuant to Education Code Section 84850, Subdivision (c), reporting to the Chancellor, on forms and at such times as directed, all expenditures and income related to handicapped students for whom allowances are made.

Y) To determine and certify that reasonable efforts have been made to utilize all funds from federal, state and local sources available for serving students with disabilities, pursuant to Education Code Sections 67310, subdivision (e), and 84850, subdivision (d), and Title 5, California Code of Regulations, Section 56076 and the "Implementing Guidelines" for Section 56076.

Z) To enter into contracts, when necessary, with third parties for the education of students whose capacity to function is impaired by physical deficiency or injury in vocational education classes, pursuant to Title 5, California Code of Regulations, Section 55602.5.

It is estimated that the West Kern Community College District incurred approximately $1,000, or more, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it

cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 15 day of May, 2003, at Taft, California

Jeff Ross
Director of DSPS
West Kern Community College District

EXHIBIT 2
COPIES OF STATUTES CITED

STATE AGENCIES—REPORTS—REQUIREMENTS

CHAPTER 745

S.B. No. 1191

SB 1191, Speier. State and local reporting requirements.

Existing law requires or requests various state and local agencies to prepare and submit reports to the Governor, the Legislature, or other state entities.

This bill would revise or delete certain reporting requirements for state and local agencies, and delete obsolete references.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1616.1 of the Business and Professions Code is repealed.

SEC. 2. Section 4425 of the Business and Professions Code is amended to read:

4425. (a) As a condition of a pharmacy's participation in the Medi-Cal program pursuant to Chapter 7 (commencing with Section 14000) of Division 9 of the Welfare and Institutions Code, the pharmacy, upon presentation of a valid prescription for the patient and the patient's Medicare card, shall charge Medicare beneficiaries a price that does not exceed the Medi-Cal reimbursement rate for prescription medicines, and an amount, as set by the State Department of Health Services to cover electronic transmission charges. However, Medicare beneficiaries shall not be allowed to use the Medi-Cal reimbursement rate for over-the-counter medications or compounded prescriptions.

assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English.

(c) The test or series of tests shall meet all of the following requirements:

(1) Provide sufficient information about pupils at each grade level to determine levels of proficiency ranging from no English proficiency to fluent English proficiency with at least two intermediate levels.

(2) Have psychometric properties of reliability and validity deemed adequate by technical experts.

(3) Be capable of administration to pupils with any primary language other than English.

(4) Be capable of administration by classroom teachers.

(5) Yield scores that allow comparison of a pupil's growth over time, can be tied to readiness for various instructional options, and can be aggregated for use in the evaluation of program effectiveness.

(6) Not discriminate on the basis of race, ethnicity, or gender.

(7) Be aligned with the standards for English language development adopted by the State Board of Education pursuant to Section 60811.

(d) The test shall be used for the following purposes:

(1) To identify pupils who are limited English proficient.

(2) To determine the level of English language proficiency of pupils who are limited English proficient.

(3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

SEC. 31. Section 66015 of the Education Code is amended to read:

66015. It is the intent of the Governor and the Legislature, in cooperation with the Trustees of the California State University, to do both of the following:

(a) Place a major priority on resolving the serious problem of impacted and overcrowded classes, not only with respect to the California State University, but throughout public postsecondary education.

(b) Ensure that needy students receive financial aid sufficient to cover the cost of fee increases for each academic year. * * *

SEC. 31.5. Section 66755 of the Education Code is amended to read:

66755. (a) The California Community Colleges, the California State University, and the University of California shall evaluate the impact of the program established by this chapter, and shall report to the California Postsecondary Education Commission on or before June 30, 2002, on student use, revenue implications, and other issues that may be identified to judge satisfactorily the program's efficiency and determine whether it should be established permanently.

(b) The California Postsecondary Education Commission shall prepare a report based on the information received from the segments pursuant to subdivision (a) and, notwithstanding Section 7550.5 of the Government Code, shall present the report, with recommendations, to the Governor and the Legislature on or before December 1, 2002. If, in the determination of the commission, the program established by this chapter appears to be underutilized, the report shall include the comments of the commission with respect to the reasons for the underutilization and options for increasing participation in the program.

SEC. 32. Section 66293 of the Education Code is repealed.

SEC. 33. Section 67301 of the Education Code is amended to read:

67301. (a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code and all other applicable sections of the

Vehicle Code relating to parking exemptions for disabled persons, as defined by Section 295.5 of the Vehicle Code, and disabled veterans, as defined by Section 295.7 of the Vehicle Code. The rules and regulations shall include authorization to park for unlimited periods in time-restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee or to display a parking permit other than pursuant to Section 5007 or 22511.55 of the Vehicle Code, provided those spaces are otherwise available for use by the general public. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by Section 295.5 of the Vehicle Code, or disabled veteran, as defined by Section 295.7 of the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

* * *

SEC. 34. Section 67359.20 of the Education Code is amended to read:

67359.20. Any funds from the 1988 Higher Education Capital Outlay Bond Fund, the June 1990 Higher Education Capital Outlay Bond Fund, and the 1992 Higher Education Capital Outlay Bond Fund, not to exceed a combined total of seventy-five million dollars ($75,000,000), are hereby appropriated to the Director of Finance for allocation to the University of California, the California State University, and the California Community Colleges to meet the timely allocation of matching grants to repair, replace, reconstruct, renovate, or retrofit

Assembly Bill No. 422

CHAPTER 379

An act to add Section 67302 to the Education Code, relating to instructional materials.

[Approved by Governor September 15, 1999. Filed with Secretary of State September 15, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 422, Steinberg. Instructional materials: disabled students.

Under existing law, a publisher or manufacturer of instructional materials offered for adoption or sale in California is required to comply with specified requirements, including providing to the state, at no cost, the right to transcribe, reproduce, and distribute the material in braille, large print, recordings, or other accessible media for use by pupils with visual disabilities. This right includes computer diskette versions of instructional materials if made available to any other state, and those corrections and revisions as may be necessary.

This bill would require every individual, firm, partnership or corporation publishing or manufacturing printed instructional materials, as defined, for students attending the University of California, the California State University, or a California Community College to provide to the university, college, or particular campus of the university or college, for use by students at no additional cost and in a timely manner, any printed instructional material in unencrypted electronic form upon the receipt of a written request, provided that the university or college complies with certain conditions.

This bill would require that the computer files or electronic versions of printed instructional material maintain their structural integrity, as defined, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary.

This bill would authorize the Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California to each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials, as prescribed.

This bill would also require an individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College to provide computer files or other electronic versions of the nonprinted

instructional materials for use by students, subject to the same conditions for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional material that is compatible with braille translation and speech synthesis software.

This bill would provide that willful failure to comply with these requirements would be subject to sanctions under the law relating to full and equal access of disabled persons to public accommodations.

The people of the State of California do enact as follows:

SECTION 1. Section 67302 is added to the Education Code, to read:

67302. (a) An individual, firm, partnership or corporation that publishes or manufactures printed instructional materials for students attending the University of California, the California State University, or a California Community College, shall provide to the university, college, or particular campus of the university or college, for use by students attending the University of California, the California State University, or a California Community College, any printed instructional material in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary. The computer files or electronic versions of the printed instructional material shall be provided to the university, college, or particular campus of the university or college at no additional cost and in a timely manner, upon receipt of a written request that does all of the following:

(1) Certifies that the university, college, or particular campus of the university or college has purchased the printed instructional material for use by a student with a disability or that a student with a disability attending or registered to attend that university, college, or particular campus of the university or college has purchased the printed instructional material.

(2) Certifies that the student has a disability that prevents him or her from using standard instructional materials.

(3) Certifies that the printed instructional material is for use by the student in connection with a course in which he or she is registered or enrolled at the university, college, or particular campus of the university or college.

(4) Is signed by the coordinator of services for students with disabilities at the university, college, or particular campus of the university or college or by the campus or college official responsible

for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the university, college, or particular campus of the university or college.

(b) An individual, firm, partnership or corporation specified in subdivision (a) may also require that, in addition to the conditions enumerated above, the request shall include a statement signed by the student agreeing to both of the following:

(1) He or she will use the electronic copy of the printed instructional material in specialized format solely for his or her own educational purposes.

(2) He or she will not copy or duplicate the printed instructional material for use by others.

(c) If a college or university permits a student to directly use the electronic version of an instructional material, the disk or file shall be copy-protected or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(d) An individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College shall provide computer files or other electronic versions of the nonprinted instructional materials for use by students attending the University of California, the California State University, or a California Community College, subject to the same conditions set forth in subdivisions (a) and (b) for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials that is compatible with braille translation and speech synthesis software.

(e) For purposes of this section:

(1) "Instructional material or materials" means textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student's success in a course of study in which a student with a disability is enrolled. The determination of which materials are "required or essential to student success" shall be made by the instructor of the course in consultation with the official making the request pursuant to paragraph (4) of subdivision (a) in accordance with guidelines issued pursuant to subdivision (i). "Instructional material or materials" does not include nontextual mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities.

(2) "Printed instructional material or materials" means instructional material or materials in book or other printed form.

(3) "Nonprinted instructional materials" means instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource, including, but not necessarily limited to, software programs, video disks, and video and audio tapes.

(4) "Structural integrity" means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. "Structural integrity" need not include nontextual elements such as pictures, illustrations, graphs, or charts. If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible.

(5) "Specialized format" means braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities.

(f) Nothing in this section shall be construed to prohibit a university, college, or particular campus of the university or college from assisting a student with a disability by using the electronic version of printed instructional material provided pursuant to this section solely to transcribe or arrange for the transcription of the printed instructional material into braille. In the event a transcription is made, the campus or college shall have the right to share the braille copy of the printed instructional material with other students with disabilities.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials pursuant to this section. If a segment establishes a center or centers, each of the following shall apply:

(1) The colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material made pursuant to paragraph (4) of subdivision (a) to the center, which shall transmit the request to the publisher or manufacturer.

(2) If there is more than one center, each center shall make every effort to coordinate requests within its segment.

(3) The publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center.

(4) If a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made.

(h) Nothing in this section shall be deemed to authorize any use of instructional materials that would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(i) The governing boards of the California Community Colleges, the California State University, and the University of California shall each adopt guidelines consistent with this section for its implementation and administration. At a minimum, the guidelines shall address all of the following:

(1) The designation of materials deemed "required or essential to student success."

(2) The determination of the availability of technology for the conversion of nonprinted materials pursuant to subdivision (d) and the conversion of mathematics and science materials pursuant to paragraph (4) of subdivision (e).

(3) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (a) and (b).

(4) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(j) Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code.

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CHAPTER 758
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INTRODUCED BY Assembly Committee on Higher Education

FEBRUARY 16, 1995

An act to amend, repeal, and add Sections 28, 1247.6, 2902, 4939, 4980.40, and 18629 of the Business and Professions Code, to amend, repeal, and add Section 1812.501 of the Civil Code, to amend, repeal, and add Section 10251 of the Corporations Code, to amend Sections 1510, 8152, 12050, 12052, 12053, 12400, 66010, 66015, 66022, 66023, 66202.5, 66743, 66753.5, 66903, 66903.3, 67385, 67500, 68011, 68133, 69509, 69613, 69615.2, 69634, 69900, 69908, 71000, 71020.5, 71090.5, 72023.5, 72411.5, 72425, 72620, 74270, 76000, 76140, 76210, 76225, 76231, 76232, 76240, 76245, 76330, 76330.1, 76355, 76370, 76380, 76391, 78015, 78217, 79121, 81033, 81130.5, 81141, 81162, 81177, 81314, 81345, 81348, 81401, 81530, 81551, 81661, 81821, 84362, 84501, 84751, 84810.5, 84820, 85223, 85233, 85267, 87008, 87017, 87411, 87413, 87414, 87418, 87419, 87420, 87423, 87448, 87451, 87453, 87460, 87464, 87468, 87469, 87470, 87483, 87487, 87603, 87604, 87622, 87672, 87673, 87675, 87676, 87677, 87701, 87715, 87732, 87734, 87740, 87744, 87745, 87746, 87762, 87764, 87768.5, 87770, 87774, 87780, 87781, 87787, 87790, 87832, 88000, 88001, 88002, 88003, 88004.5, 88010, 88013, 88014, 88015, 88020, 88023, 88024, 88030, 88033, 88036, 88050, 88051, 88053, 88054, 88057, 88063.5, 88076, 88083, 88086.5, 88092, 88093, 88097, 88098, 88104, 88105, 88107, 88120, 88125, 88126, 88128, 88132, 88136, 88164, 88165, 88167, 88168, 88185, 88191, 88192, 88194, 88195, 88196, 88197, 88198, 88203, 88205, 88205.5, 88206, 88207, 88227, 88245, 88263, 89002, 89036, 89046, 89047, 89300, 89310, 89537, 92620, 99100, 99103, 99105, and 99106 of, to amend the heading of Article 1 (commencing with Section 10000) of Chapter 1 of Part 7 of, to amend the heading of Article 13 (commencing with Section 69760) of Chapter 2 of Part 42 of, to amend and renumber the heading of Part 43.5 (commencing with Section 70900) of, to amend, repeal, and add Sections 8092, 8092.5, 44227, 49073, 66170, 69509.5, 94050, and 94355 of, to add Sections 67359.9, 84756, 84757, and 84758 to, to add an article heading immediately preceding Section 92020 of, to add Article 12 (commencing with Section 44390) to Chapter 2 of Part 25 of, Article 6 (commencing with Section 66060) and Article 7 (commencing with Section 66070) to Chapter 2 of Part 40 of, and Article 6 (commencing with Section 89250) to Chapter 2 of Part 55 of, to add Chapter 11.3 (commencing with Section 66940) to Part 40 of, and Chapter 7 (commencing with Section 94700) to Part 59 of, to repeal Sections 8081, 8084, 12051, 12061, 66207, 66211, 66605.5, 66723, 66744, 66903.4, 66903.6, 67321, 67386, 67392, 69507.7, 69534, 69534.2, 69534.5, 69534.6, 69639, 69766.1, 72410, 76320, 76392, 78217, 78310, 87012, 87018, 87461, 87772, 87773, 87778, 88032, 88035.5, 88079.1, 89003, 89004, 89009, 89032, 89033, 89040, 89070.45, 89081, 89082, 89083, 89211, 89241, 89242, 89703, 92010, 92610, and 92697 of, to repeal the headings of Article 2 (commencing with Section 92010) and Article 3 (commencing with Section 92030) of

shall include, but not be limited to, the following:
(a) The extent to which pupil achievement levels in English language skills have improved, compared with pupils receiving comparable English as a second language instruction in the traditional classroom setting.
(b) The cost savings, if any, associated with the use of distance learning technology.
(c) Barriers associated with the use of distance learning technology, and the identification of strategies to overcome these barriers.
66947. For the purposes of this article, "distance learning" means instruction in which the student and instructor are separated by distance and interact through the assistance of computer and communications technology. Distance learning also may include video or audio instruction in which the primary mode of communication between student and instructor is through a communications medium, including, but not limited to, instructional television, video, or telecourses, and any other instruction that relies on computer or communications technology to reach students at distant locations.
66948. Funding to establish and maintain the distance learning pilot projects for English as a Second Language and Adult Workforce Skills shall be obtained only from grants from federal agencies or private foundations, or both.
SEC. 49. Chapter 11.5 (commencing with Section 66950) of Part 40 of the Education Code is repealed.
SEC. 50. Chapter 13 (commencing with Section 67100) of Part 40 of the Education Code is repealed.
SEC. 52. Chapter 14 (commencing with Section 67300) of Part 40 of the Education Code is repealed.
SEC. 53. Chapter 14.2 (commencing with Section 67310) of Part 40 of the Education Code is repealed.
SEC. 54. Chapter 14 (commencing with Section 67300) is added to Part 40 of the Education Code, to read:

CHAPTER 14. DISABLED STUDENT SERVICES
Article 1. General Provisions

67300. Services for disabled students provided by the California Community Colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.
The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may adopt regulations to implement this chapter.
Notwithstanding any other provision of this section or Section 67305, blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.
67301. (a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by

Section 22511.5 of the Vehicle Code and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by Section 295.5 of the Vehicle Code, and disabled veterans, as defined by Section 295.7 of the Vehicle Code. The rules and regulations shall include authorization to park for unlimited periods in time-restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee or to display a parking permit other than pursuant to Section 5007 or 22511.55 of the Vehicle Code, provided those spaces are otherwise available for use by the general public. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by Section 295.5 of the Vehicle Code, or disabled veteran, as defined by Section 295.7 of the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California

Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

The Trustees of the California State University shall, and the Regents of the University of California may, report the findings of these audits to the Legislature and the Governor.

Article 2. Reader Services

67305. Notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and the policies and procedures of the Department of Rehabilitation.

67306. (a) California State University systemwide policy governing the provision of services to students with disabilities shall include a requirement that Disabled Student Services (DSS) directors maintain a list of readers who meet certain standards. These standards shall include some college education, a 3.0 grade point average, or the possession of equivalent skills. It is expected that most students will select a reader from this list.

(b) In addition, systemwide policy shall require that students and readers meet in a mutually agreeable public facility, either on campus or off campus, as appropriate to the student's coursework and consistent with campus policy. Requests for, and explanation of, the need for exceptions to this regulation shall be made in writing by a student on a standardized form developed by the California State University and maintained on file.

(c) Students who prefer a reader not on the campus list or prefer alternative locations for services mutually agreed to by the reader and the student, shall file written requests on a standardized form provided by the DSS director, or his or her designee, and developed by the California State University, to be maintained on file.

(d) At the beginning of each term, students shall receive a notice informing them of the option to choose a reader not on the list and to choose a location for receiving reader services in a nonpublic facility. The notice shall be signed by both the student and the DSS director, or his or her designee, and shall be maintained on file.

67307. Reader services for students with disabilities attending the California State University shall be provided for required reading not readily available on tape, handouts, and materials necessary for the required research papers. The number of reader hours provided shall be determined by the appropriate DSS staff person, in consultation with the student, and based on the volume of materials to be read. While the desirable number of hours to be available is, at a minimum, 1.5 hours of reader service per unit per week, the final number of reader services to be provided is dependent upon the student courseload, the individual student's need, and available campus funds.

Article 3. State-Funded Services

67310. (a) The Legislature finds and declares that equal access to public postsecondary education is essential for the full integration of persons with disabilities into the social, political, and economic mainstream of California. The Legislature recognizes the historic underrepresentation of disabled students in postsecondary programs and the need for equitable efforts that enhance the enrollment and retention of disabled students in public colleges and universities in California.

(b) The Legislature recognizes its responsibility to provide and adequately fund postsecondary programs and services for disabled students attending a public postsecondary institution.

(c) To meet this responsibility, the Legislature sets forth the following principles for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities:

(1) The state funded activity shall be consistent with the stated purpose of programs and services for disabled students provided by the California Community Colleges, the California State University, or the University of California, as governed by the statutes, regulations, and guidelines of the community colleges, state university, or the University of California.

(2) The state funded activity shall not duplicate services or instruction that are available to all students, either on campus or in the community.

(3) The state funded activity shall be directly related to the functional limitations of the verifiable disabilities of the students to be served.

(4) The state funded activity shall be directly related to these students' full access to and participation in the educational process.

(5) The state funded activity shall have as its goals the independence of disabled students and the maximum integration of these students with other students.

(6) The state funded activity shall be provided in the most integrated setting possible, consistent with state and federal law, state policy and funding requirements, and missions and policies of the postsecondary segment, and shall be based on identified student needs.

(d) It is the intent of the Legislature that, through the state budget process, the public postsecondary institutions request, and the state provide, funds to cover the actual cost of providing services and instruction, consistent with the principles set forth in subdivision (c), to disabled students in their respective postsecondary institutions.

(e) All public postsecondary education institutions shall continue to utilize other available resources to support programs and services for disabled students as well as maintain their current level of funding from other sources whenever possible.

(f) Pursuant to Section 67312, postsecondary institutions shall demonstrate institutional accountability and clear program effectiveness evaluations for services to students with disabilities.

67311. It is the desire and intent of the Legislature that, as appropriate for each postsecondary segment, funds for disabled student programs and services be based on the following three categories of costs:

(a) Fixed costs associated with the ongoing administration and operation of the services and programs. These fixed costs are basic ongoing administrative and operational costs of campus programs that are relatively consistent in frequency from year-to-year, such as:

(1) Access to, and arrangements for, adaptive educational equipment, materials, and supplies required by disabled students.

(2) Job placement and development services related to the transition from school to employment.

(3) Liaisons with campus and community agencies, including referral and followup services to these agencies on behalf of disabled students.

(4) On-campus and off-campus registration assistance, including priority enrollment, applications for financial aid, and related college services.

(5) Special parking, including on-campus parking registration, temporary parking permit arrangements, and application assistance for

students who do not have state handicapped placards or license plates.

(6) Supplemental specialized orientation to acquaint students with the campus environment.

(7) Activities to coordinate and administer specialized services and instruction.

(8) Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

The baseline cost of these services shall be determined by the respective system and fully funded with annual adjustments for inflation and salary range changes, to the extent funds are provided.

(b) Continuing variable costs that fluctuate with changes in the number of students or the unit load of students. These continuing variable costs are costs for services that vary in frequency depending on the needs of students, such as the following:

(1) Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities.

(2) On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities.

(3) Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both.

(4) Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students.

(5) Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students.

(6) Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable modes.

(7) Services to facilitate the repair of equipment and learning assistance devices.

(8) Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students.

(9) Speech services, provided by licensed speech or language pathologists for students with verified speech disabilities.

(10) Test taking facilitation, including adapting tests for and proctoring test taking by, disabled students.

(11) Transcription services, including, but not limited to, the provision of Braille and print materials.

(12) Specialized tutoring services not otherwise provided by the institution.

(13) Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

State funds may be provided annually for the cost of these services on an actual-cost basis, including wages for the individuals providing these services and expenses for attendant supplies. Each institution shall be responsible for documenting its costs to the appropriate state agencies.

(c) One-time variable costs associated with the purchase or replacement of equipment. One-time variable costs are one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles. State funds shall be provided for these expenses on an actual cost basis as documented by each institution.

67312. (a) The Board of Governors of the California Community

Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, do the following:

(1) Work with the California Postsecondary Education Commission and the Department of Finance to develop formulas or procedures for allocating funds authorized under this chapter.

(2) Adopt rules and regulations necessary to the operation of programs funded pursuant to this chapter.

(3) Maintain the present intersegmental efforts to work with the California Postsecondary Education Commission and other interested parties, to coordinate the planning and development of programs for students with disabilities, including, but not limited to, the establishment of common definitions for students with disabilities and uniform formats for reports required under this chapter.

(4) Develop and implement, in consultation with students and staff, a system for evaluating state-funded programs and services for disabled students on each campus at least every five years. At a minimum, these systems shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, and data on the implementation of the program and physical accessibility requirements of Section 794 of Title 29 of the Federal Rehabilitation Act of 1973.

(b) Commencing in January 1990, and every two years thereafter, the Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, submit a report to the Governor, the education policy committees of the Legislature, and the California Postsecondary Education Commission on the evaluations developed pursuant to subdivision (a). These biennial reports shall also include a review on a campus-by-campus basis of the enrollment, retention, transition, and graduation rates of disabled students.

(c) The California Postsecondary Education Commission shall review these reports and submit its comments and recommendations to the Governor and education policy committees of the Legislature.

67313. Nothing in this chapter shall be construed to be directing any student, or students, toward a particular program or service for students with disabilities nor shall anything in this chapter be used to deny any student an education because he or she does not wish to receive state funded disabled student programs and services.

SEC. 55. Section 67321 of the Education Code is repealed.

SEC. 55.5. Section 67359.9 is added to the Education Code, to read:

67359.9. This chapter shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2012, deletes or extends that date.

SEC. 56. Section 67385 of the Education Code is amended to read:

67385. (a) The governing board of each community college district, the Trustees of the California State University, the Board of Directors of the Hastings College of the Law, and the Regents of the University of California shall each adopt, and implement at each of their respective campuses or other facilities, a written procedure or protocols to ensure, to the fullest extent possible, that students, faculty, and staff who are victims of sexual assault committed at or upon the grounds of, or upon off-campus grounds or facilities maintained by the institution, or upon grounds or facilities maintained by affiliated student organizations, shall receive treatment and information. If appropriate on-campus treatment facilities are unavailable, the written procedure on protocols may provide for referrals to local community treatment centers.

(b) The written procedures or protocols adopted pursuant to subdivision (a) shall contain at least the following information:

CHAPTER 1243

An act to amend Sections 39006, 40081, and 67311.5 of, and to add Section 81034 to, the Education Code, to amend Sections 14526, 14527, 14529.7, 65082, 65089, and 65089.3 of, and to repeal Section 14529.8 of, the Government Code, to add Section 25168 to the Health and Safety Code, to amend Section 1464 of the Penal Code, to amend Sections 21503, 21650, 21650.1, 21650.2, 21655, 21662.5, 21664, 99155, and 99234 of, to amend and renumber Section 5285.5 of, to amend the heading of Article 2.5 (commencing with Section 21650) of Chapter 4 of, and to repeal Section 21015.6 of, the Public Utilities Code, to amend Section 6262 of the Revenue and Taxation Code, to amend the heading of Article 5 (commencing with Section 180) of Chapter 1 of Division 1 of, and to amend Sections 179.6, 191, 253.5, 301, 341, 346, 368, 372, 401, 405, 429, 435, 444, 475, 483, 524, 527, and 554 of, and to repeal Sections 301.1, 405.2, 426.1, 459, 548, 580.1, and 618.1 of, the Streets and Highways Code, to amend Sections 25, 320, 505.2, 2402.6, 2525.4, 4456, 4601, 4604.2, 9105, 9407, 9410, 9553, 9706, 11218, 11405, 11406, 11814, 12514, 12804, 12810.2, 12811, 13007.5, 13377, 14600, 21115.1, 21458, 21464, 21712, 27360, 32002.5, 34003, 34500, 34501.12, 34505.5, 34507.5, 34514, 34515, 35002, 40000.22, 40000.26, 40202, 40509.5, 40604, 42001.2, and 42001.5 of, to add Sections 11406.5, 11411, 22518, 35401.4, and 38240.1 to, and to add Article 6 (commencing with Section 34120) to Division 14.7 of, to repeal and add Section 12814.6 of, and to repeal Sections 4850.1, 12512.5, and 34023 of, the Vehicle Code, relating to transportation, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 29, 1992. Filed with Secretary of State September 30, 1992.]

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Omnibus Transportation Act of 1992.

SEC. 2. Section 39006 of the Education Code is amended to read:

39006. Notwithstanding Section 39005, immediately after receiving notice of a proposed acquisition of property which is within two miles, measured by air line, of that point on an airport runway, or runway proposed by an airport master plan, which is nearest the site, the Department of Transportation shall make an investigation and report to the school district governing board within 30 working days after receipt of the notice. As part of the investigation, the Department of Transportation shall give notice thereof to the owner and operator of the airport who shall be granted the opportunity to comment upon the proposed schoolsite.

Notwithstanding Section 39005, if the report of the Department of Transportation required by that section does not favor the acquisition of the property for a schoolsite, or an addition to a present

schoolsite, the governing body shall not acquire title to the property until 30 days after the department's report is received and until the department's report has been read at a public hearing duly called after 10 days' notice by publication in a newspaper of general circulation within the school district or, if there is no such newspaper, in a newspaper of general circulation within the county in which the property is located.

SEC. 3. Section 40081 of the Education Code is amended to read:

40081. (a) The department shall develop or approve courses for training school pupil activity bus (SPAB), transit bus, schoolbus, and farm labor vehicle drivers that will provide them with the skills and knowledge necessary to prepare them for certification pursuant to Sections 12517, 12519, and 12804.6 of the Vehicle Code. The department shall seek the advice and assistance of the Department of Motor Vehicles and the Department of the California Highway Patrol in developing or approving those courses.

(b) The department shall train or approve the necessary instructional personnel to conduct the driver training courses. For all schoolbus and school pupil activity bus (SPAB) driver instructor training, the department shall provide for and approve the course outline and lesson plans used in the course. For transit bus and farm labor vehicle driver training, the department shall approve the course outline and lesson plans used in the course.

(c) All courses of study and training activities required by this article shall be approved by the department and given by, or in the presence of, an instructor in possession of a valid school pupil activity bus (SPAB), transit bus, schoolbus, or farm labor vehicle driver instructor certificate of the appropriate class.

(d) As an alternative to subdivisions (a), (b), and (c), instructors who have received a certificate from the Transportation Safety Institute of the United States Department of Transportation indicating that they have completed the Mass Transit Instructor Orientation and Training (Train-the-Trainer) course may approve courses of instruction and train transit bus drivers in order to meet the requirements for certification pursuant to Section 12804.6 of the Vehicle Code.

SEC. 4. Section 67311.5 of the Education Code is amended to read:

67311.5. (a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by Section 295.5 of the Vehicle Code, and disabled veterans, as defined by Section 295.7 of the Vehicle Code. The rules and regulations shall include authorization to park for unlimited periods in time-restricted parking zones and to park in any metered parking space without

being required to pay any parking meter fee or to display a parking permit other than pursuant to Section 5007 or 22511.55 of the Vehicle Code, provided those spaces are otherwise available for use by the general public. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by Section 295.5 of the Vehicle Code, or disabled veteran, as defined by Section 295.7 of the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community

Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

The Trustees of the California State University shall, and the Regents of the University of California may, report the findings of these audits to the Legislature and the Governor.

(d) This section shall not apply to the University of California unless the Regents of the University of California, by resolution, make that provision applicable.

SEC. 5. Section 81034 is added to the Education Code, to read:

81034. Immediately after receiving notice of the proposed acquisition of property that is within two miles, measured by air line, of that point on an airport runway, or runway proposed by an airport master plan, that is nearest the site, the governing board shall notify the Division of Aeronautics of the Department of Transportation, in writing, of the proposed acquisition. The Division of Aeronautics shall make an investigation and report to the governing board within 30 working days after receipt of that notice.

SEC. 6. Section 14526 of the Government Code is amended to read:

14526. (a) Not later than December 15 of each odd-numbered year, the department shall submit, to the commission and all transportation planning agencies and county transportation commissions, its proposed state transportation improvement program consisting of all of the following:

(1) Projects on the interregional road system included in the list developed in accordance with Section 164.3 of the Streets and Highways Code.

(2) Projects on the intercity rail system.

(3) Retrofit soundwalls in accordance with the priorities established pursuant to Section 215.5 of the Streets and Highways Code.

(4) Recommendation of projects on state highways which should receive a higher priority than projects proposed in a regional transportation improvement program.

(5) Projects to be funded from the Toll Bridge Account in the State Transportation Fund.

(6) Projects to be funded from the Aeronautics Account in the State Transportation Fund.

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immediate effect. The facts constituting the necessity are:

In order that the provisions of this act, that make necessary changes in various provisions regarding transportation, may become effective as quickly as possible during 1992, it is necessary that this act take effect immediately.

State Transportation Fund.

(2) The net proceeds of any moneys received from the disposition of Parcels 1, 2, 3, and 4 of Section 6 of this act shall be deposited in the Employment Development Department Building Fund.

(3) The proceeds of any money received from the exchange of the parcel described in Section 10 of this act shall be deposited into the State Park and Recreation Fund and shall be available for appropriation for state park purposes.

(4) The proceeds from the lease of the parcel described in Section 11 of this act shall be deposited into the Low Level Radioactive Waste Disposal Fund.

CHAPTER 626

An act to amend Section 67300 of, and to add Sections 67302 and 67303 to, the Education Code, relating to education.

[Approved by Governor October 6, 1991. Filed with Secretary of State October 8, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Section 67300 of the Education Code is amended to read:

67300. Services for disabled students provided by the California Community Colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.

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CHAPTER 1206

An act to amend Section 88079 of, to add Section 84708 to, to repeal Sections 78600 and 78600.5 of, and to repeal and add Section 84850 of, the Education Code, to amend Section 12419.7 of the Government Code, and to amend Section 23.50 of Chapter 313 of the Statutes of 1988, relating to community colleges.

[Approved by Governor September 21, 1990. Filed with Secretary of State September 24, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 78600 of the Education Code is repealed.
SEC. 2. Section 78600.5 of the Education Code is repealed.
SEC. 3. Section 84708 is added to the Education Code, to read:
84708. For the 1991–92 fiscal year and each fiscal year thereafter,

the base revenues for each community college district shall be computed in accordance with the procedures defined in Section 84700, including all average daily attendance computed pursuant to Section 84500 as adjusted by Section 84895, if applicable, that would have otherwise been funded in the previous fiscal year if one-time supplemental funding of instructional hours through the Budget Act were not available.

It is the intent of the Legislature that districts' additional average daily attendance funded through the general apportionment process as a result of other districts' average daily attendance or attendance hours being funded through supplemental funds shall be understood to be one-time and shall not become part of the base revenue for subsequent years.

SEC. 4. Section 84850 of the Education Code is repealed.

SEC. 5. Section 84850 is added to the Education Code, to read:

84850. (a) The Board of Governors of the California Community Colleges shall adopt rules and regulations for the administration and funding of educational programs and support services to be provided to disabled students by community college districts pursuant to Chapter 14.2 (commencing with Section 67310) of Part 40.

(b) As used in this section, "disabled students" are persons with exceptional needs enrolled at a community college who, because of a verified disability, cannot fully benefit from classes, activities, and services regularly provided by the college without specific additional specialized services or educational programs.

(c) The regulations adopted by the board of governors shall provide for the apportionment of funds to each community college district to offset the direct excess cost of providing specialized support services or instruction, or both, to disabled students enrolled in state-supported educational programs or courses. Direct excess costs are those actual fixed, variable, and one-time costs, as defined in Section 67312, which exceed the combined total of the following:

(1) The average cost to the district of providing services to nondisabled students times the number of students served by disabled student programs and services.

(2) The indirect cost to the district of providing facilities and support for the administration of disabled student programs and services.

(3) The revenue derived from average daily attendance in special classes.

(4) Any other funds for serving disabled students which the district receives from federal, state, or local sources.

(d) As a condition of receiving funds pursuant to this section, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require.

(e) The board of governors may authorize the chancellor, consistent with the requirements the board may impose, to designate up to 3 percent of the funds allocated pursuant to this section for program development and program accountability.

SEC. 6. Section 88079 of the Education Code is amended to read:

88079. If the governing board of any community college district establishes positions and restricts initial appointment of new employees to mentally, physically, or developmentally disabled persons, then such positions shall, in addition to the regular class title, be classified as "restricted." The positions shall be part of the classified service and persons so employed shall be classified employees for all purposes except that they shall not be subject to the provisions of Section 88091 or 88092, and that they shall not acquire permanent status or seniority credit and shall not be eligible for promotion into the regular classified service until they have complied with the provisions of subdivision (c) of Section 88005.

SEC. 7. Section 12419.7 of the Government Code is amended to read:

12419.7. For the purposes of Section 12419.5, an amount due a state agency from a person or entity shall include any amount due a community college district from a person for repayment of student financial assistance or any other proper financial obligation due to the district or a college.

If the Controller, in his or her discretion, offsets an amount due a community college district from a person pursuant to Section 12419.5, the Controller shall remit the amount offset to the district.

SEC. 8. Section 23.50 of Chapter 313 of the Statutes of 1988 is amended to read:

SEC. 23.50. (a) (1) The sum of two hundred ninety-two million six hundred sixty-seven thousand dollars ($292,667,000) is hereby appropriated upon receipt from California's allocation of Federal State Legalization Impact Assistance Grant (SLIAG) funds which were appropriated by Congress in Section 204 of the Federal Immigration Reform and Control Act (IRCA) of 1986. These funds shall be transferred by the Controller, upon order of the Director of Finance, to the appropriate administering department.

(2) The amount appropriated by this section shall be allocated in accordance with the following schedule:

(A) Public Health, $23,300,000:

(1) TB/Leprosy Control	$8,100,000
(2) Sexually Transmitted Disease	1,700,000
(3) Laboratory Support	300,000
(4) California Children's Services	1,700,000
(5) Immunizations	500,000
(6) Perinatal Services	2,800,000
(7) Family Planning	3,200,000
(8) Child Health and Disability Prevention	
(9) Adolescent Family Life Program	500,000

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funds for Medically Indigent Services shall have an appropriate patient identification system in place no later than March 1, 1990.

(4) This patient identification system shall match federal documentation requirements and prevent duplicate claiming on behalf of individual beneficiaries.

(y) Of the $1,300,000 in administrative moneys for education appropriated in subdivision (a) (2) (D) (3), $60,000 shall be allocated to the California Postsecondary Education Commission for the collection of data regarding: (1) the number of individuals involved; (2) the language ability of these individuals; and (3) the number enrolled in classes. The California Postsecondary Education Commission shall report this information to the Legislature, together with recommendations for future educational funding, by January 1, 1989.

(yx) It is the intent of the Legislature to allow SLIAG funding for all adult educational programs permitted under federal law, including courses for which high school credit is granted.

(z) The State Department of Education shall permit local education providers to claim federally allowable startup costs, including curriculum development staff training administration, and outreach to initiate new English language and citizenship skills instructional programs incurred prior to December 1, 1988. These claims shall not exceed 5 percent of the federal cap, i.e., $500 multiplied by the number of eligible legalized aliens receiving educational services, except that private nonprofit programs may expend up to 12.5% for these purposes. The State Department of Education shall document such startup costs and report to the Health and Welfare Agency and to the Legislature by March 31, 1989.

CHAPTER 1066

An act to amend Sections 89071 and 90011 of, and to add Section 67311.5 to, the Education Code, and to amend Sections 1463.5a and 1463.7 of the Penal Code, relating to postsecondary education, and making an appropriation therefor.

[Approved by Governor September 18, 1990. Filed with Secretary of State September 19, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 67311.5 is added to the Education Code, to read:

67311.5. (a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code, and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by subdivision (a) of Section 22511.5 of, and subdivision (a) of Section 22511.9 of, the Vehicle Code, including authorization to park for unlimited periods in restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee. The adopted regulations shall authorize parking at campus facilities and grounds

120370

by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by subdivision (a) of Section 22511.5 of, and subdivision (a) of Section 22511.9 of, the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code

requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2-7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.31 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

The Trustees of the California State University shall, and the Regents of the University of California may, report the findings of these audits to the Legislature and the Governor.

(d) This section shall not apply to the University of California unless the Regents of the University of California, by resolution, make that provision applicable.

SEC. 2. Section 89701 of the Education Code is amended to read:

89701. The trustees are authorized to acquire, pursuant to the Property Acquisition Law (Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code) or by lease or other means, real property and to construct, operate, and maintain motor vehicle parking facilities thereon for state university officers, employees, students, or other persons. The trustees may prescribe the terms and conditions of the parking, and of parking on facilities existing on the effective date of this section, including the payment of parking fees in the amounts and under the circumstances determined by the trustees. Varying rates of parking fees may be established for different localities or for different parking facilities. In determining rates of parking fees, the trustees may consider the rates charged in the same locality by other public agencies and by private employers for employee parking, and the rates charged to students by other universities and colleges.

Except as otherwise provided in this section, revenues received by the trustees from any of the motor vehicle parking facilities, as well as from all parking facilities existing on the effective date of this section, shall be transmitted to the Treasurer and shall be deposited by that officer in the State Treasury to the credit of the State University Parking Revenue Fund, which fund is hereby created. The trustees may pledge all or any part of the revenues in connection with bonds or notes issued pursuant to the State University Revenue Bond Act of 1947 (Article 2 (commencing with Section 90010) of Chapter 8), in which case the revenues shall be deposited, transmitted, and used in the manner provided by that act. All revenues received by the trustees from parking facilities, to the extent not pledged in connection with bonds or notes issued pursuant to the State University Revenue Bond Act of 1947, are hereby appropriated, without regard to fiscal years, to the trustees for the acquisition, construction, operation, and maintenance of motor vehicle parking facilities on real property acquired hereunder or on real property otherwise under the jurisdiction of the trustees,

CHAPTER 998

An act to amend Section 67300 of the Education Code, as amended by Section 34 of, and to repeal Section 67300 of the Education Code, as amended by Section 35 of, Chapter 248 of the Statutes of 1986, relating to education.

[Approved by Governor September 22, 1987. Filed with Secretary of State September 23, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 67300 of the Education Code, as amended by Section 34 of Chapter 248 of the Statutes of 1986, is amended to read:

67300. Services for disabled students provided by the California community colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California community colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California community colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.

SEC. 2. Section 67300 of the Education Code, as amended by Section 35 of Chapter 248 of the Statutes of 1986, is repealed.

CHAPTER 829

An act to amend and renumber the heading of Chapter 14 (commencing with Section 67320) of, and to add Chapter 14.2 (commencing with Section 67310) to, Part 40 of the Education Code, relating to postsecondary education.

[Approved by Governor September 19, 1987. Filed with Secretary of State September 21, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 14.2 (commencing with Section 67310) is added to Part 40 of the Education Code, to read:

CHAPTER 14.2. STATE FUNDED DISABLED STUDENT PROGRAMS AND SERVICES

67310. (a) The Legislature finds and declares that equal access to public postsecondary education is essential for the full integration of persons with disabilities into the social, political, and economic mainstream of California. The Legislature recognizes the historic underrepresentation of disabled students in postsecondary programs and the need for equitable efforts that enhance the enrollment and retention of disabled students in public colleges and universities in California.

(b) The Legislature recognizes its responsibility to provide and adequately fund postsecondary programs and services for disabled students attending a public postsecondary institution.

(c) To meet this responsibility, the Legislature sets forth the following principles for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities:

(1) The state funded activity shall be consistent with the stated purpose of programs and services for disabled students provided by the California Community Colleges, the California State University, or the University of California, as governed by the statutes, regulations, and guidelines of the community colleges, state university, or the University of California.

(2) The state funded activity shall not duplicate services or instruction that are available to all students, either on campus or in the community.

(3) The state funded activity shall be directly related to the functional limitations of the verifiable disabilities of the students to be served.

(4) The state funded activity shall be directly related to these students' full access to and participation in the educational process.

(5) The state funded activity shall have as its goals the independence of disabled students and the maximum integration of

these students with other students.

(6) The state funded activity shall be provided in the most integrated setting possible, consistent with state and federal law, state policy and funding requirements, and missions and policies of the postsecondary segment, and shall be based on identified student needs.

(d) It is the intent of the Legislature that, through the state budget process, the public postsecondary institutions request, and the state provide, funds to cover the actual cost of providing services and instruction, consistent with the principles set forth in subdivision (c), to disabled students in their respective postsecondary institutions.

(e) All public postsecondary education institutions shall continue to utilize other available resources to support programs and services for disabled students as well as maintain their current level of funding from other sources whenever possible.

(f) Pursuant to Section 67312, postsecondary institutions shall demonstrate institutional accountability and clear program effectiveness evaluations for services to students with disabilities.

67311. It is the desire and intent of the Legislature that, as appropriate for each postsecondary segment, funds for disabled student programs and services be based on the following three categories of costs:

(a) Fixed costs associated with the ongoing administration and operation of the services and programs. These fixed costs are basic ongoing administrative and operational costs of campus programs that are relatively consistent in frequency from year-to-year, such as:

(1) Access to, and arrangements for, adaptive educational equipment, materials, and supplies required by disabled students.

(2) Job placement and development services related to the transition from school to employment.

(3) Liaisons with campus and community agencies, including referral and followup services to these agencies on behalf of disabled students.

(4) On-campus and off-campus registration assistance, including priority enrollment, applications for financial aid, and related college services.

(5) Special parking, including on-campus parking registration, temporary parking permit arrangments, and application assistance for students who do not have state handicapped placards or license plates.

(6) Supplemental specialized orientation to acquaint students with the campus environment.

(7) Activities to coordinate and administer specialized services and instruction.

(8) Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

The baseline cost of these services shall be determined by the respective system and fully funded with annual adjustments for

inflation and salary range changes, to the extent funds are provided.

(b) Continuing variable costs that fluctuate with changes in the number of students or the unit load of students. These continuing variable costs are costs for services that vary in frequency depending on the needs of students, such as:

(1) Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities.

(2) On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities.

(3) Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both.

(4) Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students.

(5) Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students.

(6) Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable modes.

(7) Services to facilitate the repair of equipment and learning assistance devices.

(8) Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students.

(9) Speech services, provided by licensed speech or language pathologists for students with verified speech disabilities.

(10) Test taking facilitation, including adapting tests for and proctoring test taking by, disabled students.

(11) Transcription services, including, but not limited to, the provision of Braille and print materials.

(12) Specialized tutoring services not otherwise provided by the institution.

(13) Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

State funds may be provided annually for the cost of these services on an actual-cost basis, including wages for the individuals providing these services and expenses for attendant supplies. Each institution shall be responsible for documenting its costs to the appropriate state agencies.

(c) One-time variable costs associated with the purchase or replacement of equipment. One-time variable costs are one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles. State funds shall be provided for these expenses on an actual cost basis as documented

by each institution.

67312. (a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may do the following:

(1) Work with the California Postsecondary Education Commission and the Department of Finance to develop formulas or procedures for allocating funds authorized under this chapter.

(2) Adopt rules and regulations necessary to the operation of programs funded pursuant to this chapter.

(3) Maintain the present intersegmental efforts to work with the California Postsecondary Education Commission and other interested parties, to coordinate the planning and development of programs for students with disabilities, including, but not limited to, the establishment of common definitions for students with disabilities and uniform formats for reports required under this chapter.

(4) Develop and implement, in consultation with students and staff, a system for evaluating state-funded programs and services for disabled students on each campus at least every five years. At a minimum, these systems shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, and data on the implementation of the program and physical accessibility requirements of Section 794 of Title 29 of the Federal Rehabilitation Act of 1973.

(b) Commencing in January 1990, and every two years thereafter, the Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, submit a report to the Governor, the education policy committees of the Legislature, and the California Postsecondary Education Commission on the evaluations developed pursuant to subdivision (a). These biennial reports shall also include a review on a campus-by-campus basis of the enrollment, retention, transition, and graduation rates of disabled students.

(c) The California Postsecondary Education Commission shall review these reports and submit its comments and recommendations to the Governor and education policy committees of the Legislature.

67313. Nothing in this chapter shall be construed to be directing any student, or students, toward a particular program or service for students with disabilities nor shall anything in this chapter be used to deny any student an education because he or she does not wish to receive state funded disabled student programs and services.

CHAPTER 248

An act to amend Sections 7108.5, 8706, 9741, 17300, and 25608 of, to amend and renumber Sections 5678, 5679, 5680, 9750, 19170, 24045.9, and 24757 of, to add Chapter 19.5 (commencing with Section 22440) to Division 8 of, and to repeal Chapter 20 (commencing with Section 22450) of Division 8 of, the Business and Professions Code, to amend Section 2945.1 of, to amend and renumber Section 43.5(a) of, to amend and renumber the heading of Chapter 6 (commencing with Section 1918) of Title 4 of Part 4 of Division 3 of, and to repeal the heading of Chapter 2a (commencing with Section 2980) of Title 14 of Part 4 of Division 3 of, the Civil Code, to amend Sections 697.590, 1985.3, and 2037 of, and to repeal Section 86.1 of, the Code of Civil Procedure, to amend Sections 44857, 48915, 49557, and 67300 of, to amend and renumber Sections 51880, 51881, 51882, and 69648.5 of, to repeal Sections 15104, 92660, 92660.5, 92661, and 92667 of, and to repeal the headings of Article 2 (commencing with Section 2520) of Chapter 12 of Part 2, Article 7 (commencing with Section 5400) of Chapter 3 of Part 4, Chapter 11 (commencing with Section 11000) of Part 7, Article 4 (commencing with Section 84070) of Chapter 1 of Part 50, and Article 4.5 (commencing with Section 92045) of Chapter 1 of Part 57 of, the Education Code, to amend Section 451 of the Evidence Code, to amend Sections 12534, 12582, and 12608.5 of the Food and Agricultural Code, to amend Sections 3501, 3541.5, 7090, 10527.2, 10549, 11010, 11346.52, 15325, 15333, 15355, 15382, 15384, 15385, 15972, 15973, 15975, 15980, 15982, 16304.6, 17622, 23150, 23285, 23358, 53637, 53638, 53639, 53640, 53641, 53643, 53645, 53650, 54957.6, 57075.5, and 66700 of, to amend and renumber Sections 6254.2, 7575, 14669, 15335.5, 19822.5, 27556, 31648.3, 35155.5, 53075, 53635.5, and 71603.5 of, to amend and renumber the headings of Chapter 26 (commencing with Section 7570) of Division 7 of Title 1, Chapter 11 (commencing with Section 8855) of Division 1 of Title 2, Article 4 (commencing with Section 14825) of Chapter 6 of Part 5.5 of Division 3 of Title 2, and Article 8 (commencing with Section 25730) of Chapter 7 of Division 2 of Title 3 of, to repeal Sections 11019, 15981, and 66714.9 of, to repeal the heading of Article 4 (commencing with Section 4380) of Chapter 4 of Division 5 of Title 1 of, and to add the heading of Article 5 (commencing with Section 18990) to Chapter 5 of Part 2 of Division 5 of Title 2 of, the Government Code, to amend Section 1202 of the Harbors and Navigation Code, to amend Sections 113, 1339.5, 1502, 1596.865, 1596.871, 1797, 1797.3, 1797.50, 1797.54, 1797.84, 1797.97, 1797.106, 1797.107, 1797.133, 1797.174, 1797.208, 1797.212, 1798.200, 1798.202, 1798.204, 1798.206, 1798.208, 1799.50, 1799.108, 11151, 11380, 12651, 25159.15, 25159.17, 25191.7, 25291, 44200, and 50177 of, to amend and renumber the headings of Article 5 (commencing with Section 4638,) Article 6 (commencing with Section 4641), and Article 7 (commencing with Section 4650) of Chapter 1 of Part 3 of Division 5 of, to repeal Sections 1271, 1418.2, 1418.6, 1424.1, 1427, 1428.1, 1430.5, 1439.5, 1439.7, and 1439.8 of, to

21380

repeal Article 2.5 (commencing with Section 1272) of Chapter 2 of Division 2 of, to repeal the headings of Article 3 (commencing with Section 1791) of Chapter 10 of Division 2, Part 1 (commencing with Section 1797) of Division 2.5, and Article 4 (commencing with Section 4627) of Chapter 1 of Part 3 of Division 5 of, and to repeal Chapter 6 (commencing with Section 38050) of Division 25 of, the Health and Safety Code, to amend Section 15001 of the Insurance Code, to amend Sections 3201, 3202, 3203, and 6382 of the Labor Code, to amend Sections 1170.1, 1213.5, 3041.5, 3605, and 11166.5 of, to amend the heading of Chapter 1 (commencing with Section 13010) of Title 3 of Part 4 of, to amend and renumber Sections 806, 1203.1g, and 1270, and to amend and renumber the headings of Articles 2 (commencing with Section 13010) and 3 (commencing with Section 13020) of Chapter 1 of Title 3 of Part 4 of, the Penal Code, to amend Section 707 of the Probate Code, to amend and renumber Sections 21000, 21001, 21002, 21100, 21101, 21102, 21103, 21104, 21105, 21106, 21107, 21108, 21109, 21110, 21200, 21201, 21202, 21203, 21204, 21205, 21206, 21207, 21208, 21209, 21210, 21211, 21212, 21213, 21214, and 21215 of the Public Contract Code, to amend Sections 739, 3236.5, 3754.5, 5020.6, 9314, and 31101 of, and to amend and renumber the heading of Division 7.2 (commencing with Section 8700) of, the Public Resources Code, to amend Section 28746.6 of, and to amend and renumber Sections 779.1 and 99270 of, the Public Utilities Code, to amend Sections 7252, 23735, 24344, 24447, 24520, 25553.5, and 26426 of, and to repeal Sections 3791.4 and 6357.5 of, the Revenue and Taxation Code, to amend Sections 2117 and 2127 of the Streets and Highways Code, to amend Sections 976.6, 984, 987.7, 1085, 1222, 9973, 15002, 15056.6, and 15077 of, and to repeal Sections 986.5, 987.5, and 1088.5 of, the Unemployment Insurance Code, to amend Sections 387, 1808.6, and 42270 of, to amend and renumber Sections 1670 and 23206.5 of, and to repeal Section 6700.5 of, the Vehicle Code, to amend Section 128 of the Water Code, and to amend Sections 350 and 14123 of, to amend and renumber Sections 22, 362.3, 729, 1752.82, 4473, 9132, 11312, 14005.10, 14105.1, 14105.9, 14133.6, 14149, 14462, 16145, 16146, and 16147 of, to amend and renumber the headings of Chapter 6 (commencing with Section 5500) of Part 1 of Division 5 and Chapter 8 (commencing with Section 9540) of Division 8.5 of, to add Chapter 4.8 (commencing with Section 9396) to Division 8.5 and Article 3.85 (commencing with Section 11348.5) to Chapter 2 of Part 3 of Division 9 of, to repeal Sections 4302, 14022.3, 14110.6, 14110.7, 14123.1, 14124.7, and 14124.10 of, to repeal Chapter 4.7 (commencing with Section 9390) of Division 8.5 of, and to repeal Article 3.8 (commencing with Section 11347) of Chapter 2 of Part 3 of Division 9 of, the Welfare and Institutions Code, and to add Section 10 to Chapter 30 of the Statutes of 1985, relating to the maintenance of the codes.

21410

[Approved by Governor July 2, 1986. Filed with Secretary of State July 2, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 5678 of the Business and Professions Code, as added by Chapter 1383 of the Statutes of 1984, is amended and renumbered to read:

5678.5. Every insurer providing professional liability insurance to a holder of a certificate, and every certificate holder, shall send a complete report to the board on any settlement or arbitration award in excess of five thousand dollars ($5,000) of a claim or action for damages caused by the certificate holder's fraud, deceit, negligence, incompetency, or recklessness in practice. The report shall be sent within 30 days after the settlement agreement has been consented to by the insured or within 30 days after service of the arbitration award on the parties.

SEC. 2. Section 5679 of the Business and Professions Code, as added by Chapter 1383 of the Statutes of 1984, is amended and renumbered to read:

5679.5. Every settlement or arbitration award in excess of five thousand dollars ($5,000) of a claim or action for damages caused by the certificate holder's fraud, deceit, negligence, incompetency, or recklessness in practice when the certificate holder does not possess professional liability insurance as to the claim shall, within 30 days after any settlement agreement has been consented to by the certificate holder or 30 days after service of the arbitration award on the parties, be reported to the board. A complete report shall be made by appropriate means by the certificate holder or the holder's counsel, with a copy of the communication to be sent to the claimant through the claimant's counsel if the claimant is so represented, or directly if the claimant is not. If, within 45 days of the conclusion of the settlement agreement or service of the arbitration award on the parties, counsel for the claimant, or if the claimant is not represented by counsel, the claimant, has not received a copy of the report, he or she shall himself or herself make the complete report. Failure of the certificate holder or claimant or, if represented by counsel, their counsel, to comply with this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000). Knowing and intentional failure to comply with this section, or conspiracy or collusion not to comply with this section, or to hinder or impede any other person in compliance shall be a misdemeanor punishable by a fine of not less than ten thousand dollars ($10,000) nor more than one hundred thousand dollars ($100,000).

SEC. 3. Section 5680 of the Business and Professions Code, as added by Chapter 1383 of the Statutes of 1984, is amended and renumbered to read:

5680.05. Within 10 days after a judgment by a court of this state

21440

These plans shall ensure each of the following:

(1) The names of the children shall not be published, posted, or announced in any manner, or used for any other purpose other than the National School Lunch Program.

(2) There shall be no overt identification of any of the children by the use of special tokens or tickets or by any other means.

(3) The children shall not be required to work for their meals or milk.

(4) The children shall not be required to use a separate dining area, go through a separate serving line, enter the dining area through a separate entrance, or consume their meals or milk at a different time.

(c) When more than one lunch or breakfast or type of milk is offered pursuant to this article, the children shall have the same choice of meals or milk that is available to those children who pay the full price for their meal or milk.

SEC. 31. Section 51880 of the Education Code, as added by Chapter 1033 of the Statutes of 1983, is amended and renumbered to read:

51879.7. The Legislature finds that, given the great diversity of water recreation activities available statewide and the significant loss of life associated with those activities, there is a great need for an aquatic safety program in the state.

It is the intent of the Legislature in enacting this article that fundamental water safety training be provided for all the children of the state so that California's youth will be able to enjoy water recreation while avoiding its hazards.

SEC. 32. Section 51881 of the Education Code, as added by Chapter 1033 of the Statutes of 1983, is amended and renumbered to read:

51879.8. The Department of Boating and Waterways, in cooperation with the State Department of Education and other appropriate agencies, industry, and nonprofit organizations involved with water safety, shall develop an aquatic safety program which shall be made available for use at an appropriate grade level in public elementary schools, as determined by the Director of Boating and Waterways, at no expense to the schools. The aquatic education program shall include, but not be limited to, an audiovisual instructional aid and parental involvement materials. The Department of Boating and Waterways shall act as liaison between the schools and school districts and the industry and nonprofit organizations involved with water safety.

SEC. 33. Section 51882 of the Education Code, as added by Chapter 1033 of the Statutes of 1983, is amended and renumbered to read:

51879.9. Once developed, the Department of Boating and Waterways shall notify the schools and school districts of the availability of the aquatic safety program.

SEC. 34. Section 67300 of the Education Code, as added by

Section 1 of Chapter 903 of the Statutes of 1985, is amended to read:

67300. Services for disabled students provided by the California community colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California community colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California community colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law.

This section shall remain in effect only until July 1, 1988, and as of that date is repealed, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date.

SEC. 35. Section 67300 of the Education Code, as added by Section 2 of Chapter 903 of the Statutes of 1985, is amended to read:

67300. Services for disabled students provided by the California community colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California community colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, adopt regulations to implement this chapter.

This section shall become effective on July 1, 1988, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date.

SEC. 36. Section 69648.5 of the Education Code, as added by Chapter 609 of the Statutes of 1984, is amended and renumbered to read:

SEC. 275. Section 16147 of the Welfare and Institutions Code, as added by Chapter 1460 of the Statutes of 1982, is amended and renumbered to read:

16144.3. Notwithstanding any other provision of law, the parent or parents of a person under 21 years of age who is domiciled in this state shall not be held financially responsible, nor shall financial contributions be requested or required of the parent or parents, for maternity home care, social service counseling, or other services related to pregnancy of the person which are provided by a licensed maternity home pursuant to this chapter.

SEC. 276. Section 10 is added to Chapter 30 of the Statutes of 1985, to read:

Sec. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Existing law, enacted in 1984, provides for a unified system of state regulated bar and inland pilotage for the Bays of San Francisco, San Pablo, and Suisun with provision for the continuation of inland pilots licenses for those existing inland pilots who apply for those licenses prior to March 31, 1985. In order to clarify these laws to make certain that the provisions relating to suspension and revocation of licenses continue to apply to this category of pilot, and in order to include drug abuse as a ground for suspension or revocation, it is necessary that this act take effect immediately.

SEC. 277. Any section of any act enacted by the Legislature during the 1986 calendar year, which takes effect on or before January 1, 1987, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to or subsequent to this act.

CHAPTER 903

An act to amend, repeal and add Section 67300 of the Education Code, relating to blind persons, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 21, 1985. Filed with Secretary of State September 23, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 67300 of the Education Code is amended to read:

67300. Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter.

Notwithstanding any other provision of this section or Section 67301, blind students who are attending California community colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law.

This section shall remain in effect only until July 1, 1988, and as of that date is repealed, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date.

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SEC. 2. Section 67300 is added to the Education Code, to read:

67300. Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter.

This section shall become effective on July 1, 1988, unless a later enacted statute, which is enacted prior to that date, deletes or extends that date.

SEC. 3. There is hereby reappropriated from funds appropriated for the 1985–86 fiscal year to the community colleges for local assistance to disabled students, the sum of eighty-two thousand dollars ($82,000) to the Department of Rehabilitation in order to implement Section 1 of this act.

SEC. 4. The Department of Rehabilitation shall seek federal financial participation for the provision of readers to blind students, as authorized pursuant to Section 1 of this act.

SEC. 5. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The resources and service delivery system of the community colleges has been inadequate to meet the basic educational needs of blind college students attending these institutions. In order to attempt to more adequately meet the basic educational needs of blind students at the earliest possible time, it is necessary that this act go into immediate effect.

CHAPTER 323

An act to amend Section 1531 of, and to repeal Section 1531.1 of, the Code of Civil Procedure, to amend Sections 9997, 18632, 18711, 19610, 19610.5, 23095, 23954.5, 24012, 24013, and 24045 of, and to add Sections 24017, 24212, and 24310 to, the Business and Professions Code, to amend Sections 2558, 8263, 10106, 18024, 24701, 42238, 62000.5, and 89500 of, to add Sections 8279.1, 60247, 66905, 67301, and 92102 to, to add Article 4.5 (commencing with Section 92045) to Chapter 1 of Part 57 of, to add and repeal Section 71063.5 of, to repeal and add Section 62000 to, and to repeal Section 84896 of, the Education Code, to amend Sections 32812 and 32822 of the Financial Code, to amend Sections 1231, 3516, 3562, 8836, 8836.5, 12021.3, 12440, 13140, 13143, 13144, 13322, 13336.5, 13340, 14669, 15202, 15792, 15799, 15799.2, 15799.4, 15799.6, 16113, 16114, 16183, 16422, 17281, 17282, 17284, 19815.6, 19826, 19849.11, 27707.1, 68207, and 68562 of, to amend and renumber Sections 1232.3 and 1232.4 of, to add Sections 3517.7, 11011.8, 12024, 12429, 12439, 13304, 15331.1, 15332.1, 15333.1, 15334.1, 16115.5, 18850, 20603.6, 68562.1, and 92354 to, to add Chapter 10.5 (commencing with Section 4530) to Division 5 of Title 2 of, to add Article 2.5 (commencing with Section 13332) to Chapter 3 of Part 3 of Division 3 of Title 2 of, to repeal Sections 1232, 1232.1, 1232.2, 1232.5, 1232.6, 1232.7, 1232.8, 1232.9, 1232.10, 12132.11, 1232.12, 1232.13, 8835, and 13887.3 of, and to repeal Chapter 8 (commencing with Section 11995) of Part 1 of Division 3 of Title 2 of, the Government Code, to amend Sections 208.3, 289.7, 442.10, 1597.55, 1597.57, 1597.58, 13142.4, 25174, 25174.3, 25174.4, 25174.6, 25207, 25208, 25208.5, 33080, 34328.1, 50460, and 50913 of, to amend and renumber Section 1597.64 of, to add Sections 1597.64, 13142.5, 25174.8, 25174.9, 50009, 50154, and 50155 to, and to repeal Section 13142.2 of, the Health and Safety Code, to amend Section 1700.12 of, and to add Section 90.5 to, the Labor Code, to amend Section 502 of the Military and Veterans Code, to amend Sections 987.9 and 11105 of the Penal Code, to amend Sections 2804, 3825, 6217, and 30400 of the Public Resources Code, to amend Section 5003.1 of, and to repeal and add Chapter 2.5 (commencing with Section 401) to Part 1 of Division 1 of, the Public Utilities Code, to amend Sections 100.5, 6006, 6010, 6359, 7651, 8353, 8751, 10753, 10753.2, 11005, 17038, 17054, 17204, 17253, 17254, 17257, 19269, 23601.5, 23701, and 23772 of, to amend and renumber Section 17052.4 of, to amend and repeal Sections 17052.5 and 23601 of, to add

Sections 100.7 and 6359.45 to, to add and repeal Section 17204.2 of, and to repeal Sections 6359.2, 6359.4, 17204, 17204.3, 18693, and 25904 of, the Revenue and Taxation Code, to amend Section 13021 of, and to add Section 9614 to, the Unemployment Insurance Code, to amend Section 5106 of the Vehicle Code, to add Section 12938.2 to the Water Code, to amend Sections 303.1, 5705.1, 10606, 11450, 11452, 11453, 11460, 11461, 12201, 12201.5, 12205, 12301, 12301.2, 12303.5, 12303.7, 12304, 14005.7, 14005.12, 14006, 14021.5, 14087.2, 14165, 15200, 16706, 16707, 16709, 16715, 18969, 19350, 19353, 19354.5, 19355, and 19356 of, to amend and repeal Section 12200 of, to add Sections 4023, 11462.1, 12200, 12300.2, 13004, and 14023.7 to, to add Article 3.1 (commencing with Section 11315) to Chapter 2 of Part 3 of Division 9 of, to add and repeal Section 16709.1 of, to repeal and add Section 16704 to, and to repeal Sections 11315 and 13004 of, the Welfare and Institutions Code, to amend Section 41 of Chapter 10 of the 1983–84 First Extraordinary Session, to amend Section 7 of Chapter 1274 of the Statutes of 1982, to amend Section 74 of Chapter 1201 of the Statutes of 1982, to amend Sections 1 and 2 of Chapter 523 of the Statutes of 1982, to amend Section 5 of Chapter 502 of the Statutes of 1982, to amend Section 4 of Chapter 322 of the Statutes of 1982, to amend Section 1 of Chapter 796 of the Statutes of 1981, and to repeal Section 61 of Chapter 10 of the 1983–84 First Extraordinary Session, relating to fiscal affairs, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 21, 1983. Filed with Secretary of State July 21, 1983]

I object to the following sections contained in Assembly Bill No. 223:

SEC. 97.5. – I am eliminating the $1 million reappropriation contained in this section for the purpose of funding a mental health program in private industry for displaced workers.

I believe that mental health services for displaced workers should be funded as a part of legislation implementing such a program.

SEC. 149.3. – I am eliminating this section which contains controlling language of appropriation and a specific appropriation.

I believe the Budget Act appropriation which provides funding for the Driver Training Program from the Motor Vehicle Account is appropriate for the 1983–84 fiscal year.

SEC. 149.41. – I am eliminating the language contained in the section which would appropriate additional funds to the City of Avenal.

There is no indication that this city should receive special treatment at a time when all levels of government in California face serious fiscal constraints.

SEC. 149.42. – I am eliminating the language contained in this section which would appropriate additional funds to the City of Southgate.

There is no indication that this city should receive special treatment at a time when all levels of government in California face serious fiscal constraints.

SEC. 151.14. – I am eliminating the language contained in this section which would maintain funding for the Graduate Field Research Training Program in Ethnic/Minority Communities at the University of California at its 1982–83 fiscal year level for the 1983–84 fiscal year.

While the program is effective and is expected to be continued by the University, I have eliminated the section because it limits flexibility of the University administration to allocate limited resources, and because it mandates state assumption of a program which the federal government may discontinue.

SEC. 151.5. – I am eliminating this section. It would require that the Calaveras Fire Center be operated only as a joint fire center by the Department of Forestry and the California Conservation Corps.

Funding for the Calaveras Fire Center has been eliminated from Item 3340-001-001. The California Conservation Corps no longer requires the use of this camp. In addition, the provision unnecessarily restricts the flexibility of other state agencies performing comparable fire suppression activities.

SEC. 151.23. – I am eliminating the language contained in this section which would reduce the appropriation for support of the Department of Finance if support for the Agricultural Labor Relations Board is reduced.

I am eliminating this section because it abridges my constitutional authority to eliminate or reduce an item of appropriation.

SEC. 151.28. – I am eliminating the allocation of federal Jobs Bill money contained in this section.

This section duplicates items in the 1983–84 Budget Act and is included here solely to limit my constitutional authority to reduce or eliminate items of appropriation. Since this language constitutes an appropriation I eliminate it.

SEC. 151.35. – I am eliminating the claim of Beatrice Carrico Wood contained in this section.

Claims against the State should be carefully reviewed before funds are appropriated. This claim should be resubmitted as part of the normal claims bill process or as a separate bill.

SEC. 151.36. – I am eliminating the appropriation for the 48th District Agricultural Association contained in this section.

This section provides a request for appropriation at some time in the future. Financial needs of the 48th District should be compared against competing demands for limited State resources. This request should be funded through the normal budgetary process.

With the above deletions, I hereby approve Assembly Bill No. 223.

GEORGE DEUKMEJIAN, Governor

The people of the State of California do enact as follows:

SECTION 1. Section 1531 of the Code of Civil Procedure is amended to read:

1531. (a) Within 150 days after the receipt of property as required by Section 1532, the Controller shall cause a notice to be published, in a newspaper of general circulation which the Controller determines is most likely to give notice to the apparent owner of the property. The Controller need not publish any name the publication of which is not likely to give notice to the apparent owner.

(b) Each published notice shall be entitled "notice of names of persons appearing to be owners of unclaimed property," and shall contain the names in alphabetical order.

(c) Each published notice shall also contain a statement that information concerning the amount or description of the property may be obtained by any persons possessing an interest in the property by addressing any inquiry to the Controller.

(d) The Controller is not required to publish in such notice any item of less than fifty dollars ($50) unless the Controller deems the publication to be in the public interest.

Commission on Teacher Credentialing and the Chancellor of the California Community Colleges, other than by only the State Department of Education.

(d) It is also the intent of the Legislature to create its own review process in order to complete the program reviews required by this section and Section 62001, and that the review process be implemented and completed as expeditiously as possible.

SEC. 23.7. Section 66905 is added to the Education Code, to read:

66905. It is the intent of the Legislature that the California Postsecondary Education Commission annually review and fix the salary of its director according to a methodology established by the commission. This methodology shall take into consideration the salary of directors of coordinating boards for higher education in states with postsecondary education systems comparable to California's in size, complexity, and level of state expenditures. The comparison states shall include seven major industrial states, including Illinois, New Jersey, New York, Ohio, and Texas. The commission shall notify the Chairperson of the Joint Legislative Budget Committee of this annual salary amount. Notwithstanding the provisions of Section 19825 of the Government Code, the salary shall become effective no sooner than 30 days after written notice of the salary is provided to the chairperson of the committee, or no sooner than a lesser time as the chairperson, or his or her designee, may determine.

SEC. 23.8. Section 67301 is added to the Education Code, to read:

67301. Notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and the policies and procedures of the Department of Rehabilitation.

SEC. 23.9. Section 71063.5 is added to the Education Code, to read:

71063.5. (a) The board of governors may permit community college districts to elect to provide direct support services pursuant to Section 84850 to students with disabilities through an independent contractor system which would allot to eligible students selecting the independent contractor system a fixed number of dollars or hours to contract for those services. The services shall be provided to the extent that funds are available.

(b) The system shall permit students to select, hire, and discharge those provider services to them and may allow the student to determine how, when, and where to work with the service provider.

(c) Notwithstanding any other provisions of law, no community college district shall incur any liability for the health or safety of a student with a disability while the student is receiving services from an independent contractor, unless the services are provided in facilities owned or leased by the community college district. The student utilizing the services shall bear liability for his or her misuse

recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 155. Notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of this act shall remain in effect unless and until they are amended or repealed by a later enacted act.

SEC. 156. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 157. The provisions of this act shall not become operative unless and until the Budget Act of 1983 becomes law.

SEC. 158. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that this act, which would provide necessary statutory adjustments to implement the Budget Act of 1983, may take effect during the 1983–84 fiscal year, it is necessary that this act take effect immediately.

CHAPTER 251

An act to amend Sections 1260, 1510, 8366, 16010, 16191, 32341, 72401, 76001, 76160, 78030, 81633.5, 81137, 81332, 81640, 81648, 81676, 82305, 82305.6, 84850, 85260, 87009, 87010, 87011, 87446, 87732, 87821, 88006, 88020, and 88122 of, to add Sections 76470, 81670, and 87809 to, to add Chapter 5 (commencing with Section 81900) to Part 49 of, and to repeal Sections 79000.5, 81929, 81936, 81961, 81962, 81963, 81965, 81966, 87739, and 87739.5 of, the Education Code, relating to education, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor June 11, 1982. Filed with Secretary of State June 11, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 1260 of the Education Code is amended to read:

1260. The county superintendent of schools, with the approval of the county board of education, may:

(a) Conduct studies through research and investigation as are determined by the county board to be required in connection with the future management, conditions, needs, and financial support of the schools within the county; or join with one or more school district

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SEC. 20. Section 81929 of the Education Code, as added by Section 2 of Chapter 333 of the Statutes of 1981, is repealed.

SEC. 21. Section 81936 of the Education Code, as amended by Section 3 of Chapter 333 of the Statutes of 1981, is repealed.

SEC. 22. Section 81936 of the Education Code, as added by Section 4 of Chapter 333 of the Statutes of 1981, is repealed.

SEC. 23. Section 81961 of the Education Code is repealed.

SEC. 24. Section 81962 of the Education Code is repealed.

SEC. 25. Section 81963 of the Education Code is repealed.

SEC. 26. Section 81965 of the Education Code is repealed.

SEC. 27. Section 81966 of the Education Code is repealed.

SEC. 28. Chapter 5 (commencing with Section 81900) is added to Part 49 of the Education Code, to read:

CHAPTER 5. COMMUNITY COLLEGE REVENUE BOND ACT OF 1961

81900. This chapter may be cited as "The Community College Revenue Bond Act of 1961."

81901. The governing board of any community college district may issue revenue bonds pursuant to this chapter.

81902. The following terms wherever used in this chapter, or in any indenture entered into pursuant to this chapter, have the following meanings, unless a different meaning appears from the context:

(a) "Board" means the governing board of a community college district.

(b) "Community college" means a community college maintained by the district issuing bonds under this chapter.

(c) "Project" means any one or more dormitories or other housing facilities, boarding facilities, student union or activity facilities, vehicle parking facilities, or any other auxiliary or supplementary facilities for individual or group accommodation, owned or operated or authorized to be acquired, constructed, furnished, equipped, and operated by the board for use by students, faculty members, or other employees of any one or more community colleges, or a combination of such facilities, which may include facilities already completed and facilities authorized for future completion, designated by the board as a project in providing for the issuance of revenue bonds.

(d) "Bonds" or "revenue bonds" mean the written evidence of any obligation issued by the board, payment of which is secured by a pledge of revenues or any part of revenues, as provided in this chapter, in order to obtain funds with which to carry out the purposes of this chapter, irrespective of the form of such obligations.

(e) "Revenues" mean and include any and all fees, rates, rentals, and other charges received or receivable in connection with, and any and all other incomes and receipts of whatever kind and character derived by, the board from the operation of or arising from a project, including any such revenue as may have been or may be impounded

81967. This chapter shall be liberally construed to carry out the objects and purposes and the declared policy of the State of California as stated in this chapter.

SEC. 29. Section 82305 of the Education Code is amended to read:

82305. In bidding on contracts, bidders may include in their bids abstractions of their quotations indicating the pricing structure used to compute the annual lease or rental payments for the sole purpose of identifying that portion of each annual lease or rental payment which may represent tax exemption reimbursement to the vendor, lessor or to their assignees.

SEC. 30. Section 82305.6 of the Education Code is amended to read:

82305.6. When the governing board of a community college district provides for the transportation of students to and from community colleges, the governing board of the district may require the parents and guardians of all or some of the students transported, to pay a portion of the cost of such transportation in an amount determined by the governing board. The amount determined by the board shall be no greater than that paid for transportation on a common carrier or municipally owned transit system by other students in the district who do not use the transportation provided by the district. The governing board shall exempt from such charges students of parents and guardians who are indigent as set forth in rules and regulations adopted by the board. No charge under this section shall be made for the transportation of handicapped students. Nothing in this section shall be construed to sanction, perpetuate, or promote the racial or ethnic segregation of students in the community colleges.

SEC. 32. Section 84850 of the Education Code is amended to read:

84850. (a) The Chancellor of the California Community Colleges shall apportion to each community college district for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, transportation, program accountability, and program developmental services for handicapped students enrolled at a community college as defined in Section 78600, who have demonstrated a need for such services, an amount not exceeding seven hundred eighty-five dollars ($785) in each fiscal year for each such handicapped student.

(b) The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining program and service components and appropriation of resources to community college districts pursuant to Section 78600. Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

(c) Each community college district receiving an allowance under this section shall report to the chancellor on forms and at such

times as he or she shall provide, all expenditures and incomes related to handicapped students for whom the allowances are made. If the chancellor determines that the current expense of educating such students does not equal or exceed the sum of basic state aid and state equalization aid provided in the regular community college foundation program per unit of average daily attendance, the allowance provided under this section and any amount of local tax funds contributed to the foundation program for each such handicapped student in average daily attendance in the district, then the amount of the deficiency shall be withheld from state apportionments to the district in the succeeding fiscal year in accordance with the procedure prescribed in Section 84330.

(d) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to three times the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78600; provided, however, that any allocations made pursuant to this subdivision shall not result in an increase in the total amount of funds allocated pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b).

(e) In the event that requests for apportionments exceed the amount of state funds statutorily available, the chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established and approved by the chancellor and the Director of Rehabilitation pursuant to this section. State apportionments shall be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

(f) The chancellor's office and the Department of Rehabilitation shall jointly develop guidelines governing expenditures relating to handicapped students to prevent duplication in state expenditures for such students.

SEC. 33. Section 85260 of the Education Code is amended to read:

85260. In any county, the county superintendent of schools, the county board of education and the county auditor, may prescribe a payroll procedure, to be followed by designated community college districts in the county, under which the community college district governing boards, by use of payroll orders, shall authorize and direct the county superintendent of schools and the county auditor to draw separate payroll warrants in the names of the individual district employees for the respective amounts set forth therein to the end that each employee may be furnished with a statement of the amount earned and an itemization of the amounts withheld therefrom under requirements of the law or by direction of the

period.

SEC. 43. Section 88006 of the Education Code is amended to read:

88006. Notwithstanding the provisions of Section 88003 or Section 88076, which exempt certain types of positions or categories of personnel from the classified service of a community college district, persons serving in exempt positions or who serve in classified positions but are exempted from the classified service shall, nevertheless, be subject to the provisions of Sections 87408.6, 88021, 88022, 88023 and 88024. The governing board of every district shall, by rule or regulation, provide for the implementation of this section.

The provisions of this section shall not apply to full-time day students regularly attending in the district of employment.

SEC. 44. Section 88020 of the Education Code is amended to read:

88020. Any person not a student or substitute employee, who has been employed by a community college student body organization pursuant to Section 76062 for a period of at least six months immediately preceding becoming a member of the classified service pursuant to Section 76062 or 81676 shall, without examination, be deemed to be a permanent classified service employee of the community college district.

Any person not a student or substitute employee employed by a student body organization pursuant to Section 76062 for less than six months immediately preceding becoming a member of the classified service pursuant to Section 76062 or 81676 shall, without examination, be deemed to be a probationary classified employee of the district.

This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 3 (commencing with Section 88060) of this chapter.

SEC. 45. Section 88122 of the Education Code is amended to read:

88122. In addition to any causes for suspension or dismissal which are designated by rule of the commission, employees in the classified service shall be suspended and dismissed in the manner provided by law for any one or more of the following causes:

(a) Knowing membership by the employee in the Communist Party.

(b) Conduct specified in Section 1028 of the Government Code.

SEC. 46. The addition of Chapter 5 (commencing with Section 81900) to Part 49 of the Education Code made by Section 28 of this act shall be construed as a continuation, not a reenactment, of the provisions of law contained in that chapter.

SEC. 47. Sections 12, 23, 24, 25, 26, 27, 28, and 46 of this act shall become operative July 1, 1982.

SEC. 48. This act is an urgency statute necessary for the immediate preservation of the public peace, health, and safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to correct technical oversights and chaptering problems in current provisions of the Education Code, and thus clarify numerous legal ambiguities, it is necessary that this act take effect

immediately.

CHAPTER 796

An act to add Chapter 14 (commencing with Section 67300) to Part 40 of the Education Code, relating to disabled student services.

[Approved by Governor September 25, 1981. Filed with Secretary of State September 25, 1981.]

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that students with verifiable disabilities shall continue to be assured access to all campus programs and activities of those public postsecondary educational institutions for which they are academically qualified. To this end, it is the intent of the Legislature that such students continue to receive from the postsecondary educational institution they attend such supportive services as are necessary to permit students to participate fully in the educational programs offered.

It is the further intent of the Legislature that state funds be made available to the California community colleges, the California State University and Colleges, and the University of California to provide supportive services adequate to meet the needs of students with disabilities.

SEC. 2. Chapter 14 (commencing with Section 67300) is added to of Part 40 of the Education Code, to read:

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CHAPTER 14. DISABLED STUDENT SERVICES

67300. Services for disabled students provided by the California community colleges and the California State University and Colleges shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the State Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter shall be construed to require the California community colleges, the California State University and Colleges, or the University of California to provide the services for disabled students in the same manner as those services were provided by the State Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University and Colleges shall, for their respective systems, and the Regents of the University of California may, by January 15, 1982, promulgate regulations to implement the provisions of this chapter.

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because this act implements a federal law or regulation and involves only "costs mandated by the federal government," as defined by Section 2206 of the Revenue and Taxation Code.

CHAPTER 1035

An act to amend Sections 2550, 2551, 12516, 17701, 17730.5, 17732, 39363, 42237, 42238, 42239.5, 42240, 45452, 84700, 84701, 84702, 84703, 84704, 84705, 84720, 84721, 84722, and 84724 of, to add Sections 17730.6, 42237.6, 42243.5, 42243.7, and 84719.5 to, to repeal Sections 17726, 17727, 17728, 17732.2, 17737, and 17739 of, to repeal and add Section 17722 of, to add Article 5 (commencing with Section 84801) and Article 6 (commencing with Section 84850) to Chapter 5 of Part 50 of, to repeal and add Chapter 11 (commencing with Section 42900) of Part 24 of, and Article 8 (commencing with Section 84890) of Chapter 5 of Part 50 of, the Education Code, to add Section 100.4 to the Revenue and Taxation Code, to amend Section 27.2 of Chapter 259 of the Statutes of 1979 and Section 97 of Chapter 282 of the Statutes of 1979, and to repeal Chapter 1203 of the Statutes of 1970, relating to the funding of governmental agencies, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 26, 1979. Filed with Secretary of State September 26, 1979.]

The people of the State of California do enact as follows:

SECTION 1. Section 2550 of the Education Code, as added by Chapter 282 of the Statutes of 1979, is amended to read:

2550. The Superintendent of Public Instruction shall perform the computations prescribed in this section for each county superintendent of schools.

(a) The Superintendent of Public Instruction shall make the following computations to determine the revenue limits for special education programs operated by county superintendents of schools:

(1) For the 1979–80 fiscal year, the Superintendent of Public Instruction shall determine the 1978–79 revenue limits for each of the programs specified in subdivisions (b), (c), and (d) of Section 2500, as computed pursuant to Section 6 of Chapter 292 of the Statutes of 1978, as amended by Chapter 332 of the Statutes of 1978. The Superintendent of Public Instruction shall increase each of such revenue limits by a percentage equal to the inflation allowance

submitted.

SEC. 25. Article 6 (commencing with Section 84850) is added to Chapter 5 of Part 50 of the Education Code, to read:

Article 6. Handicapped Students

84850. (a) The Chancellor of the California Community Colleges shall apportion to each community college district for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, transportation, program accountability, and program developmental services for handicapped students enrolled at a community college as defined in Section 78014, who have demonstrated a need for such services, an amount not exceeding seven hundred eighty-five dollars ($785) in each fiscal year for each such handicapped student.

(b) The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining program and service components and appropriation of resources to community college districts pursuant to Section 78014. Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

The chancellor and the Director of Rehabilitation shall incorporate suggestions from other interested persons and organizations in the guidelines where feasible and appropriate.

If the chancellor and the Director of Rehabilitation are unable to agree upon any portion or portions of the guidelines, each may submit guidelines to the board of governors, which may base the rules and regulations which it adopts on any combination of guidelines submitted.

(c) Each community college district receiving an allowance under this section shall report to the chancellor on forms and at such times as he or she shall provide, all expenditures and incomes related to handicapped students for whom such allowances are made. If the chancellor determines that the current expense of educating such students does not equal or exceed the sum of basic state aid and state equalization aid provided in the regular community college foundation program per unit of average daily attendance, the allowance provided under this section and any amount of local tax funds contributed to the foundation program for each such handicapped student in average daily attendance in the district, then the amount of such deficiency shall be withheld from state apportionments to the district in the succeeding fiscal year in accordance with the procedure prescribed in Section 84330.

(d) The chancellor and the Director of Rehabilitation shall review programs for handicapped students funded pursuant to this section and shall report, jointly or separately, their findings and

recommendations to the Legislature not later than February 15, 1978. The report shall include recommendations relative to appropriate levels of support for programs and services for handicapped students and further improvements in funding procedures.

(e) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to three times the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78014; provided, however, that any allocations made pursuant to this subdivision shall not result in an increase in the total amount of funds allocated pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b).

(f) In the event that requests for apportionments exceed the amount of state funds statutorily available, the chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established and approved by the chancellor and the Director of Rehabilitation pursuant to this section. State apportionments shall be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

(g) The chancellor's office and the Department of Rehabilitation shall jointly develop guidelines governing expenditures relating to handicapped students to prevent duplication in state expenditures for such students.

Section A of the State School Fund the sum of one million two hundred thousand dollars ($1,200,000) for the purpose of making apportionments pursuant to Section 42237.6 of the Education Code.

SEC. 33. The sum of three hundred sixty-nine thousand twelve dollars ($369,012) is hereby appropriated from the Professional Engineers' Fund to the State Board of Registration for Professional Engineers for transfer to and in augmentation of Item 97 of the Budget Act of 1979 (Chapter 259, Statutes of 1979), provided that one hundred seven thousand four hundred twenty dollars ($107,420) shall be used for the costs of conducting administrative hearings mandated by Section 11504 of the Government Code on appeals from the denial of applications for registration as professional engineers in title protection programs.

SEC. 34. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order for the provisions of this act to apply to the 1979–80 fiscal year, it is necessary that this act take effect immediately.

CHAPTER 282

An act to amend Section 19632 of the Business and Professions Code, to amend Sections 16250, 39246, 39247, 39363, 41300, 41301, 41403, 41604, 42103.5, 52171, 60200, 60265, 84370, 84897, 84904, and 85003.5 of, to add Sections 16096.5, 39618, 39619, 39620, 39621, 41601.5,

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41886.5, 45452, 54057, and 56364 to, to add Article 3 (commencing with Section 2550) to Chapter 12 of Part 2 of, Article 1 (commencing with Section 14000) to Chapter 1 of Part 9 of, Chapter 24 (commencing with Section 17780) and Chapter 25 (commencing with Section 17785) to Part 10 of, Chapter 15 (commencing with Section 23400) to Part 13 of, Article 2.5 (commencing with Section 39327) to Chapter 3 of Part 23 of, Chapter 5.3 (commencing with Section 41975) to Part 24 of, Article 2 (commencing with Section 42237) to Chapter 7 of Part 24 of, Part 34 (commencing with Section 62000) to, and Chapter 5 (commencing with Section 84700) to Part 50 of, to repeal Sections 24105, 39453, 41716, 41716.5, 52045, 54057, and 56364 of, to repeal Article 1 (commencing with Section 14000) of Chapter 1 of Part 9 of, Article 6.5 (commencing with Section 16255) of Chapter 8 of Part 10 of, Chapter 15 (commencing with Section 23400) of Part 13, Article 2 (commencing with Section 42230) of Chapter 7 of Part 24 of, and Chapter 5 (commencing with Section 84700) of Part 50 of, the Education Code, to amend Sections 10500, 10527, 10528, 16115, 16250, 16260, 16496.5, 16497.5, 16498, 16499, 16499.5, 54775, and 65974 of, and to add Sections 16117, 26912.3, 26912.7, 53898, 54790.3, 65979, 65980, 65981, and 66434.1 to, the Government Code, to amend, repeal, and add Section 11836 of the Health and Safety Code, to add Part 0.5 (commencing with Section 95) to Division 1 of the Revenue and Taxation Code, to amend Sections 11450, 11451.5, 11454, 15200.1, 15200.2, 15204.2, 16120, and 18917 of, to amend, repeal, and add Sections 5705 and 15200 of, to add Sections 11406, 11407, 14154, 15200.3, 15200.4, 15204.5, 18905, 18906, and 18906.5 to, to add Chapter 4.1 (commencing with Section 10815) to Part 2 of Division 9 of, and Part 4.5 (commencing with Section 16700) to Division 9 of, to repeal Sections 11403, 11450.2, 14150, 14150.3, 14150.5, and 18906 of, and to repeal Article 9 (commencing with Section 12400) of Chapter 3 of Part 3 of Division 9 of, the Welfare and Institutions Code, to amend Section 5 of Chapter 292 of the Statutes of 1978, and to add Section 29.6 to Chapter 977 of the Statutes of 1976, relating to public finance, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 24, 1979. Filed with Secretary of State July 24, 1979.]

The people of the State of California do enact as follows:

SECTION 1. Section 19632 of the Business and Professions Code is amended to read:

19632. All license fees for conducting horseracing meetings, other than those attributable to breakage, not payable into the Fair and Exposition Fund shall be paid as follows:

(a) During each fiscal year there shall be paid into the Wildlife Restoration Fund, which fund is hereby continued in existence, to

62004. The Auditor General shall audit, on a sampling basis, school districts' use of the funds specified in Section 62002.

62005. If the Superintendent of Public Instruction determines that a school district did not comply with the provisions of this chapter, any apportionment subsequently made pursuant to Section 62003 shall be reduced by two times the amount the superintendent determines was not used in compliance with the provisions of this chapter.

62006. The Legislature shall begin immediately a detailed study which shall insure that each funding source and program be scrutinized regarding, but not limited to, the:

(1) Appropriateness of identification formulas in determining which children have special needs.

(2) Appropriateness of allocation formulas and adequacy of funding.

(3) Effectiveness of programs.

(4) Appropriateness of local control.

(5) Appropriateness of state level involvement in monitor, review, and auditing to assure that funds are being used efficiently, economically, and legally.

(6) Appropriateness of costs of administration at all levels of operating these programs.

(7) Appropriateness of Department of Education administration of categorical programs.

SEC. 39. Section 84370 of the Education Code is amended to read:

84370. (a) No community college district, other than one newly formed, shall, except as otherwise provided in this article, receive its full apportionment from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year.

(b) For the purposes of this article, the Board of Governors of the California Community Colleges shall establish standards to determine whether the districts within its jurisdiction have maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year.

(c) If a community college district fails to maintain its schools for the required 175 days, the Board of Governors shall withhold from that district's apportionment the product of 0.01143 times the district's apportionment for each additional day the district would have had to maintain its schools in order to meet the requirement prescribed by this section. This subdivision shall apply retroactively to fiscal year 1975–76 and each fiscal year thereafter.

SEC. 40. Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code is repealed.

SEC. 41. Chapter 5 (commencing with Section 84700) is added to Part 50 of the Education Code, to read:

Any other deadlines required for the development of the budget may be delayed 30 days.

SEC. 103. Sections 8, 18, 19, 20, 21, and 28.5 of this act shall be operative on July 1, 1980.

SEC. 104. If any section, part, clause or phrase of this act is for any reason held to be invalid or unconstitutional, the remainder of the act shall not be affected but will remain in full force and effect.

SEC. 105. (a) No appropriation is made by this act, nor is any obligation created thereby under Section 2231 or 2234 of the Revenue and Taxation Code, for the reimbursement of any local agency or school district for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

(b) Notwithstanding Section 905.2 of the Government Code, Section 2253 of the Revenue and Taxation Code, or any other provision of law, no local agency or school district shall have standing to make a claim to the State Board of Control for any costs incurred by it under this act pursuant to Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code or pursuant to Article 3.5 (commencing with Section 2250) of Chapter 3 of Part 4 of Division 1 of the Revenue and Taxation Code.

(c) Notwithstanding Section 2246 of the Revenue and Taxation Code, the Department of Finance shall not review this act to determine costs or revenue losses and shall not report on this act nor make recommendations to the Legislature on this act concerning reimbursements to local agencies or school districts.

(d) The Legislature finds and declares that the complete waiver of the provisions of Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code is justified for the following reasons:

(1) This act implements an initiative constitutional amendment approved by the people of the State of California.

(2) This act is part of an overall legislative program implementing Article XIII A of the California Constitution, which includes billions of dollars of local assistance to local agencies.

(3) There are administrative savings as well as costs mandated by the provisions of this act.

SEC. 106. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The adoption of Article XIII A of the California Constitution has reduced the amount of property tax revenues available to local government and schools to meet operating and certain debt expenses, and may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately.

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CHAPTER 1403

An act to amend Sections 14020, 84301, and 84850 of, and to add Section 78035 to, the Education Code, relating to school finance, and making an appropriation therefor.

[Became law without Governor's signature October 1, 1978. Filed with Secretary of State October 1, 1978.]

The people of the State of California do enact as follows:

SECTION 1. Section 14020 of the Education Code is amended to read:

14020. (a) The State Controller shall during each fiscal year transfer from the General Fund of the state to that portion of the State School Fund restricted for community college purposes, hereinafter called Section B of the State School Fund, such sums, in addition to the sums accruing from other sources, as shall provide in Section B of the State School Fund for apportionment during the fiscal year a total amount per pupil in average daily attendance during the preceeding fiscal year credited to all community colleges and adult schools maintained in conjunction with community colleges in the state, as certified by the Chancellor of the California Community Colleges, of one hundred eighty dollars ($180).

(b) The Controller shall also transfer, as needed during each fiscal year, such additional amounts from the General Fund to Section B of the State School Fund as are certified from time to time by the Chancellor of the California Community Colleges to be necessary to meet actual computed apportionments from the State School Fund for the purposes set forth in Section 84300; provided that the total of such additional amounts transferred in a fiscal year shall not exceed, except pursuant to subdivision (c) of this section, four hundred thirty-four dollars and four cents ($434.04) for the 1978–79 fiscal year, per pupil in average daily attendance during the preceding fiscal

year credited to all community colleges in the state, as certified by the Chancellor of the California Community Colleges. Beginning in fiscal year 1979–80, the dollar amount in this subdivision shall be increased annually by 6 percent over the amount applicable for the preceding fiscal year.

(c) In addition to the amounts authorized to be transferred to Section B of the State School Fund from the General Fund under subdivisions (a) and (b) of this section, the Controller shall transfer from the General Fund to Section B of the State School Fund during each fiscal year, commencing with 1977–78, upon certification of the Chancellor of the California Community Colleges, an amount sufficient to increase state apportionments as required pursuant to Sections 84764 and 84765.

(d) In addition to the amounts authorized to be transferred to Section B of the State School Fund from the General Fund under subdivisions (a) and (b) of this section, the Controller shall transfer from the General Fund to Section B of the State School Fund during the fiscal year, upon certification of the Chancellor of the California Community Colleges, if necessary to meet actual computed apportionments for the fiscal year for the purposes set forth in Section 84300, an amount not to exceed 1 percent of the total apportionment from Section B of the State School Fund in the preceding fiscal year for the purposes set forth in Section 84300.

(e) He shall also transfer to Section B of the State School Fund any additional amounts appropriated thereto by the Legislature in augmentation of any of the amounts prescribed for any of the purposes set forth in Section 84300 and such additional amounts shall be allowed and apportioned by the Chancellor of the California Community Colleges and warrants therefor drawn by the Controller in the manner provided in Article 1 (commencing with Section 14000) and Article 2 (commencing with Section 14040) of Chapter 1 of Part 9 of this division, and Article 3 (commencing with Section 41330) of Chapter 3 of Part 24 of Division 3 of Title 2, and in Sections 41050, 46304, and 84503, and Article 1 (commencing with Section 41600) of Chapter 4 of Part 24 of Division 3 of Title 2.

SEC. 2. Section 84301 of the Education Code is amended to read:

84301. The amount transferred to Section B of the State School Fund pursuant to subdivision (b) of Section 14030 shall be expended in accordance with the following schedule:

(a) Four hundred twenty-one dollars and eighty-five cents ($421.85) multiplied by the total average daily attendance credited to community college districts during the preceding fiscal year for basic aid and equalization aid to be apportioned to community college districts on account of average daily attendance. This amount shall be increased by the amount necessary to equalize the total expenditures from this section to the transfers from the General Fund to the State School Fund required by subdivisions (b), (c), (d), and (e) of Section 14020.

(b) Twelve dollars and nineteen cents ($12.19) multiplied by the

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average daily attendance during the 1977–78 school year credited for purposes of state apportionments to all community college districts for the purpose of Article 11 (commencing with Section 84850) of Chapter 5 of this part.

(c) Beginning in fiscal year 1979–80, the dollar amount in subdivision (b) shall be increased annually by 6 percent over the amount applicable for the preceding fiscal year.

SEC. 3. Section 84850 of the Education Code is amended to read:

84850. (a) The Chancellor of the California Community Colleges shall apportion to each community college district for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, transportation, program accountability, and program developmental services for handicapped students enrolled at a community college as defined in Section 78014, who have demonstrated a need for such services, an amount not exceeding seven hundred eighty-five dollars ($785) in each fiscal year for each such handicapped student.

(b) The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining program and service components and appropriation of resources to community college districts pursuant to Section 78014. Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

The chancellor and the Director of Rehabilitation shall incorporate suggestions from other interested persons and organizations in the guidelines where feasible and appropriate.

If the chancellor and the Director of Rehabilitation are unable to agree upon any portion or portions of the guidelines, each may submit guidelines to the board of governors, which may base the rules and regulations which it adopts on any combination of guidelines submitted.

(c) Each community college district receiving an allowance under this section shall report to the chancellor on forms and at such times as he shall provide, all expenditures and incomes related to handicapped students for whom such allowances are made. If the chancellor determines that the current expense of educating such students does not equal or exceed the sum of basic state aid and state equalization aid provided in the regular community college foundation program per unit of average daily attendance, the allowance provided under this section and any amount of local tax funds contributed to the foundation program for each such handicapped student in average daily attendance in the district, then the amount of such deficiency shall be withheld from state apportionments to the district in the succeeding fiscal year in accordance with the procedure prescribed in Section 84330.

(d) The chancellor and the Director of Rehabilitation shall review

programs for handicapped students funded pursuant to this section and shall report, jointly or separately, their findings and recommendations to the Legislature not later than February 15, 1978. The report shall include recommendations relative to appropriate levels of support for programs and services for handicapped students and further improvements in funding procedures.

(e) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to three times the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78014; provided, however, that any allocations made pursuant to this subdivision (e) shall not result in an increase in the total amount of funds allocated pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b).

(f) In the event that requests for apportionments exceed the amount of state funds statutorily available, the chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established and approved by the chancellor and the Director of Rehabilitation pursuant to this section. State apportionments shall be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

(g) The chancellor's office and the Department of Rehabilitation shall jointly develop guidelines governing expenditures relating to handicapped students to prevent duplication in state expenditures for such students.

SEC. 4. Section 78035 is added to the Education Code, to read:

78035. A handicapped district resident, notwithstanding any interdistrict attendance agreement or notice of restriction, shall be permitted to enroll and be admitted to a community college of another district which offers special programs or services not available in the district of residence. For purposes of tuition to be paid on account of the attendance of the student, the student shall be deemed to have been admitted pursuant to Section 78033.

SEC. 5. The Chancellor of the California Community Colleges shall recommend to the Legislature not later than October 1, 1979, whether or not the state should reimburse excess district costs arising from the employment of disabled classified and certificated employees.

SEC. 6. Sections 1 to 5, inclusive, of this act shall become operative on July 1, 1979.

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CHAPTER 36

An act to amend Sections 40, 1042, 1330, 1891, 1904, 1908, 2104, 2502, 4200, 4210, 4321, 4364, 5012, 5016, 5018, 5204, 5454, 8203, 8210, 8211, 8212, 8240, 8242, 8245, 8246, 8248, 8250, 8250.1, 8251, 8252, 8254, 8321, 8326, 8327, 8329, 8330, 8360, 8361, 8362, 8363, 8364, 8365, 8366, 8367, 8368, 8369, 8383, 8395, 8500, 10101, 10103, 10104, 10106, 10601, 10602, 10603, 10604, 10606, 12516, 14002, 14003, 14020, 15104, 16035, 16040, 16044, 16057, 16058, 16063, 16192, 16250, 16310, 16343, 18383, 18535, 19422, 19423, 19424, 19510, 19511, 19512, 19515, 19521, 19522, 21107, 21108, 21110, 21111, 21112, 21180, 21183, 21189, 21192, 22112, 22114, 22122, 22127, 22142, 22401, 22716, 22802, 22809, 23006, 23100, 23108, 23401, 23506, 23702, 23703, 23704, 23800, 23803, 23804, 23811, 23900, 23903, 23909, 23910, 23918, 23919, 23920, 23921, 24100, 24200, 24203, 24600, 33332, 35041.5, 35101, 35174, 35214, 35300, 35330, 35511, 35512, 35515, 35518, 35704, 35705, 37220, 37228, 39002, 39140, 39143, 39149, 39210, 39214, 39227, 39230, 39321, 39363.5, 39440, 39602, 39651, 39674, 39830, 40000, 40013, 41015, 41020, 41201, 41301, 41372, 41601, 41700, 41718, 41761, 41762, 41840, 41856, 41857, 41859, 41863, 41886, 41888, 41915, 42238, 42244, 42245, 42603, 42631, 42633, 42635, 42636, 42639, 42643, 42831, 44008, 44009, 44228, 44263, 44274, 44335, 44346, 44853, 44909, 45023.5, 45057, 45203, 45205, 45207, 45250, 46010, 46111, 46300, 48011, 48200, 48265, 48412, 48414, 48938, 48980, 49061, 49063, 49065, 49068, 49069, 49070, 49075, 49076, 49077, 51226, 51767, 51872, 52002, 52012, 52015, 52113, 52309, 52315, 52317, 52321, 52324, 52372, 52500, 52506, 52517, 52570, 52612, 54002, 54006, 54123, 54125, 54665, 54666, 54669, 56336, 56601, 56717, 56811, 56829, 60014, 60101, 60201, 60202, 60204, 60222, 60223, 60261, 60640, 60643, 60664, 66602, 68014, 69273, 69274, 69511, 69532, 69536, 69538, 69565, 69566, 69582, 69583, 69584,

69602, 69604, 69605, 69621, 69623, 71046, 72023, 72246, 72419.5, 72511, 72620, 72632, 72640, 74162, 74165, 74644, 74645, 76066, 76140, 76143, 76210, 76221, 76223, 76225, 76230, 76231, 76232, 76240, 76242, 76243, 76244, 78031, 78247, 78405, 78461, 78462, 78601, 78932, 79020, 79150, 81033, 81130, 81133, 81139, 81160, 81165, 81178, 81180, 81350, 81363.5, 81390, 81602, 81651, 81820, 81822, 81831, 81833, 82321, 82508, 84035, 84040, 84201, 84301, 84322, 84324, 84327, 84362, 84520, 84521, 84522, 84526, 84528, 84533, 84701, 84706, 84790, 84817, 84836, 84838, 85132, 85133, 85133.5, 85203, 85231, 85233, 85235, 85236, 85239, 85243, 85431, 87008, 87009, 87215, 87290, 87422, 87470, 87830, 88070, 88203, 88205, 88207, 89033, 89301, 89304, 89505, 89900, 89903, 90273, 92492, 94110, 94144, 94151, 94153, 94190, 94191, and 94324 of, to amend the heading of Article 5 (commencing with Section 8360) of Chapter 2 of Part 6 of, and the heading of Article 5 (commencing with Section 19510) of Chapter 8 of Part 11 of, to add Sections 1294.5, 1910, 2112, 2113, 2500.3, 2506.5, 5015.5, 5203.5, 8243.5, 8331, 8512, 16051.5, 16071.5, 16321.7, 16330.5, 18534.3, 18534.5, 22141, 22141.5, 22229, 22504, 22608, 22725, 22726, 22727, 23400.5, 23701, 23904.5, 23910.5, 23910.6, 24104, 24105, 24202, 33318, 35016, 35046, 35511.4, 35511.5, 35512.1, 35512.2, 35512.3, 35512.4, 35512.5, 35513.5, 37065.4, 37065.5, 39002.5, 39141.6, 39234, 39384, 39617, 39645.5, 39646, 39649.5, 41716.5, 41760.5, 41836, 41841, 42239.5, 42244.2, 42244.3, 42244.4, 42244.5, 42244.6, 42244.7, 42637.5, 42649, 42650, 42901.5, 44253.5, 44253.6, 44978.5, 45206.5, 48204, 48985, 49064, 51224, 51225, 51225.5, 51411, 51760.5, 52022.5, 52310.5, 52327.5, 52331, 52501.3, 52501.5, 52610, 56033.5, 56034.5, 56613.5, 56728.5, 60200, 66903.2, 66903.4, 66903.6, 68082, 71094, 71095, 72013, 72026.5, 72241.5, 72426, 74011.5, 74161.4, 74162.3, 74162.5, 74162.7, 74163.5, 76222, 78014, 78440, 78452, 78460.5, 78462.5, 81033.5, 81131.6, 81184, 81383, 81645.5, 81646, 81649.5, 84521.5, 84524.5, 84726, 84730.5, 84850, 85112, 85134.5, 85237.5, 85265, 85266, 87781.5, 88205.5, 89519, and 89546 to, to add Article 6 (commencing with Section 1340) to Chapter 2 of Part 2, Article 2 (commencing with Section 7050) to Chapter 1 of Part 5, Article 14.5 (commencing with Section 18555) to Chapter 3 of Part 11, Chapter 1.5 (commencing with Section 33080) to Part 20, Article 8 (commencing with Section 33400) to Chapter 3 of Part 20, Article 13.5 (commencing with Section 35335) to Chapter 2 of Part 21, Article 2 (commencing with Section 39030) to Chapter 1 of Part 23, Chapter 12 (commencing with Section 43000) to Part 24, Article 3 (commencing with Section 52160) to Chapter 7 of Part 28, Chapter 13 (commencing with Section 67100) to Part 40, Article 9 (commencing with Section 81190) to Chapter 1 of Part 49, Article 4.5 (commencing with Section 84762) to Chapter 5 of Part 50, Article 2.5 (commencing with Section 89550) to Chapter 5 of Part 55, and Chapter 3.5 (commencing with Section 94360) to Part 59 of, to add and repeal Sections 10916, 39213, 39233, 46605.5, 68076.6, 68077.5, 69538.5, 81163, and 81183 of, to add and repeal Chapter 2.5 (commencing with Section 8400) of Part 6 and Article 1.5 (commencing with Section 69503) of Chapter 2 of Part 42 of, to repeal Sections 8380, 8512, 10605, 10608, 14030, 16078, 22141, 23700,

23701, 24202, 24501, 33384, 35517, 37531, 37645, 39215, 39216, 39217, 39218, 39219, 39220, 39221, 39222, 39223, 39224, 39646, 44034, 44641, 45314, 45315, 45316, 49064, 51224, 51225, 52152, 52390, 52610, 52613, 54109, 54425, 54601, 54640, 54641, 54670, 56616, 56630, 56631, 56632, 58513, 60200, 60247, 60630, 60631, 60632, 68110, 74167, 76222, 78000, 78400, 78440, 78450, 78460, 78463, 78615, 81166, 81167, 81168, 81169, 81170, 81171, 81172, 81173, 81174, 81175, 81646, 84524, 84525, 84721, 84722, 84723, 84731, 84760, 84770, 84780, 84850, 85112, 85130, 85135, 85136, 85137, 85138, 85139, 85140, 85141, 87034, 88133, 88134, and 88135 of, and to repeal Article 2 (commencing with Section 5050) of Chapter 1 of Part 4, Chapter 4 (commencing with Section 5500) of Part 4, Article 4 (commencing with Section 54680) of Chapter 9 of Part 29, and Article 3 (commencing with Section 84550) of Chapter 4 of Part 50 of, the Education Code as enacted by Chapter 1010 and Chapter 1011 of the Statutes of 1976, and to repeal Sections 91, 190.5, 373, 403, 472, 473, 474, 475, 477, 653, 895.12, 924.6, 945.1, 1009.7, 1070, 1073, 1081.5, 1102, 1114, 1117.5, 1118, 1120, 1203.2, 1203.5, 1251, 1463, 1992, 1992.1, 1992.2, 1993, 1993.1, 1993.2, 1993.3, 1993.4, 1993.5, 1994.1, 1996, 1999, 2369, 2370, 3100, 3106, 3202, 3255, 5201, 5207, 5302, 5605.15, 5605.16, 5701, 5702.1, 5702.5, 5708, 5746, 5746.1, 5749.8, 5750.6, 5750.10, 5753, 5753.1, 5756, 5756.1, 5756.5, 5757, 5757.1, 5764.5, 5768.2, 5768.6, 5769, 5769.4, 5778, 5778.5, 5779, 5780, 5902, 5985.1, 5991, 6443.5, 6445.1, 6445.11, 6445.14, 6445.22, 6499.56, 6499.57, 6499.60, 6499.232, 6499.237, 6750.1, 6755.4, 6812.1, 6820.5, 6871.6, 6872.1, 6880.16, 6880.46, 6950.6, 7020, 7451.7, 7451.11, 7455.3, 7456, 7459, 7460, 7463.5, 7466.5, 8573, 8574, 8574.5, 8575, 9222, 9322, 9400, 9401, 9402, 9404, 9422, 9423, 9461, 10705, 10805.1, 10921, 10926, 10932, 10934, 10935, 10936, 10939, 10940, 10941, 10946, 10947, 10948, 10953, 11002, 11251, 11475, 11475.1, 11475.2, 11475.5, 11476.1, 11477, 11481, 11487, 11501, 12101, 12101.1, 12406, 12603, 12605, 12851, 12910, 12911, 13116.1, 13125.4, 13125.5, 13134, 13135.1, 13166, 13175, 13220.16, 13271, 13329, 13401.5, 13468.4, 13501.5, 13529, 13656, 13656.2, 13656.4, 13657, 13708, 13830, 13832, 13835.2, 13838, 13846.5 as added by Chapter 1308 of the Statutes of 1976, 13846.5 as added by Chapter 1412 of the Statutes of 1976, 13846.8, 13870.2, 13931, 13946, 13969, 13988.1, 13988.2, 13988.3, 13997, 14023, 14031, 14056, 14070, 14076, 14084.1, 14100.5, 14111, 14116.5, 14116.10, 14152, 14153, 14154, 14155, 14180, 14185, 14186, 14189, 14210, 14210.5, 14214, 14214.1, 14214.3, 14220.1, 14220.5, 14225, 14226, 14227, 14228, 14245, 14245.2, 14260, 14280, 14283, 14284, 14390, 15002.1, 15002.2, 15002.3, 15451, 15452.3, 15454, 15459.1, 15501, 15503.1, 15503.5, 15516, 15518, 15518.01, 15518.2, 15716, 15802.1, 15815, 15835, 15955.3, 15955.5, 15957.1, 15958, 16051.1, 16053.1, 16075, 16501, 16521, 16665, 16702, 16709, 16710, 16711, 16720, 16721, 16722.1, 16725, 16726, 16728, 16730, 16730.1, 16732, 16733, 16735, 16740.5, 16746, 16746.5, 16750, 16751, 16752, 16760, 16761, 16762, 16763, 16764, 16765, 16766, 16767, 16768, 16769, 16783, 16794, 16851, 17203, 17206, 17262, 17301, 17301.2, 17301.9, 17301.12, 17301.13, 17303.5, 17303.6, 17402, 17407, 17411.1, 17503, 17601.1, 17611, 17651, 17667, 17668.6, 17668.8, 17669, 17701.4, 17702, 17702.2, 17946, 17951, 17951.1, 17970, 18055, 18056, 18057, 18060,

18102.6, 18102.9, 18151, 18258, 19576, 19578, 19581, 19584.4, 19589, 19590, 19594, 19601.5, 19682.5, 19699.9, 19700.51, 19700.78, 19700.608, 19700.695, 20065, 20067, 20076, 20078, 20110, 20204, 20212, 20213, 20450.5, 20452, 20456.4, 20803, 20905, 20905.55, 20906, 20906.1, 20906.2, 20906.3, 20906.4, 20906.5 as added by Chapter 323 of the Statutes of 1976, 20906.5 as added by Chapter 397 of the Statutes of 1976, 20907, 20935, 20935.1, 20935.15, 20935.2, 20954, 21102, 21104, 21106, 21107, 21107.6, 21109, 21113, 21118, 21119, 21352, 21702.2, 22601, 22712.5, 22712.6, 22712.7, 22809, 22855.5, 22856.5, 22859.6, 23583.22, 23604.5, 23802, 23805, 24054, 24055, 24204, 24217, 24317, 25393, 25411.5, 25411.7, 25424.3, 25425, 25430.1, 25430.3, 25430.4, 25430.5, 25430.7, 25430.8, 25430.9, 25430.10, 25430.12, 25430.14, 25430.15, 25430.16, 25457.5, 25502.1, 25505.4, 25505.8, 25505.20, 25506.5, 25515.3, 25515.7, 27803, 27804, 27805, 27901, 27902, 27902.1, 27903, 27952, 27953, 28204, 28455.1, 28455.2, 28456, 29042, 30303, 30313, 30320, 30321.5, 30328, 30329, 31026, 31058, 31059, 31061, 31062, 31063, 31151, 31154, 31160, 31163, 31913, 31913.5, 40201, 40402, 40405, 40406, 40406.5, 41006, 41007, 41201.1, 41202, 41203, 41402, 41403.1, 41404, 41801, 41803, 42200, 42401, 43003, 43203, 45000, and 45022 of, to repeal Article 2.5 (commencing with Section 27) of Chapter 1 of Division 1, Article 7 (commencing with Section 490) of Chapter 3 of Division 2, Article 9.5 (commencing with Section 1084) of Chapter 3 of Division 4, Article 14.5 (commencing with Section 1900) of Chapter 6 of Part 2 of Division 1 of Title 1, Chapter 5.76 (commencing with Section 5767) of Division 6, Article 1.5 (commencing with Section 12930) of Chapter 1 of Division 10, Article 2 (commencing with Section 15051) of Chapter 1 of Division 11, Division 12.4 (commencing with Section 16690), Article 8.2 (commencing with Section 17971) of Chapter 3 and Chapter 3.9 (commencing with Section 20940) of Division 14, Chapter 1.2 (commencing with Section 22509) and Chapter 4.5 (commencing with Section 22670) of Division 16.5, Article 3 (commencing with Section 24320) of Chapter 9 of Division 18, Article 11.5 (commencing with Section 28520) of Chapter 6 of Division 20, Chapter 1.5 (commencing with Section 29090) of Division 21, and Article 1 (commencing with Section 40100) of Chapter 1 of Division 25 of, and to repeal the headings of Chapter 4 (commencing with Section 16760) of Division 12.5, and Article 4 (commencing with Section 27901) of Chapter 5 of Division 20 of, the Education Code as enacted by Chapter 2 of the Statutes of 1959, relating to education law and declaring the urgency thereof, to take effect immediately.

[Approved by Governor April 29, 1977. Filed with Secretary of State April 29, 1977.]

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the 1977 Education Code Supplemental Act.

SEC. 1.5. Section 40 of the Education Code as enacted by Chapter

SEC. 535. Section 84850 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

84850. (a) The Chancellor of the California Community Colleges shall apportion to each community college district for the purpose of funding the excess direct district cost of providing special facilities, special educational material, educational assistance, mobility assistance, transportation, and program developmental services for

handicapped students enrolled at a community college as defined in Section 78014, who have demonstrated a need for such services, an amount not exceeding seven hundred eighty-five dollars ($785) in each fiscal year for each such handicapped student.

(b) The Board of Governors of the California Community Colleges shall adopt rules and regulations for determining program and service components and appropriation of resources to community college districts pursuant to Section 78014. Such rules and regulations shall be based upon guidelines, developed and approved by both the chancellor and the Director of Rehabilitation after public hearings, and shall be appropriate to the educational needs of handicapped students enrolled at a community college.

The chancellor and the Director of Rehabilitation shall incorporate suggestions from other interested persons and organizations in the guidelines where feasible and appropriate.

If the chancellor and the Director of Rehabilitation are unable to agree upon any portion or portions of the guidelines, each may submit guidelines to the board of governors, which may base the rules and regulations which it adopts on any combination of guidelines submitted.

(c) Each community college district receiving an allowance under this section shall report to the chancellor on forms and at such times as he shall provide, all expenditures and incomes related to handicapped students for whom such allowances are made. If the chancellor determines that the current expense of educating such students does not equal or exceed the sum of basic state aid and state equalization aid provided in the regular community college foundation program per unit of average daily attendance, the allowance provided under this section and any amount of local tax funds contributed to the foundation program for each such handicapped student in average daily attendance in the district, then the amount of such deficiency shall be withheld from state apportionments to the district in the succeeding fiscal year in accordance with the procedure prescribed in Section 84330.

(d) The chancellor and the Director of Rehabilitation shall review programs for handicapped students funded pursuant to this section and shall report, jointly or separately, their findings and recommendations to the Legislature not later than February 15, 1978. The report shall include recommendations relative to appropriate levels of support for programs and services for handicapped students and further improvements in funding procedures.

(e) Notwithstanding subdivision (a), the chancellor may, upon recommendation of the Director of Rehabilitation, allocate amounts up to twice the amount authorized in subdivision (a) to provide for excess costs of educational services for severely disabled students as defined pursuant to subdivision (c) of Section 78014; provided, however, that any allocations made pursuant to this subdivision (e) shall not result in an increase in the total amount of funds allocated

pursuant to this section. Allocations in excess of seven hundred eighty-five dollars ($785) per student shall be provided only to programs identified by the chancellor and the Director of Rehabilitation in accordance with rules and regulations adopted pursuant to subdivision (b).

(f) In the event that requests for apportionments exceed the amount of state funds statutorily available, the chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established and approved by the chancellor and the Director of Rehabilitation pursuant to this section. State apportionments shall be made only to districts which certify that all appropriate federal and local funds available for programs for handicapped students are being utilized.

(g) The chancellor's office and the Department of Rehabilitation shall jointly develop guidelines governing expenditures relating to handicapped students to prevent duplication in state expenditures for such students.

SEC. 631. Section 84731 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 632. Section 84760 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 633. Section 84770 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 634. Section 84780 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 635. Section 84850 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 636. Section 85112 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 637. Section 85130 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 638. Section 85135 of the Education Code, as amended by Chapter 1011 of the Statutes of 1976, is repealed.

SEC. 639. Section 85136 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 640. Section 85137 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 641. Section 85138 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 642. Section 85139 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 643. Section 85140 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 644. Section 85141 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 645. Section 87034 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 646. Section 88133 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 647. Section 88134 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 648. Section 88135 of the Education Code as enacted by Chapter 1010 of the Statutes of 1976 is repealed.

SEC. 649. Article 2.5 (commencing with Section 27) of Chapter 1 of Division 1 of the Education Code, as added by Chapter 777 of the Statutes of 1976, is repealed.

SEC. 650. Section 91 of the Education Code, as amended by Chapter 1176 of the Statutes of 1976, is repealed.

SEC. 651. Section 190.5 of the Education Code, as amended by Chapter 643 of the Statutes of 1976, is repealed.

SEC. 652. Section 373 of the Education Code, as added by Chapter 855 of the Statutes of 1976, is repealed.

SEC. 653. Section 403 of the Education Code, as amended by Chapter 1012 of the Statutes of 1976, is repealed.

SEC. 654. Section 472 of the Education Code, as amended by Chapter 1012 of the Statutes of 1976, is repealed.

incorporate the changes made in the Education Code, in 1976, into the Education Code as enacted by Chapter 1010 of the Statutes of 1976. It is not the intent of the Legislature to make any substantive change in the law.

SEC. 1136. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The new reorganized Education Code, enacted by Chapter 1010 of the Statutes of 1976, will become operative on April 30, 1977, which is long before the effective date of ordinary statutes enacted in 1977 in the 1977–78 Regular Session of the Legislature. Other 1976 education legislation was directed to the Education Code as enacted by Chapter 2 of the Statutes of 1959. This bill would adapt such other education legislation enacted in 1976 to the reorganized Education Code as enacted by Chapter 1010 of the Statutes of 1976. In order that statutory continuity may be maintained and that administrative confusion may be avoided, such adaptation must become operative on the operative date of the new Education Code. It is, therefore, necessary that this act take effect immediately as an urgency statute.

EXHIBIT 3
COPIES OF EDUCATION CODES CITED

Chapter 12.3

HIGHER EDUCATION FACILITIES BOND ACT OF JUNE 1994 [REJECTED]

Chapter 12.3, added by Stats.1994, c. 18 (S.B.46), § 1, (Prop. 1C), eff. March 15, 1994, consisting of §§ 67010 to 67025, to be in effect upon adoption by the voters, was rejected by the voters at the June 7, 1994, primary election.

§§ 67010 to 67025. Rejected

Historical and Statutory Notes

Section 2 of Stats.1994, c. 18, provides:

"Section 1 of this act shall take effect upon the adoption by the voters of the Higher Education Facilities Bond Act of June 1994, [Prop. 1C was rejected at the June, 1994, primary election] set forth in Section 1 of this act."

Chapter 13

STUDENT RECORDS [REPEALED]

Chapter 13 was repealed by Stats.1995, c. 758 (A.B.446), § 50.

Cross References

Information Practices Act of 1977, student records, see Civil Code § 1798.74.

§§ 67100 to 67147.5. Repealed by Stats.1995, c. 758 (A.B.446), § 50

Historical and Statutory Notes

Section 67134, added by Stats.1989, c. 593, § 1, related to records of disciplinary action in connection with sexual assault or physical abuse.

Section 67140.5, added by Stats.1991, c. 811 (A.B.771), § 1, related to disclosure of student records to state agencies.

Section 67143 was amended, prior to repeal, by Stats. 1989, c. 593, § 2; Stats.1993, c. 8 (A.B.46), § 8.

§ 67175. Renumbered § 67500 and amended by Stats.1988, c. 160, § 29

Historical and Statutory Notes

Section 67175, added by Stats.1986, c. 1169, § 1, and Stats.1986, c. 1224, § 1, was renumbered § 67500 and amended by Stats.1988, c. 160, § 29. Section 67175, as added by Stats.1986, c. 1169, § 1, was repealed by Stats. 1989, c. 1360, § 35, leaving § 67175, as added by Stats. 1986, c. 1224, § 1, subsequently renumbered and amended, in full force and effect.

Chapter 14

DISABLED STUDENT SERVICES

Chapter 14 was added by Stats.1995, c. 758 (A.B.446), § 54.

Former Chapter 14, consisting of §§ 67300 to 67303, was repealed by Stats.1995, c. 758 (A.B.446), § 52.

Article 1

GENERAL PROVISIONS

Article 1 was added by Stats.1995, c. 758 (A.B.446), § 54.

§ 67300. Minimum level and quality; regulations; reader services

Services for disabled students provided by the California Community Colleges and the California State University shall, and services provided for the University of California may, at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges, the California State University, or the University of California to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.

The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may adopt regulations to implement this chapter.

Notwithstanding any other provision of this section or Section 67305, blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the Department of Rehabilitation. Reader services provided by the Department of Rehabilitation pursuant to this section shall be furnished in accordance with federal and state law. The Department of Rehabilitation shall seek federal funds for the provision of readers to blind students pursuant to this section.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

1995 Legislation

Former § 67300 was amended by Stats.1991, c. 626 (A.B.1021), § 1, and repealed by Stats.1995, c. 758 (A.B. 446), § 52. See, now, this section.

Derivation: Former § 67300, added by Stats.1981, c. 796, § 2, amended by Stats.1985, c. 903, § 1; Stats.1986, c. 248, § 34; Stats.1987, c. 998, § 1; Stats.1991, c. 626, § 1.

Library References

Legal Jurisprudences

Cal Jur 3d Univ & C § 107.

§ 67301. Parking exemptions for disabled persons; visitor parking; use of fees; audits

(a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, adopt rules and regulations prescribing requirements similar to those provided by Section 22511.5 of the Vehicle Code and all other applicable sections of the Vehicle Code relating to parking exemptions for disabled persons, as defined by Section 295.5 of the Vehicle Code, and disabled veterans, as defined by Section 295.7 of the Vehicle Code. The rules and regulations shall include authorization to park for unlimited periods in time-restricted parking zones and to park in any metered parking space without being required to pay any parking meter fee or to display a parking permit other than pursuant to Section 5007 or 22511.55 of the Vehicle Code, provided those spaces are otherwise available for use by the general public. The adopted regulations shall authorize parking at campus facilities and grounds by students with disabilities and by persons providing transportation services to students with disabilities. Except as otherwise provided in this section, students with disabilities and persons providing transportation to students with disabilities shall be required to display a valid parking permit, if applicable, for the campus attended. Nothing in this section prohibits the adoption of rules and regulations providing greater accessibility for students with disabilities and persons providing transportation services to those students.

The adopted rules and regulations shall exempt students with disabilities and persons providing transportation services to these persons from any applicable parking restrictions in areas including, but

not limited to, metered parking spaces and parking facilities designated for use by students, faculty, administrators, and employees.

(b) The Regents of the University of California may provide, and the Trustees of the California State University shall provide, and the Board of Governors of the California Community Colleges shall adopt rules and regulations requiring the governing board of each community college district to provide, visitor parking at each campus of the university or district at no charge for a disabled person, as defined by Section 295.5 of the Vehicle Code, or disabled veteran, as defined by Section 295.7 of the Vehicle Code, or as defined by each segment's policy concerning the provision of services to students with disabilities, whichever is more inclusive, and for persons providing transportation services to individuals with disabilities. Whenever parking designated for a disabled person is provided on any campus of the University of California, the California State University, or a community college district in a facility controlled by a mechanical gate, that university or district shall also provide accommodations for any person whose disability prevents him or her from operating the gate controls. These accommodations may be provided by making arrangements for disabled persons to be assisted in the operation of the gate controls, or through other effective and reasonable means the university or district may devise. Nothing in this subdivision shall be construed to require the replacement or elimination of special parking facilities restricted for the use of disabled persons located on the campuses of these universities or districts.

It is the intent of the Legislature that community college districts shall utilize the proceeds from parking fees charged to community college students and employees to offset costs incurred by these districts in accommodating disabled persons pursuant to the requirements of this section.

(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, and the Regents of the University of California may, establish procedures for the purpose of conducting biennial audits to determine whether individual campuses are in compliance with all state building code requirements relating to the location and the designation of minimum percentages of available campus parking spaces for use by students with disabilities, as determined by guidelines of Section 14679 of the Government Code, Section 2–7102 of Title 24 of the California Code of Regulations, Part 40 (commencing with Section 40.1) of Title 24 of the Code of Federal Regulations, Section 1190.81 of Title 36 of the Code of Federal Regulations, or their successor provisions, or any other applicable provisions of law, whichever provides the greater accessibility for disabled persons.

* * *

(Added by Stats.1995, c. 758 (A.B.446), § 54. Amended by Stats.2001, c. 745 (S.B.1191), § 33, eff. Oct. 12, 2001.)

Historical and Statutory Notes

1995 Legislation

Former § 67301 was repealed by Stats.1995, c. 758 (A.B.446), § 52. See, now, Education Code § 67305.

Derivation: Former § 67311.5, added by Stats.1990, c. 1066, § 1, amended by Stats.1992, c. 1248, § 4.

§ 67302. Electronic format; instructional materials for university or college students; students with disabilities

(a) An individual, firm, partnership or corporation that publishes or manufactures printed instructional materials for students attending the University of California, the California State University, or a California Community College, shall provide to the university, college, or particular campus of the university or college, for use by students attending the University of California, the California State University, or a California Community College, any printed instructional material in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary. The computer files or electronic versions of the printed instructional material shall be provided to the university, college, or particular campus of the university or college at no additional cost and in a timely manner, upon receipt of a written request that does all of the following:

(1) Certifies that the university, college, or particular campus of the university or college has purchased the printed instructional material for use by a student with a disability or that a student with a disability attending or registered to attend that university, college, or particular campus of the university or college has purchased the printed instructional material.

(2) Certifies that the student has a disability that prevents him or her from using standard instructional materials.

(3) Certifies that the printed instructional material is for use by the student in connection with a course in which he or she is registered or enrolled at the university, college, or particular campus of the university or college.

(4) Is signed by the coordinator of services for students with disabilities at the university, college, or particular campus of the university or college or by the campus or college official responsible for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the university, college, or particular campus of the university or college.

(b) An individual, firm, partnership or corporation specified in subdivision (a) may also require that, in addition to the conditions enumerated above, the request shall include a statement signed by the student agreeing to both of the following:

(1) He or she will use the electronic copy of the printed instructional material in specialized format solely for his or her own educational purposes.

(2) He or she will not copy or duplicate the printed instructional material for use by others.

(c) If a college or university permits a student to directly use the electronic version of an instructional material, the disk or file shall be copy-protected or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(d) An individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College shall provide computer files or other electronic versions of the nonprinted instructional materials for use by students attending the University of California, the California State University, or a California Community College, subject to the same conditions set forth in subdivisions (a) and (b) for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials that is compatible with braille translation and speech synthesis software.

(e) For purposes of this section:

(1) "Instructional material or materials" means textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student's success in a course of study in which a student with a disability is enrolled. The determination of which materials are "required or essential to student success" shall be made by the instructor of the course in consultation with the official making the request pursuant to paragraph (4) of subdivision (a) in accordance with guidelines issued pursuant to subdivision (i). "Instructional material or materials" does not include nontextual mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities.

(2) "Printed instructional material or materials" means instructional material or materials in book or other printed form.

(3) "Nonprinted instructional materials" means instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource, including, but not necessarily limited to, software programs, video disks, and video and audio tapes.

(4) "Structural integrity" means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. "Structural integrity" need not include nontextual elements such as pictures, illustrations, graphs, or charts. If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible.

(5) "Specialized format" means braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities.

(f) Nothing in this section shall be construed to prohibit a university, college, or particular campus of the university or college from assisting a student with a disability by using the electronic version of printed instructional material provided pursuant to this section solely to transcribe or arrange for the transcription of the printed instructional material into braille. In the event a transcription is made, the campus or college shall have the right to share the braille copy of the printed instructional material with other students with disabilities.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials pursuant to this section. If a segment establishes a center or centers, each of the following shall apply:

(1) The colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material made pursuant to paragraph (4) of subdivision (a) to the center, which shall transmit the request to the publisher or manufacturer.

(2) If there is more than one center, each center shall make every effort to coordinate requests within its segment.

(3) The publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center.

(4) If a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made.

(h) Nothing in this section shall be deemed to authorize any use of instructional materials that would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(i) The governing boards of the California Community Colleges, the California State University, and the University of California shall each adopt guidelines consistent with this section for its implementation and administration. At a minimum, the guidelines shall address all of the following:

(1) The designation of materials deemed "required or essential to student success."

(2) The determination of the availability of technology for the conversion of nonprinted materials pursuant to subdivision (d) and the conversion of mathematics and science materials pursuant to paragraph (4) of subdivision (e).

(3) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (a) and (b).

(4) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(j) Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code.

(Added by Stats.1999, c. 379 (A.B.422), § 1.)

Historical and Statutory Notes

1995 Legislation

Former § 67302, added by Stats.1991, c. 626 (A.B.1021), § 2, relating to reader services, was repealed by Stats. 1995, c. 758 (A.B.446), § 52. See Education Code § 67306.

§ 67303. Repealed by Stats.1995, c. 758 (A.B.446), § 52

Historical and Statutory Notes

The repealed section, added by Stats.1991, c. 626 (A.B. 1021), § 3, related to reader services. See, now, Education Code § 67307.

Article 2

READER SERVICES

Article 2 was added by Stats.1995, c. 758 (A.B.446), § 54.

§ 67305. Reader and interpreter services; use of federal and state vocational rehabilitation funds

Notwithstanding the provisions of Section 67300, federal and state vocational rehabilitation funds may be utilized to provide reader and interpreter services to clients of the Department of Rehabilitation, provided that those funds are administered in full compliance with applicable federal and state laws and regulations and the policies and procedures of the Department of Rehabilitation.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

Derivation: Former § 67301, added by Stats.1983, c. 323, § 23.8.

§ 67306. Selection from list of readers having standard skills; meeting place; exceptions; form; notice of option to choose alternative reader and location

(a) California State University systemwide policy governing the provision of services to students with disabilities shall include a requirement that Disabled Student Services (DSS) directors maintain a list of readers who meet certain standards. These standards shall include some college education, a 3.0 grade point average, or the possession of equivalent skills. It is expected that most students will select a reader from this list.

(b) In addition, systemwide policy shall require that students and readers meet in a mutually agreeable public facility, either on campus or off campus, as appropriate to the student's coursework and consistent with campus policy. Requests for, and explanation of, the need for exceptions to this regulation shall be made in writing by a student on a standardized form developed by the California State University and maintained on file.

(c) Students who prefer a reader not on the campus list or prefer alternative locations for services mutually agreed to by the reader and the student, shall file written requests on a standardized form provided by the DSS director, or his or her designee, and developed by the California State University, to be maintained on file.

(d) At the beginning of each term, students shall receive a notice informing them of the option to choose a reader not on the list and to choose a location for receiving reader services in a nonpublic facility. The notice shall be signed by both the student and the DSS director, or his or her designee, and shall be maintained on file.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

Derivation: Former § 67302, added by Stats.1991, c. 626, § 2.

§ 67307. Reader services for required papers; desirable and final number of hours

Reader services for students with disabilities attending the California State University shall be provided for required reading not readily available on tape, handouts, and materials necessary for the required research papers. The number of reader hours provided shall be determined by the appropriate DSS staff person, in consultation with the student, and based on the volume of materials to be read. While the desirable number of hours to be available is, at a minimum, 1.5 hours of reader service per unit per week, the final number of reader services to be provided is dependent upon the student courseload, the individual student's need, and available campus funds.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

Derivation: Former § 67303, added by Stats.1991, c. 626, § 3.

Article 3

STATE-FUNDED SERVICES

Article 3 was added by Stats.1995, c. 758 (A.B.446), § 54.

§ 67310. Legislative findings, declarations and intent; equal access to public postsecondary education; other resources; accountability and evaluations

(a) The Legislature finds and declares that equal access to public postsecondary education is essential for the full integration of persons with disabilities into the social, political, and economic mainstream of California. The Legislature recognizes the historic underrepresentation of disabled students in postsecondary programs and the need for equitable efforts that enhance the enrollment and retention of disabled students in public colleges and universities in California.

(b) The Legislature recognizes its responsibility to provide and adequately fund postsecondary programs and services for disabled students attending a public postsecondary institution.

(c) To meet this responsibility, the Legislature sets forth the following principles for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities:

(1) The state funded activity shall be consistent with the stated purpose of programs and services for disabled students provided by the California Community Colleges, the California State University, or the University of California, as governed by the statutes, regulations, and guidelines of the community colleges, state university, or the University of California.

(2) The state funded activity shall not duplicate services or instruction that are available to all students, either on campus or in the community.

(3) The state funded activity shall be directly related to the functional limitations of the verifiable disabilities of the students to be served.

(4) The state funded activity shall be directly related to these students' full access to and participation in the educational process.

(5) The state funded activity shall have as its goals the independence of disabled students and the maximum integration of these students with other students.

(6) The state funded activity shall be provided in the most integrated setting possible, consistent with state and federal law, state policy and funding requirements, and missions and policies of the postsecondary segment, and shall be based on identified student needs.

(d) It is the intent of the Legislature that, through the state budget process, the public postsecondary institutions request, and the state provide, funds to cover the actual cost of providing services and instruction, consistent with the principles set forth in subdivision (c), to disabled students in their respective postsecondary institutions.

(e) All public postsecondary education institutions shall continue to utilize other available resources to support programs and services for disabled students as well as maintain their current level of funding from other sources whenever possible.

(f) Pursuant to Section 67312, postsecondary institutions shall demonstrate institutional accountability and clear program effectiveness evaluations for services to students with disabilities.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

1995 Legislation

Former § 67310 was repealed by Stats.1995, c. 758 (A.B.446), § 53. See, now, this section.

Derivation: Former § 67310, added by Stats.1987, c. 829, § 1.

Code of Regulations References

Disabled Student Programs and Services,
Academic accommodations, see 5 Cal. Code of Regs. § 56027.
Communication disability, see 5 Cal. Code of Regs. § 56034.
Special projects, see 5 Cal. Code of Regs. § 56054.

§ 67311. Categories of costs

It is the desire and intent of the Legislature that, as appropriate for each postsecondary segment, funds for disabled student programs and services be based on the following three categories of costs:

(a) Fixed costs associated with the ongoing administration and operation of the services and programs. These fixed costs are basic ongoing administrative and operational costs of campus programs that are relatively consistent in frequency from year-to-year, such as:

(1) Access to, and arrangements for, adaptive educational equipment, materials, and supplies required by disabled students.

(2) Job placement and development services related to the transition from school to employment.

(3) Liaisons with campus and community agencies, including referral and followup services to these agencies on behalf of disabled students.

(4) On-campus and off-campus registration assistance, including priority enrollment, applications for financial aid, and related college services.

(5) Special parking, including on-campus parking registration, temporary parking permit arrangements, and application assistance for students who do not have state handicapped placards or license plates.

(6) Supplemental specialized orientation to acquaint students with the campus environment.

(7) Activities to coordinate and administer specialized services and instruction.

(8) Activities to assess the planning, implementation, and effectiveness of disabled student services and programs.

The baseline cost of these services shall be determined by the respective system and fully funded with annual adjustments for inflation and salary range changes, to the extent funds are provided.

(b) Continuing variable costs that fluctuate with changes in the number of students or the unit load of students. These continuing variable costs are costs for services that vary in frequency depending on the needs of students, such as the following:

(1) Diagnostic assessment, including both individual and group assessment not otherwise provided by the institution to determine functional, educational, or employment levels or to certify specific disabilities.

(2) On-campus mobility assistance, including mobility training and orientation and manual or automatic transportation assistance to and from college courses and related educational activities.

(3) Off-campus transportation assistance, including transporting students with disabilities to and from the campus in areas where accessible public transportation is unavailable, inadequate, or both.

(4) Disability-related counseling and advising, including specialized academic, vocational, personal, and peer counseling, that is developed specifically for disabled students and not duplicated by regular counseling and advising services available to all students.

(5) Interpreter services, including manual and oral interpreting for deaf and hard-of-hearing students.

(6) Reader services to coordinate and provide access to information required for equitable academic participation if this access is unavailable in other suitable modes.

(7) Services to facilitate the repair of equipment and learning assistance devices.

(8) Special class instruction that does not duplicate existing college courses but is necessary to meet the unique educational needs of particular groups of disabled students.

(9) Speech services, provided by licensed speech or language pathologists for students with verified speech disabilities.

(10) Test taking facilitation, including adapting tests for and proctoring test taking by, disabled students.

(11) Transcription services, including, but not limited to, the provision of Braille and print materials.

(12) Specialized tutoring services not otherwise provided by the institution.

(13) Notetaker services for writing, notetaking, and manual manipulation for classroom and related academic activities.

State funds may be provided annually for the cost of these services on an actual-cost basis, including wages for the individuals providing these services and expenses for attendant supplies. Each institution shall be responsible for documenting its costs to the appropriate state agencies.

(c) One-time variable costs associated with the purchase or replacement of equipment. One-time variable costs are one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles. State funds shall be provided for these expenses on an actual cost basis as documented by each institution.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

1995 Legislation

Former § 67311 was repealed by Stats.1995, c. 758 (A.B.446), § 58. See, now, this section.

Derivation: Former § 67311, added by Stats.1987, c. 829, § 1.

Code of Regulations References

Disabled Student Programs and Services,
Academic accommodations, see 5 Cal. Code of Regs. § 56027.
Communication disability, see 5 Cal. Code of Regs. § 56034.
Special projects, see 5 Cal. Code of Regs. § 56054.

United States Supreme Court

Establishment clause, private schools, deaf students, sign-language interpreters, neutral government programs, see Zobrest v. Catalina Foothills School Dist., U.S.Ariz. 1993, 113 S.Ct. 2462, 509 U.S. 1, 125 L.Ed.2d 1.

§ 67311.5. Repealed by Stats.1995, c. 758 (A.B.446), § 53

Historical and Statutory Notes

The repealed section, added by Stats.1990, c. 1066 (A.B. 2625), § 1, amended by Stats.1992, c. 1243 (A.B.3090), § 4, provided for parking exemptions and visitor parking for disabled persons. See, now, Education Code § 67301.

§ 67312. Development of formulas or procedures for allocating funds; adoption of rules and regulations; coordination of planning and development of programs; reports

(a) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, do the following:

(1) Work with the California Postsecondary Education Commission and the Department of Finance to develop formulas or procedures for allocating funds authorized under this chapter.

(2) Adopt rules and regulations necessary to the operation of programs funded pursuant to this chapter.

(3) Maintain the present intersegmental efforts to work with the California Postsecondary Education Commission and other interested parties, to coordinate the planning and development of programs for students with disabilities, including, but not limited to, the establishment of common definitions for students with disabilities and uniform formats for reports required under this chapter.

(4) Develop and implement, in consultation with students and staff, a system for evaluating state-funded programs and services for disabled students on each campus at least every five years. At a minimum, these systems shall provide for the gathering of outcome data, staff and student perceptions of program effectiveness, and data on the implementation of the program and physical accessibility requirements of Section 794 of Title 29 of the Federal Rehabilitation Act of 1973.

(b) Commencing in January 1990, and every two years thereafter, the Board of Governors of the California Community Colleges and the Trustees of the California State University shall, for their respective systems, and the Regents of the University of California may, submit a report to the Governor, the education policy committees of the Legislature, and the California Postsecondary Education Commission on the evaluations developed pursuant to subdivision (a). These biennial reports shall also include a review on a campus-by-campus basis of the enrollment, retention, transition, and graduation rates of disabled students.

(c) The California Postsecondary Education Commission shall review these reports and submit its comments and recommendations to the Governor and education policy committees of the Legislature.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

1995 Legislation
Former § 67312 was repealed by Stats.1995, c. 758 (A.B.446), § 53. See, now, this section.

Derivation: Former § 67312, added by Stats.1987, c. 829, § 1.

Code of Regulations References

Disabled Student Programs and Services,
Academic accommodations, see 5 Cal. Code of Regs. § 56027.
Communication disability, see 5 Cal. Code of Regs. § 56034.
Special projects, see 5 Cal. Code of Regs. § 56054.

§ 67313. Construction of chapter

Nothing in this chapter shall be construed to be directing any student, or students, toward a particular program or service for students with disabilities nor shall anything in this chapter be used to deny any

student an education because he or she does not wish to receive state funded disabled student programs and services.

(Added by Stats.1995, c. 758 (A.B.446), § 54.)

Historical and Statutory Notes

1995 Legislation

Former § 67313 was repealed by Stats.1995, c. 758 (A.B.446), § 53. See, now, this section.

Derivation: Former § 67313, added by Stats.1987, c. 829, § 1.

Chapter 14.2

STATE FUNDED DISABLED STUDENT PROGRAMS AND SERVICES [REPEALED]

Chapter 14.2, consisting of §§ 67310 to 67314, was repealed by Stats.1995, c. 758 (A.B.446), § 53.

§ 67314. Repealed by Stats.1995, c. 758 (A.B.446), § 53

Chapter 14.25

OFFICE EQUIPMENT

Section

67321. Repealed.

Chapter 14.25, formerly Chapter 14.3, was renumbered Chapter 14.25 and amended by Stats.1990, c. 216 (S.B.2510), § 18.

§ 67321. Repealed by Stats.1995, c. 758 (A.B.446), § 55

Chapter 14.3

HIGHER EDUCATION FACILITIES BOND ACT OF 1988

Another Chapter 14.3, Office Equipment, was renumbered Chapter 14.25 and amended by Stats.1990, c. 216 (S.B.2510), § 18.

Article 3

FISCAL PROVISIONS

Section

67340.5. Bonds including opinion on exclusion of interest from federal tax; separate accounts for proceeds and earnings; use.

§ 67340.5. Bonds including opinion on exclusion of interest from federal tax; separate accounts for proceeds and earnings; use

Notwithstanding any other provision of this bond act, or of the State General Obligation Bond Law (Chapter 4 (commencing with Section 16720) of Part 3 of Division 4 of Title 2 of the Government Code), if the Treasurer sells bonds pursuant to this bond act that include a bond counsel opinion to the effect that the interest on the bonds is excluded from gross income for federal tax purposes under designated conditions, the Treasurer may maintain separate accounts for the bond proceeds invested and the investment earnings on those proceeds, and may use or direct the use of those proceeds or earnings to pay any rebate, penalty, or other payment required under federal law, or take any other action with respect to the investment and use of those bond proceeds, as may be required or desirable under federal law in order to maintain the tax-exempt status of those bonds and to obtain any other advantage under federal law on behalf of the funds of this state.

(Added by Stats.1991, c. 652 (S.B.822), § 7.)

Section 84834, enacted by Stats.1976, c. 1010, § 2, derived from Educ.C.1959, § 18102.2, added by Stats.1969, c. 784, p. 1594, § 26, amended by Stats.1970, c. 102, p. 212, § 256; Stats.1972, c. 1373, p. 2793, § 79; Stats.1972, c. 1406, p. 2946, § 2.58; Stats.1973, c. 208, p. 591; Educ.C.1959, § 18102, added by Stats.1967, c. 1209, p. 2941, § 22.8, amended by Stats.1968, c. 928, p. 1769, § 20; Stats.1968, c. 1321, p. 2496, § 1, related to computation of allowances for mentally retarded pupils.

Section 84836, enacted by Stats.1976, c. 1010, § 2, amended by Stats.1977, c. 36, § 352, derived from Educ.C.1959, § 18102.6, added by Stats.1969, c. 784, p. 1596, § 29, amended by Stats.1970, c. 102, p. 213, § 258; Stats.1970, c. 1542, p. 3124, § 19; Stats.1972, c. 1373, p. 2794, § 81; Stats.1972, c. 1406, p. 2947, § 2.62; Stats.1973, c. 208, p. 545, § 31; Stats. 1974, c. 1527, p. 3435, §§ 4, 31; Stats.1976, c. 321, § 5; Educ.C.1959, § 18102, added by Stats.1967, c. 1209, p. 2941, § 22.8, amended by Stats.1968, c. 928, p. 1769, § 20; Stats.1968, c. 1321, p. 2496, § 1, related to computation of allowances for educationally handicapped pupils.

Section 84837, enacted by Stats.1976, c. 1010, § 2, derived from Educ.C.1959, § 18102.8, added by Stats.1969, c. 784, p. 1596, § 30, amended by Stats.1970, c. 1542, p. 3125, § 20; Stats.1973, c. 538, p. 1038, § 1; related to allowances for smaller than maximum size special education classes.

Section 84838, enacted by Stats.1976, c. 1010, § 2, amended by Stats.1976, c. 1011, § 98; Stats.1977, c. 36, § 353, derived from Educ.C.1959, § 18102.9, added by Stats.1969, c. 784, p. 1596, § 31, amended by Stats.1972, c. 1373, p. 2795, § 82; Stats.1973, c. 1168, p. 2442, § 4; Stats.1976, c. 32, § 2, related to additional special education allowances.

Section 84839, enacted by Stats.1976, c. 1010, § 2, amended by Stats.1976, c. 1011, § 99, derived from Educ.C.1959, § 18102.10, added by Stats.1969, c. 784, p. 1596, § 32, amended by Stats.1970, c. 1095, p. 1941, § 1; Stats.1971, c. 1449, p. 2860, § 1; Stats.1972, c. 1373, p. 2795, § 83, related to special classes' or programs' expenditure and income reports.

Section 84840, enacted by Stats.1976, c. 1010, § 2, derived from Educ.C.1959, § 18103, added by Stats.1967, c. 1209, § 22.8, provided construction of conflicting provisions.

Article 5

GENERAL PROVISIONS [REPEALED]

Article 5, "General Provisions", added by Stats.1979, c. 1035, p. 3596, § 24, consisting of §§ 84801 to 84840, was repealed by Stats.1990, c. 1372 (S.B.1854), § 685.5.

Article 6

HANDICAPPED STUDENTS

Section

Article 6 was added by Stats.1979, c. 1035, p. 3599, § 25, eff. Sept. 26, 1979.

Code of Regulations References

Disabled Student Programs and Services,
Generally, see 5 Cal. Code of Regs. § 56000 et seq.
Academic accommodations, see 5 Cal. Code of Regs. § 56027.
Accounting for funds, generally, see 5 Cal. Code of Regs. § 56074.
Communication disability, see 5 Cal. Code of Regs. § 56034.
Funding and accountability, see 5 Cal. Code of Regs. § 56072.

§ 84850. Administration and funding of educational programs and support services; rules and regulations; certification of utilization of other available funds

(a) The Board of Governors of the California Community Colleges shall adopt rules and regulations for the administration and funding of educational programs and support services to be provided to disabled students by community college districts pursuant to Chapter 14.2 (commencing with Section 67310) of Part 40.

(b) As used in this section, "disabled students" are persons with exceptional needs enrolled at a community college who, because of a verified disability, cannot fully benefit from classes, activities, and services regularly provided by the college without specific additional specialized services or educational programs.

(c) The regulations adopted by the board of governors shall provide for the apportionment of funds to each community college district to offset the direct excess cost of providing specialized support services or instruction, or both, to disabled students enrolled in state-supported educational programs or courses. Direct excess costs are those actual fixed, variable, and one-time costs, as defined in Section 67312, which exceed the combined total of the following:

(1) The average cost to the district of providing services to nondisabled students times the number of students served by disabled student programs and services.

(2) The indirect cost to the district of providing facilities and support for the administration of disabled student programs and services.

(3) The revenue derived from average daily attendance in special classes.

(4) Any other funds for serving disabled students which the district receives from federal, state, or local sources.

(d) As a condition of receiving funds pursuant to this section, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require.

(e) The board of governors may authorize the chancellor, consistent with the requirements the board may impose, to designate up to 3 percent of the funds allocated pursuant to this section for program development and program accountability.

(Added by Stats.1990, c. 1206 (A.B.3929), § 5.)

Historical and Statutory Notes

Former § 84850, added by Stats.1979, c. 1035, § 25, amended by Stats.1982, c. 251, § 32, relating to apportionment to community colleges for funding the excess direct district

cost of providing special facilities, materials and assistance, was repealed by Stats.1990, c. 1206 (A.B.3929), § 4. See this section.

Former § 84850, added by Stats.1977, c. 36, § 535, amended by Stats.1978, c. 1403, p. 4652, § 3, relating to similar subject matter, was repealed by Stats.1979, c. 282, p. 1002, § 40, eff. July 24, 1979.

Former § 84850, enacted by Stats.1976, c. 1010, § 2, relating to similar subject matter, was repealed by Stats.1977, c. 36, § 635, operative April 30, 1977.

Derivation: Former § 84850, added by Stats. 1979, c. 1035, § 25, amended by Stats.1982, c. 251, § 32.

Former § 84850, added by Stats.1977, c. 36, p. 369, § 535, amended by Stats.1978, c. 1403, p. 4652, § 3.

Educ.C.1976, § 84850 enacted by Stats.1976, c. 1010, § 2.

Educ.C.1959, § 18151, added by Stats.1976, c. 275, § 6.

Educ.C.1959, § 18151, added by Stats.1972, c. 1123, § 3; Stats.1971, c. 1619, § 1.

Cross References

Administrative regulations and rulemaking, see Government Code § 11340 et seq.
Average daily attendance,
Generally, see Education Code § 46300 et seq.
State school fund, sources, conditions of apportionments, amounts of support per average daily attendance, see Education Code § 14000 et seq.
California Community Colleges, Board of Governors, see Education Code § 71000 et seq.

Code of Regulations References

Disabled Student Programs and Services,
Generally, see 5 Cal. Code of Regs. § 56000 et seq.
Academic accommodations, see 5 Cal. Code of Regs. § 56027.
Accounting for funds, generally, see 5 Cal. Code of Regs. § 56074.
Communication disability, see 5 Cal. Code of Regs. § 56034.
Funding and accountability, see 5 Cal. Code of Regs. § 56072.
Special projects, see 5 Cal. Code of Regs. § 56054.

Library References

Colleges and Universities ⟹4.
WESTLAW Topic No. 81.
C.J.S. Colleges and Universities § 7.

United States Code Annotated

Americans with Disabilities Act, see 42 U.S.C.A. § 12101 et seq.

§ 84850.5. Repealed by Stats.1990, c. 1372 (S.B.1854), § 687

Historical and Statutory Notes

The repealed section, added by Stats.1984, c. 609, § 6, related to adoption of rules and regulations concerning programs and services provided by trained credentialed professionals and paraprofessionals and allowed a waiver by the chancellor in certain instances.

Adoption of regulations incorporating text of specified Education Code sections repealed or amended by Stats.1990, c. 1372, legislative intent regarding continuation of the provisions of the sections, and operative effect of Stats.1990, c. 1372, see Historical and Statutory Notes under Education Code § 84001.

Legislative findings in Stats.1990, c. 1372 (S.B.1854), regarding application of Education Code provisions to community colleges, and authority of community college districts under Const. Art. 9, § 14, see Historical and Statutory Notes under Education Code § 84001.

EXHIBIT 4
COPIES OF REGULATIONS CITED

Subchapter 2. Parking for Students with Disabilities

§ 54100. Parking for Students with Disabilities.

(a) Each community college district which provides parking shall, consistent with the requirements of this section and Education Code Sections 66260 and 67311.5, provide parking at each of its colleges or centers to students with disabilities and those providing transportation for such students.

(b) For purposes of this section, "students with disabilities" are those who have enrolled at the college and:

(1) qualify as disabled persons or disabled veterans pursuant to Section 22511.5 of the Vehicle Code; or

(2) are entitled to special parking provided through Disabled Student Programs and Services pursuant to Subchapter 1 (commencing with Section 56000) of Chapter 7 of this Division.

(c) Students with disabilities using parking provided under this section may be required to display a distinguishing license plate or placard issued by the Department of Motor Vehicles pursuant to Section 22511.5 of the Vehicle Code or a special sticker issued by the college authorizing parking in spaces designated for persons with disabilities.

(d) Students with disabilities may be required to pay parking permit fees imposed pursuant to Education Code Section 72247. Students with disabilities shall not be required to pay any other charge, or be subjected to any time limitation or other restriction not specified herein, when parking in any of the following areas:

(1) any restricted zone described in subdivision (e) of Section 21458 of the Vehicle Code;

(2) any street upon which preferential parking privileges and height limits have been given pursuant to Section 22507 of the Vehicle Code;

(3) any parking zone that is restricted as to the length of time parking is permitted as indicated by a sign erected pursuant to a local ordinance;

(4) any metered zone; or

(5) any space in any lot or area otherwise designated for use by faculty, staff, administrators, or visitors.

(e) Parking specifically designated for persons with disabilities pursuant to Section 7102 of Title 24 of the California Code of Regulations shall be available to students with disabilities, and those providing transportation to such persons, in those parking areas which are most accessible to facilities which the district finds are most used by students.

(f) Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for such students.

(g) When parking provided pursuant to this section is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by an attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district.

(h) Revenue form parking fees collected pursuant to Education Code Section 72247 may be used to offset the costs of implementing this section.

NOTE: Authority cited: Sections 66260, 67311.5, 66700 and 70901, Education Code. Reference: Sections 66260, 67311.5 and 72247, Education Code; and Sections 21458, 22507 and 22511.5, Vehicle Code.

§ 55522. Special Accommodations.

Matriculation services for ethnic and language minority students and students with disabilities, shall be appropriate to their needs, and community college districts shall, where necessary, make modifications in the matriculation process or use alternative instruments, methods or procedures to accommodate the needs of such students. Districts may require students requesting such accommodations to provide proof of need. Extended Opportunity Programs and Services (EOPS) and Disabled Students Programs and Services (DSPS) are authorized, consistent with the provisions of chapter 1 (commencing with section 56000) and chapter 2.5 (commencing with section 56200) of division 7 of this part, to provide specialized matriculation services and modified or alternative matriculation services to their respective student populations. Notwithstanding this authorization, participation in the EOPS and DSPS programs is voluntary and no student may be denied necessary accommodations in the assessment process because he or she chooses not to use specialized matriculation services provided by these programs. Modified or alternative matriculation services for limited or non–English–speaking students may be provided in English as a Second Language programs.

NOTE: Authority cited: Section 11138, Government Code; Sections 66700, 70901, and 84500.1, Education Code. Reference: Section 11135, Government Code; Sections 72011, 78211, 78213, and 84500.1, Education Code.

§ 55602.5. Contracts for Vocational Education for Students with Impaired Physical Capacity.

Notwithstanding any provision in the Education Code to the contrary, the governing board of a community college district and a proprietary or nonprofit organization, a public entity, or a proprietary or nonprofit private corporation may enter into a contract for the education of community college students whose capacity to function is impaired by physical deficiency or injury in vocational education classes to be conducted for such students by the proprietary or nonprofit organization, the public entity, or the proprietary or nonprofit private corporation maintaining the vocational education classes. All instruction pursuant to this Section shall be approved of and supervised by the governing board of the community college district and shall be conducted by academic employees. The full-time equivalent student of such community college students attending classes under the provisions of this Section shall be credited to the community college district, and college credit may be granted to students who satisfactorily complete the course of instruction in such classes.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

Chapter 7. Special Programs

Subchapter 1. Disabled Student Programs and Services

Article 1. General Provisions and Definitions

§ 56000. Scope of Chapter.

This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code Sections 67310–12 and 84850.

Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter. Any support services or instruction funded, in whole or in part, under the authority of this subchapter must:

(a) not duplicate services or instruction which are otherwise available to all students;

(b) be directly related to the educational limitations of the verified disabilities of the students to be served;

(c) be directly related to the students' participation in the educational process;

(d) promote the maximum independence and integration of students with disabilities; and

(e) support participation of students with disabilities in educational activities consistent with the mission of the community colleges as set forth in Education Code Section 66701.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 66701, 67310–12 and 84850, Education Code.

HISTORY

1. Repealer of chapter 1 (sections 56000–56062) and new chapter 1 (sections 56000–56088, not consecutive) filed 12–17–76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of chapter 1 (sections 56000–56088, not consecutive) and new chapter 1 (sections 56000–56088) filed 3–15–77; effective thirtieth day thereafter (Register 77, No. 12).
3. Amendment of section and NOTE filed 11–4–77; effective thirtieth day thereafter (Register 77, No. 45).
4. Amendment filed 4–27–83; effective thirtieth day thereafter (Register 83, No. 18).
5. Repealer of chapter 1 (sections 56000–56088, not consecutive) and new chapter 1 (sections 56000–56088, not consecutive) filed 3–29–88; operative 4–28–99 (Register 88, No. 16).
6. Amendment of first and second paragraphs, repealer of subsections (a) and (f), amendment of newly designated subsections (a)–(d), new subsection (e), and amendment of NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56002. Student with a Disability.

A "student with a disability" or "disabled student" is a person enrolled at a community college who has a verified impairment which limits one or more major life activities, as defined in 28 C.F.R. 35.104, and which imposes an educational limitation as defined in Section 56004. For purposes of reporting to the Chancellor under Section 56030, students with disabilities shall be reported in the categories described in Sections 56032–44.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56004. Educational Limitation.

As used in this subchapter, "educational limitation" means disability related functional limitation in the educational setting. This occurs when the limitation prevents the student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction as defined in Section 56005.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56005. Support Services or Instruction.

As used in this subchapter, "support services or instruction" means any one or more of the services listed in Section 56026, special class instruction authorized under Section 56028, or both.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. New section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56006. Determination of Eligibility.

(a) In order to be eligible for support services or instruction authorized under this chapter, a student with a disability must have an impairment which is verified pursuant to subdivision (b) which results in an educational limitation identified pursuant to subdivision (c) of this section.

(b) The existence of an impairment may be verified, using procedures prescribed by the Chancellor, by one of the following means:

(2) assessment by appropriate DSPS professional staff; or

(3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS.

(c) The student's educational limitations must be identified by appropriate DSPS professional staff and described in the Student Education Contract (SEC) required pursuant to Section 56022. Eligibility for each service provided must be directly related to an educational limitation consistent with Section 56000(b) and Section 56004.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56008. Student Rights.

(a) Participation by students with disabilities in Disabled Student Programs and Services shall be entirely voluntary.

(b) Receiving support services or instruction authorized under this subchapter shall not preclude a student from also participating in any other course, program or activity offered by the college.

(c) All records maintained by DSPS personnel pertaining to students with disabilities shall be protected from disclosure and shall be subject to all other requirements for handling of student records as provided in Subchapter 2 (commencing with Section 54600) of Chapter 5 of this Division.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56010. Student Responsibilities.

(a) Students receiving support services or instruction under this subchapter shall:

(1) comply with the student code of conduct adopted by the college and all other applicable statutes and regulations to student conduct;

(2) be responsible in their use of DSPS services and adhere to written service provision policies adopted by DSPS; and

(3) make measurable progress toward the goals established in the student's Student Educational Contract or, when the student is enrolled in a regular college course, meet academic standards established by the college pursuant to Subchapter 8 (commencing with Section 55750) of Chapter 6 of this Division.

(b) A district may adopt a written policy providing for the suspension or termination of DSPS services where a student fails to comply with subdivisions (a)(2) or (a)(3) of this section. Such policies shall provide for written notice to the student prior to the suspension or termination and shall afford the student an opportunity to appeal the decision. Each student shall be given a copy of this policy upon first applying for services from DSPS.

NOTE: Authority cited: Section 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56012. Communication Disability.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56014. Learning Disability.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, NO. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56016. Acquired Brain Injury.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56018. Developmentally Delayed Learner.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Article 2. DSPS Services

§ 56020. Availability of Services.

Each community college district receiving funds pursuant to this subchapter shall employ reasonable means to inform all students and staff about the support services or instruction available through the DSPS program.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment and repositioning of article 2. heading and repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56022. Student Educational Contract.

A Student Educational Contract (SEC) is a plan to address specific needs of the student. An SEC must be established upon initiation of DSPS services and shall be reviewed and updated annually for every student with a disability participating in DSPS. The SEC specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The SEC shall be reviewed annually by a DSPS professional staff person to determine whether the student has made progress toward his/her stated goals(s).

Whenever possible the SEC shall serve as the Student Educational Plan (SEP) and shall meet the requirements set forth in Section 55525 of this division. In addition, for students in noncredit special classes, each SEC shall include, but need not be limited to a description of the criteria used to evaluate the student's progress.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 63710–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56024. Measurable Progress.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56026. Support Services.

Support services are those specialized services available to students with disabilities as defined in Section 56002, which are in addition to the regular services provided to all students. Such services enable students to participate in regular activities, programs and classes offered by the college. They may include, but need not be limited to:

(a) Basic fixed cost administrative services associated with the ongoing administration and operation of the DSPS program. These services include:

(1) Access to and arrangements for adaptive educational equipment, materials and supplies required by students with disabilities;

(2) Job placement and development services related to transition to employment;

(3) Liaison with campus and/or community agencies, including referral to campus or community agencies and follow–up services;

(4) Registration assistance relating to on or off–campus college registration, including priority enrollment assistance, application for financial aid and related college services;

(5) Special parking, including on–campus parking registration or, while an application for the State handicapped placard or license plate is pending, provision of a temporary parking permit.

(6) Supplemental specialized orientation to acquaint students with environmental aspects of the college and community.

(b) Continuing variable cost services which fluctuate with changes in the number of students or the unit load of the students. These services include, but are not limited to:

(1) Test–taking facilitation, including arrangement, proctoring and modification of test and test administration for students with disabilities;

(2) Assessment, including both individual and group assessment not otherwise provided by the college to determine functional educational and vocational levels or to verify specific disabilities;

(3) Counseling, including specialized academic, vocational, personal, and peer counseling services specifically for students with disabilities, not duplicated by ongoing general counseling services available to all students;

(4) Interpreter services, including manual and oral interpreting for hearing–impaired students;

(5) mobility ability assistance (on–campus), including manual or motorized transportation to and from college courses and related educational activities;

(6) notetaker services, to provide assistance to students with disabilities in the classroom;

(7) reader services, including the coordination and provision of services for students with disabilities in the instructional setting;

(8) speech services provided by a licensed speech/language pathologist for students with verified speech disabilities;

(9) transcription services, including, but not limited to, the provision of braille and print materials;

(10) transportation assistance (off–campus), only if not otherwise provided by the college to all students, where public accessible transportation is unavailable, and is deemed inadequate by the Chancellor's Office;

(11) specialized tutoring services not otherwise provided by the college;

(12) outreach activities designed to recruit potential students with disabilities to the college;

(13) accommodations for participation in co–curricular activities directly related to the student's enrollment in state–funded educational courses or programs; and

(14) repair of adaptive equipment donated to the DSPS program or purchased with funds provided under this subchapter.

(c) One–time variable costs for purchase of DSPS equipment, such as adapted educational equipment, materials, supplies and transportation vehicles.

NOTE: Authority cited; Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56027. Academic Accommodations.

Each community college district receiving funding pursuant to this subchapter shall establish a policy and procedure for responding to, in a timely manner consistent with Section 53203 of this division, accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the Section 504 Coordinator, or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56028. Special Classes Instruction.

Special classes are instructional activities designed to address the educational limitations of students with disabilities who would be unable to substantially benefit from regular college classes even with appropriate support services or accommodations. Such classes generate revenue based on the number of full–time equivalent students (FTES) enrolled in the classes.

Such classes shall be open to enrollment of students who do not have disabilities, however, to qualify as a special class, a majority of those enrolled in the class must be students with disabilities.

Special classes offered for credit or noncredit shall meet the applicable requirements for degree credit, non–degree credit, or noncredit set forth in Sections 55002 and 55705.5 of this part. In addition, special classes shall:

(a) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire the skills necessary to complete their educational objectives;

(b) Employ instructors who meet minimum qualifications set forth in Section 53414 of this Division.

(c) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities. Curriculum committees responsible for reviewing and/or recommending special class offerings shall have or obtain the expertise appropriate for determining whether the requirements of this section are satisfied; and

(d) Utilize student/instructor ratios determined to be appropriate by the District given the educational limitations of the students with disabilities enrolled in each class. Class size should not be so large as to impede measurable progress or to endanger the well–being and safety of students or staff.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88 operative 4–29–88 (Register 88, No. 16).

2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56029. Special Class Course Repeatability.

Repetition of special classes is subject to the provisions of Sections 55761–63 and 58161 of this division. However, districts are authorized to permit additional repetitions of special classes to provide an accommodation to a student's educational limitations pursuant to state and federal nondiscrimination laws. Districts shall develop policies and procedures providing for repetition under the follow circumstances:

(a) When continuing success of the student in other general and/or special classes is dependent on additional repetitions of a specific class;

(b) When additional repetitions of a specific special class are essential to completing a student's preparation for enrollment into other regular or special classes; or

(c) When the student has a student educational contract which involves a goal other than completion of the special class in question and repetition of the course will further achievement of that goal.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code; and 29 U.S.C. Sec. 794.

HISTORY

1. New section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Article 3. Reports, Plans and Program Requirements

§ 56030. Reporting Requirements.

Each community college district receiving funding pursuant to this subchapter shall submit such reports (including budget and fiscal reports described in Article 4) as the Chancellor may require. When submitting such reports, districts shall use the disability categories set forth in Sections 56032–44 and shall conform to the reporting format, procedures, and deadlines the Chancellor may additionally prescribe.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment and repositioning of article 3. heading and repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56032. Physical Disability.

Physical disability means a visual, mobility or orthopedic impairment.

(a) Visual impairment means total or partial loss of sight.

(b) Mobility or orthopedic impairment means a serious limitation in locomotion or motor function.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56034. Communication Disability.

Communication disability is defined as an impairment in the processes of speech, language or hearing.

(a) Hearing impairment means a total or partial loss of hearing function which impedes the communication process essential to language, educational, social and/or cultural interactions.

(b) Speech and language impairments mean one or more speech/language disorders of voice, articulation, rhythm and/or the receptive and expressive processes of language.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56036. Learning Disability.

Learning disability is defined as a persistent condition of presumed neurological dysfunction which may exist with other disabling conditions. This dysfunction continues despite instruction in standard classroom situations. To be categorized as learning disabled, a student must exhibit:

(a) Average to above–average intellectual ability;

(b) Severe processing deficit(s);

(c) Severe aptitude–achievement discrepancy(ies); and

(d) Measured achievement in an instructional or employment setting.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56038. Acquired Brain Impairment.

Acquired brain impairment means a verified deficit in brain functioning which results in a total or partial loss of cognitive, communicative, motor, psycho–social, and/or sensory–perceptual abilities.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56040. Developmentally Delayed Learner.

The developmentally delayed learner is a student who exhibits the following:

(a) below average intellectual functioning; and

(b) potential for measurable achievement in instructional and employment settings.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56042. Psychological Disability.

(a) Psychological disability means a persistent psychological or psychiatric disorder, or emotional or mental illness.

(b) For purposes of this subchapter, the following conditions are not psychological disabilities:

(1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; and

(3) psychoactive substance abuse disorders resulting from current illegal use of drugs.

(c) In developing the allocation formula required under Section 56072, the Chancellor shall assign a zero weight to students with psychological disabilities until such time as the state budget provides additional funds to serve this population.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56044. Other Disabilities.

This category includes all students with disabilities, as defined in Section 56002, who do not fall into any of the categories described in Sections 56032–42, but who indicate a need for support services or instruction provided pursuant to Sections 56026 and 56028.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error in subsection (a) (Register 91, No. 31).
3. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56046. DSPS Program Plan.

(a) Each district receiving funding pursuant to this subchapter shall submit to the Chancellor, at such times as the Chancellor shall designate, a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the District and the Chancellor. Expenditures of funds appropriated pursuant to this subchapter must conform to the approved plan.

(b) Each district shall submit updates to its program plan to the Chancellor upon request.

(c) The program plan shall be in the form prescribed by the Chancellor and shall contain at least all of the following:

(1) long–term goals of the DSPS program;

(2) the short-term measurable objectives of the program;

(3) the activities to be undertaken to accomplish the goals and objectives; and

(4) a description of the methods used for program evaluation.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56048. Staffing.

(a) Persons employed pursuant to this subchapter as counselors or instructors of students with disabilities shall meet minimum qualifications set forth in Section 53414 of Subchapter 4 of Chapter 4 of this Division.

(b) Each district receiving funds pursuant to this subchapter shall designate a DSPS Coordinator for each college in the district. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day-to-day operation of DSPS. The designated Coordinator must meet the minimum qualifications for a DSPS counselor or instructor set forth in Section 53414(a) through (d) or meet the minimum qualifications for an educational administrator set forth in Section 53420 and, in addition, have two (2) years full-time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) instruction or counseling or both in a higher education program for students with disabilities;

(2) administration of a program for students with disabilities in an institution of higher education;

(3) teaching, counseling or administration in secondary education, working predominantly or exclusively in programs for students with disabilities; or

(4) administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominantly or exclusively related to persons with disabilities.

(c) Districts receiving funding pursuant to this subchapter may also employ classified and/or paraprofessional support staff. Support staff shall function under the direction of a DSPS counselor, instructor, or Coordinator as appropriate for the support services or instruction being provided.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56050. Advisory Committee.

Each district receiving funds pursuant to this subchapter shall establish, at each college in the district, an advisory committee which shall meet not less than once per year.

The advisory committee shall, at a minimum, include student with disabilities and representatives of the disability community and agencies or organizations serving persons with disabilities.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56052. Evaluation.

The Chancellor shall conduct evaluations of DSPS programs to determine their effectiveness. Each college shall be evaluated at least once every five years. The evaluation shall at a minimum, provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of the Americans with Disabilities Act (42 USC 12101 et seq.), Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), compliance with Education Code Section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code Section 84850.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code; and 29 U.S.C. Sec. 794.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment of section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56054. Special Projects.

(a) Community college districts receiving funding pursuant to this subchapter shall cooperate to the maximum extent possible with the Chancellor in carrying out special projects. Such projects may include, but are not limited to, task force meetings, research studies, model programs, conferences, training seminars, and other activities designed to foster program development and accountability. Such special projects shall be funded from the three percent set aside authorized pursuant to Education Code Section 84850(e).

(b) Where such special projects fund services to students, such students need not meet the eligibility criteria otherwise required under this subchapter, but such students shall meet any eligibility requirements which the Chancellor may prescribe.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56056. Authorized Professional Staff.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–888 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56058. Coordinator of Disabled Student Programs and Services.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Article 4. Funding And Accountability

§ 56060. Basis of Funding.

Any community college district shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess cost, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment and repositioning of article heading and repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56062. Provision of Support Services or Instruction.

A community college district will be deemed to have "provided support services or instruction" to a student with a disability, as required by Section 56060, if the student is enrolled in a special class or is enrolled in a regular class and received four or more service contracts per year with the DSPS program.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error in first paragraph (Register 91, No. 31).
3. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56064. Direct Excess Costs.

Direct excess costs are those actual fixed, variable, and one–time costs (not including indirect administrative costs, as defined in Section 56068) for providing support services or instruction, as defined in Sections 56026 and 56028, which exceed the combined total of the following:

(a) the average cost to the district of providing comparable services (as defined in Section 56066) to nondisabled students times the number of students receiving such services from DSPS;

(b) the revenue derived from special classes as provided in Section 56070; and

(c) any other funds for serving students with disabilities which the district receives from federal, state, or local sources other than discretionary district funds.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error in first paragraph (Register 91, No. 31).
3. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56066. Comparable Services.

(a) As used in Section 56064, "comparable services" are those services which are comparable to services available from a college to its nondisabled students. These services include, but are not limited to:

(1) job placement and development as described in Section 56026(a)(2);

(2) registration assistance as described in Section 56026(a)(4);

(3) special parking as described in Section 56026(a)(5);

(4) assessment as described in Section 56026(b)(2);

(5) counseling as described in Section 56026(b)(3);

(6) tutoring as described in Section 56062(b)(11); and

(7) outreach as described in Section 56026(b)(12).

(b) Districts which claim reimbursement for direct excess costs for comparable services as defined in subdivision (a) must, for each college in the district:

(1) certify that the service in question is not offered to nondisabled students; or

(2) collect and report to the Chancellor, on forms prescribed by the Chancellor, data showing the number of new and the number of continuing students with disabilities enrolled in credit courses who received one or more such services, in whole or in part, from DSPS.

(c) The Chancellor shall adjust the allocation of each district by the number, if any, of students reported pursuant to subdivision (b)(2), times the applicable credit student services funding rates for new and continuing students calculated pursuant to Article 4 (commencing with Section 58730) of Subchapter 4 of Chapter 9 of this Division.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56068. Indirect Administrative Costs.

As used in Section 56064, the term "indirect administrative costs" means any administrative overhead or operational cost, including but not limited to, the following:

(a) college administrative support costs, such as staff of the college business office, bookstore, reproduction center, etc.;

(b) administrative salaries and benefits, with the exception of the DSPS Coordinator;

(c) indirect costs, such as heat, light, power, telephone, FAX, gasoline and janitorial;

(d) costs of construction, except for removal or modification of minor architectural barriers;

(e) staff travel costs for other than DSPS–related activities or functions;

(f) costs for on– and off–campus space and plant maintenance;

(g) the cost of office furniture (e.g., desks, bookcases, filing cabinets, etc.);

(h) costs of dues or memberships for DSPS staff;

(i) rent of off–campus space;

(j) costs for legal matters, election campaigns or audit expenses;

(k) building costs, even if the new building were for exclusive use of DSPS;

(l) books or other resource material purchases for the general or main library; or

(m) equipment which is not, in whole or part, adapted for use by students with disabilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56070. Revenue from Special Classes.

(a) For purposes of Section 56064 (b), the revenue derived from special classes, for fiscal year 1995–96 and all subsequent years, shall be calculated by adding together the following:

(1) the FTES instructional non–credit rate times the number of units of FTES in noncredit special classes; and

(2) the FTES instructional credit rate, not including indirect administrative costs, times the number of units of FTES in credit special classes for each college in the District.

(b) In implementing this section, the Chancellor shall insure that increases or decreases in the amount of special class revenue attributed to a district solely as a result of the adoption of the "disaggregate" method of calculation described in subdivision (A) shall be spread evenly over a three (3) year phase–in period ending with full implementation for fiscal year 1995–96.

(c) Revenue from special classes shall be used for provision of support services or instruction pursuant to Section 56026 and 56028 and shall not be used for indirect administrative costs as defined in Section 56068.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56072. Allocations; Reports; Audits; Adjustments.

(a) The Chancellor shall adopt an allocation formula which is consistent with the requirements of this subchapter. The Chancellor shall use this formula to make advance allocations of funding provided pursuant to Section 56060 to each community college district consistent with the district's approved DSPS program plan and the requirements of this Article.

(b) A portion, not to exceed 10 percent, of the allocation may be based on the amount of federal, state, local, or district discretionary funds which the district has devoted to serving students with disabilities. Provided, however, that in no event shall any district be entitled to receive funding which exceeds the direct excess cost, as defined in Section 56064, of providing support services or instruction to student with disabilities.

(c) Each district shall submit such enrollment and budget reports as the Chancellor may require.

(d) The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the reports required pursuant to subdivision (c).

(e) The Chancellor may, based on audit findings or enrollment/budget reports, adjust the allocation of any district to compensate for over or un-

der–allocated amounts in the current fiscal year or any of the three immediately preceding fiscal years.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56074. Accounting for Funds.

Each community college district shall establish a unique budget identifier code to separately account for all funds provided pursuant to this subchapter. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of this subchapter.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56076. Other Resources.

As a condition of receiving funds pursuant to this subchapter, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56078. Average Daily Attendance Apportionment (ADA) for Classes Offered Through DSP&S.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56080. Determination of Direct Excess Costs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600, and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No.16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56082. Adjustments to Allocation.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56084. District Fiscal Responsibility and Contribution.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56086. Expenses Not Funded.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56088. Other Support Funds.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Subchapter 2. Extended Opportunity Programs and Services*

NOTE: Authority cited: Sections 66948, 66952, 71020, Education Code. Reference: Chapter 2, Article 8 (commencing with Section 69640) of Part 42 of the Education Code.

HISTORY

1. Repealer of Chapter 2 (Sections 56100–56198) filed 11–15–79; effective thirtieth day thereafter (Register 79, No. 46). For prior history, see Registers 78, No. 3; 74, No. 26; 73, No. 26; 72, No. 29; 71, No. 8; and 70, No. 50.

*Chapter 2 (Sections 56100–56198) superseded by provisions of Chapter 2.5 (Sections 56200–56296) as of 7–1–77.

Subchapter 2.5. Extended Opportunity Programs and Services

Article 1. General Provisions and Definitions

§ 56200. Implementation.

This chapter implements, and should be read in conjunction with, Chapter 2, Article 8 (commencing with Section 69640), Part 42, Division 5, of the Education Code. The definitions in this article apply to the requirements of this chapter.

NOTE: Authority cited: Sections 69648, 69652 and 71020, Education Code. Reference: Sections 69640–69655, Education Code.

HISTORY

1. New Chapter 2.5 (Sections 56200–56296, not consecutive) filed 10–8–76; designated effective 7–1–77 (Register 76, No. 41).
2. Amendment filed 8–16–77; effective thirtieth day thereafter (Register 77, No. 34).
3. Repealer of Chapter 2.5 (Sections 56200–56296, not consecutive) and new Chapter 2.5 (Sections 56200–56293, not consecutive) filed 8–10–79; effective thirtieth day thereafter (Register 79, No. 32). For prior history, see Registers 77, No. 34; 77, No. 45; 78, No. 26 and 78, No. 39.
4. Repealer filed 1–16–81; effective thirtieth day thereafter (Register 81, No. 3).
5. Repealer of Subchapter 1 heading, amendment of Article 1 heading, and new section filed 4–27–83; effective thirtieth day thereafter (Register 83, No. 18).
6. Repealer and new section filed 9–24–87; operative 10–24–87 (Register 87, No. 40).

§ 56201. Waiver.

The Chancellor is authorized to waive any part or all of Articles 3 and 5. Waiver requests must be submitted to the Chancellor in writing by the district superintendent/chancellor setting forth in detail the reasons for the request and the resulting problems caused if the request were denied.

NOTE: Authority cited: Sections 69648, 69648.7 and 71020, Education Code. Reference: Sections 69640–69655, Education Code.

HISTORY

1. New section filed 9–24–87; operative 10–24–87 (Register 87, No. 40). For prior history, see Register 83, No. 18.

§ 56202. Full–Time Student.

"Full–Time Student" means a student, who during a regular semester or quarter, is enrolled in a minimum of 12 credit units or the equivalent in community college courses. Full–time student for a summer or inter session shall be defined by the college district.

NOTE: Authority cited: Sections 69648, 69648.7 and 71020, Education Code. Reference: Sections 69640–69655, Education Code.

HISTORY

1. New section filed 9–24–87; operative 10–24–87 (Register 87, No. 40).

EXHIBIT 5
COPY OF IMPLEMENTING GUIDELINES CITED

IMPLEMENTING GUIDELINES FOR TITLE 5 REGULATIONS

DISABLED STUDENT PROGRAMS AND SERVICES

CHANCELLOR'S OFFICE
CALIFORNIA COMMUNITY COLLEGES
STUDENT SERVICES DIVISION/
DISABLED STUDENT PROGRAMS AND SERVICES UNIT

IMPLEMENTING GUIDELINES

FOR TITLE 5 REGULATIONS

The *Implementing Guidelines for the Title 5 Regulations for Disabled Student Programs and Services* (DSPS) represent the consensus of the Chancellor's Office regarding interpretation of the regulations. The *Guidelines* are designed to provide technical assistance to college staff in administering DSPS programs. They provide guidance to the colleges in their legal and fiscal responsibilities to DSPS and students with disabilities. This document includes the Title 5 Regulations for DSPS (Title 5, *California Code of Regulations*, Sections 56000-56076), which were rearranged, updated or repealed in November 1992.

It is important to note that the *Guidelines* are not regulations which have gone through the full regulatory approval process. College staff are encouraged, but not required, to use the *Guidelines* in administering the DSPS programs. It is the responsibility of the colleges to establish programs, policies, and procedures which meet the requirements of these and other relevant statutes and regulations. College staff should also note that the *Guidelines* are subject to change as regulations and/or interpretations change. Copies of any changes will be distributed to the colleges by the Chancellor's Office.

The format of the document consists of the text of the Title 5 regulations (printed in small type) followed, where appropriate, by the Implementation and Documentation sections (in larger type).

Additional copies of the *Guidelines* may be obtained by writing to the DSPS Unit, California Community Colleges, Chancellor's Office, 1107 9th Street, Second Floor, Sacramento, California 95814-3607.

LISTING OF CONTENTS

ARTICLE 1.

GENERAL PROVISIONS AND DEFINITIONS

56000. Scope of Chapter.

This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code Sections 67310-12 and 84850.

Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter. Any support services or instruction funded, in whole or in part, under the authority of this subchapter must:

(a) Not duplicate services or instruction which are otherwise available to all students;

(b) Be directly related to the educational limitations of the verified disabilities of the students to be served;

(c) Be directly related to the student's participation in the educational process;

(d) Promote the maximum independence and integration of students with disabilities; and

(e) Support participation of students with disabilities in educational activities consistent with the mission of the community colleges as set forth in Education Code Section 66701.

Note: Authority cited: Sections 67312, 70901 and 84850 Education Code. Reference: Sections 6601-4, 67310-12 and 84850, Education Code.

Implementation

The introductory paragraph of Section 56000 indicates that these regulations apply to all activities authorized under *Education Code* Sections 67310-12 and 84850. This means any activity for which a district receives direct excess cost (see Section 56064) funding from the State to serve students with disabilities through the Disabled Student Programs and Services (DSPS). This includes special classes and support services for students with disabilities in either regular or special classes, regardless of whether the class is offered on- or off-campus for credit, noncredit, or non-degree credit. Community service courses are not eligible for direct excess cost funding, and services provided to students with disabilities in such courses are not governed by these regulations.

Section 56000 also implements a requirement of Assembly Bill 746 (Chapter 829 Statute 1987) that expenditures under the DSPS program must conform to the five specified criteria outlined in "a thru e." These criteria apply to funds for services to students with disabilities in public postsecondary education in California. The DSPS Program Plan required under Section 56046 must demonstrate that all activities conducted with State categorical funds meet these criteria.

Subsection 56000 (a) prohibits provision of services or instruction which duplicate those otherwise available to all students. This means that services funded through the DSPS program should not replace or supplant existing general college services but should go above and beyond

those services inorder to meet the needs of students with disabilities. Separate special programs, classes, or services should only be established when regular services or instruction, combined with the provision of support services, *does not* meet the educational needs of students with disabilities. Under Section 504 of the 1973 Rehabilitation Act (29 U.S.C. 794), students with disabilities must have access to the general college services and instructional process. The DSPS program is intended to provide the additional, specialized support which allows students with disabilities to more fully access and benefit from the general offerings and services of the college. For example, tutoring services provided through the DSPS program should provide disability-related tutoring rather than general tutoring available through the Learning Center, EOPS, or other sources. In regard to special instruction, classes must meet a unique instructional need directly related to the educational limitation due to the disability which cannot be accommodated in a regular class with support services.

Subsection 56000 (b) requires that the educational need for the service must be directly related to the educational limitations of the verified disabilities of the student to be served. Thus, DSPS funds cannot be used to meet needs a student may have which do not result from his or her disability. For example, the DSPS program may provide specialized instruction to address a student's learning disability, but this should not include instruction designed to overcome learning problems attributable to linguistic or cultural differences.

Subsection 56000 (c) states that services or instruction must be directly related to participation in the educational process. Therefore, DSPS funds cannot be used to meet personal or social needs which exist regardless of whether or not the student is attending college. The provision of personal attendant care on a regular or emergency basis and/or durable medical equipment are among the services which would be excluded under this provision.

Subsection 56000 (d) mandates promotion of maximum independence and integration of students with disabilities. This means that, wherever feasible, students with disabilities should be served in integrated programs with the general student population.

Subsection 56000 (e) requires that services and instruction be consistent with the purposes of the community colleges. Services should support students with disabilities in educational activities that comply with the mission of the college. These services may include integrating students with disabilities into the general college program; facilitating general education, transfer, or vocational preparation; increasing independence; and making referrals to community resources. Therapy and/or custodial care are not appropriate functions of the DSPS program. The determining factors for instruction and services should be the purpose and duration of the program. As an educational institution, the colleges are designed to help students acquire skills in a particular area. While this process may require more time due to the limitations from the disability and may require adapted instruction, its purpose should be instructional rather than therapeutic *or recreational*. Adaptive physical education, for example, should serve as an adapted instructional mode for the learning of physical education skills—swimming, basketball, general exercise—rather than as a method to engage in therapeutic activities.

Documentation

The fact that the requirements of Section 56000 have been satisfied with respect to any particular student should be reflected as part of the *Student Educational Contract* process (see Section 56022). The fact that these requirements are satisfied by the DSPS program as a whole is to be documented through the special class approval process (see Section 56028) and through the college's program plan (see Section 56046).

56002. Student with a Disability.

A "student with a disability" or "disabled student" is a person enrolled at a community college who has a verified impairment which limits one or more major life activities, as defined in 28 C.F.R. 35.104, and which imposes an educational limitation as defined in Section 56004. For purposes of reporting to the Chancellor under Section 56030, students with disabilities shall be reported in the categories described in Sections 56032-44.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56002 gives the general definition of a student with a disability. To qualify, a person must:

(1) be enrolled at a community college;

(2) have a verifiable disability (see Sections 56032-44);

(3) be unable to fully benefit from the regular programs and services offered by the college due to the educational functional limitation of a disability; and

(4) need specialized services or instruction in order to mitigate these disability-related educational limitations.

Documentation

Documentation that students meet these criteria should be available in their files. These files should include but are not limited to the following:

(1) a signed application for services and verification of enrollment at the community college;

(2) verification of disability and identification of educational limitation(s) due to the disability;

(3) a *Student Educational Contract*; and

(4) documentation of services provided.

56004. Educational Limitation.

As used in this subchapter, "educational limitation" means disability related functional limitation in the educational setting. This occurs when the limitation prevents the student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction as defined in Section 56005.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

An "educational limitation" is a disability related functional limitation in the educational setting. An educational limitation prevents the student from fully benefiting from classes, activities, or services offered to nondisabled students, without specific additional support services or instruction as defined in Section 56005. Services and accommodations provided by the DSPS program must be directly related to the student's educational limitation(s).

Documentation

Documentation that services and accommodations are directly related to the student's educational limitation should be available in the student's file.

56005. Support Services or Instruction.

As used in this subchapter, "support services or instruction" means any one or more of the services listed in Section 56026, special class instruction authorized under Section 56028, or both.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Support services or instruction as used in Section 56005 means any service or classroom instruction that is above and beyond the regular services or instruction offered by the college. These classes, activities, or services are offered to enable the student with an educational limitation (see Section 56004) due to a disability to fully benefit in the offerings of the college.

Documentation

Documentation that the support services or instruction are related to the student's educational limitation (see Section 56004) should be part of the *Student Educational Contract* (see Section 56022).

56006. Determination of Eligibility.

(a) In order to be eligible for support services or instruction authorized under this subchapter, a student with a disability must have an impairment which is verified pursuant to subdivision (b) which results in an educational limitation identified pursuant to subdivision (c) of this section.

(b) The existence of an impairment may be verified, using procedures prescribed by the Chancellor, by one of the following means:
   (1) observation by DSPS professional staff with review by the DSPS coordinator;
   (2) assessment by appropriate DSPS professional staff; or
   (3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS.

(c) The student's educational limitations must be identified by appropriate DSPS professional staff and described in the Student Educational Contract (SEC) required pursuant to Section 56022. Eligibility for each service provided must be directly related to an educational limitation consistent with Section 56000(b) and Section 56004.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56006 requires that every student participating in the DSPS program must have a verified disability. These procedures outline accepted practices and are intended as a guide to the college in the development of local DSPS policies and procedures which must meet regulatory requirements.

Determination of disability should be performed in one of three ways:

(1) DSPS professional staff, with review by the DSPS coordinator, may, through personal observation, verify the existence of an observable disability. Use of this procedure is limited to conditions that can be seen externally, e.g., quadriplegia, paraplegia, amputation, cerebral palsy. This observation must be documented in the student's file and state the observed disability and educational limitation(s) of the student.

or

(2) a staff member who is licensed or certified in a professional field to diagnose specified conditions may verify the existence of a disability. The diagnosis must be documented in the student's file with a statement of the student's educational limitation(s).

or

(3). DSPS professional staff, with review by the DSPS coordinator, may verify a student's disability based on documentation provided by an appropriate agency or certified professional capable of diagnosing the disability in question or documentation from agencies participating in interagency agreements with the state Chancellor's Office. If the person signing the verification is not qualified to diagnose the condition in question, (e.g., a nurse), the verification should state that it was based on a review of records prepared by an appropriate professional who did perform the diagnosis. The name and address of the professional and/or agency should also appear on the document. This documentation must be in the student's file along with a statement of the student's educational limitation(s).

The ultimate responsibility of verification lies with the DSPS coordinator. The verification should identify and describe the student's disability and the educational limitations which inhibit the educational process.

Requirements for verification of disability apply to all students receiving DSPS services or instruction, which include students served at off-campus community-based facilities, such as hospital sites or shelter workshops. If the verification is based on documents provided by a community-based facility, the college should advise the facility of its responsibility to provide accurate information for verification as outlined in methods 2 and 3 of Section 56006. Also, state auditors must be allowed access to records maintained at such facilities and, in the event that significant errors are discovered, the college must ensure that the verification procedures will be modified at the facilities.

Documentation

A verification of disability form should be placed in each student's file. This form should have the necessary information cited above, and it should be signed by the appropriate professional or representative from an agency participating in interagency agreements with the state Chancellor's Office. The verification should include the functional limitations resulting from the disability so that its impact on the student in the educational setting can be appropriately determined. Documentation of the educational limitation should be written in the *Student Educational Contract* (see Section 56022) relating the educational limitation to the services (see Section 56000(b) and Section 56004).

56008. Student Rights.

(a) Participation by students with disabilities in Disabled Student Programs and Services shall be entirely voluntary.

(b) Receiving support services or instruction authorized under this subchapter shall not preclude a student from also participating in any other course, program or activity offered by the college.

(c) All records maintained by DSPS personnel pertaining to students with disabilities shall be protected from disclosure and shall be subject to all other requirements for handling of student records as provided in Subchapter 2 (commencing with Section 54600) of Chapter 5 of this Division.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

All records maintained by DSPS personnel pertaining to students with disabilities shall be protected from disclosure and shall be subject to all other relevant statutes and regulations for handling of student records.

If a student requests accommodations that impact the delivery of instruction and/or the instructor, then the instructor has a right to know the student's educational (functional) limitation(s) and the appropriate accommodation, with the student's permission. The nature and origin of the disability are not to be disclosed to the instructor without the written permission of the student.

Documentation

A release of information form should be in the student's file and signed by the student if any information is released regarding the student's disability.

56010. Student Responsibilities.

(a) Students receiving support services or instruction under this subchapter shall:
  (1) comply with the student code of conduct adopted by the college and all other applicable statutes and regulations related to student conduct;
  (2) be responsible in their use of DSPS services and adhere to written service provision policies adopted by DSPS; and
  (3) make measurable progress toward the goals established in the student's Student Educational Contract or, when the student is enrolled in a regular college course, meet academic standards established by the college pursuant to Subchapter 8 (commencing with Section 55750) of Chapter 6 of this Division.

(b) A district may adopt a written policy providing for the suspension or termination of DSPS services where a student fails to comply with subdivisions (a)(2) or (a)(3) of this section. Such policies shall provide for written notice to the student prior to the suspension or termination and shall afford the student an opportunity to appeal the decision. Each student shall be given a copy of this policy upon first applying for services from DSPS.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

A student with a disability, like any other student on the campus, must adhere to the student code of conduct adopted by the college. Termination of services to the student under the code of conduct, must go through the same procedures as with any other student.

A college may also adopt a written policy providing for the suspension or termination of DSPS services where a student fails to comply with any of the following requirements:

(1) be responsible in his/her use of DSPS services and adhere to written service provision policies adopted by the college; or

(2) make measurable progress toward the goals established in the *Student Educational Contract* or, when the student is enrolled in a regular college course, meet academic standards established by the college.

The service suspension or termination policies shall be given to each student upon applying for DSPS services and must contain a process were a student is:

(1) provided with a written notice informing he/she of the reasons for the impending suspension or termination of services;

(2) permitted the opportunity to appeal the decision to suspend or terminate his/her services; and

(3) provided with either a written notice of the resolution arrived at during the appeal process to continue services or a final notice for the suspension or termination of services.

These policies and requirements should not differ from those pertaining to all students.

Documentation

Documentation that verifies that the student was notified of all policies dealing with the rights and responsibilities in receiving DSPS services should be in the student's file. In order to suspend or terminate DSPS services to a student there should also be a copy of all notices sent to the student about the student's abuse of DSPS services, all documents of the appeal process, and a copy of the notification of the outcome of the appeal, in the student's file.

ARTICLE 2.

DSPS SERVICES

56022. Student Educational Contract.

A Student Educational Contract (SEC) is a plan to address specific needs of the student. A SEC must be established upon initiation of DSPS services and shall be reviewed and updated annually for every student with a disability participating in DSPS. The SEC specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The SEC shall be reviewed annually by a DSPS professional staff person to determine whether the student has made progress toward his/her stated goal(s).

Whenever possible the SEC shall serve as the Student Educational Plan (SEP) and shall meet the requirements set forth in Section 55525 of this division. In addition, for students in noncredit special classes, each SEC shall include, but need not be limited to a description of the criteria used to evaluate the student's progress.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

The *Student Educational Contract* (SEC) is designed to serve as an educational contract between the DSPS program and the student. It should contain the following information:

(1) an outline of the specific instructional and educational goal(s) of the student with a description of the objectives and activities needed to achieve these goal(s);

(2) a measurement of the student's progress in completing the objectives and activities leading to their goal(s); and

(3) a list of the services to be provided to the student to accommodate their disability-related educational limitations.

The SEC should be initially developed when the student first applies for DSPS services. A DSPS professional staff person and the student should develop the SEC. It is important for the student to participate in the development of the SEC, and the student's signature is necessary to indicate agreement with the short-term objectives as well as the criteria for measuring their progress.

After the initial preparation of the SEC, it should be reviewed and updated each year thereafter to determine the student's progress toward their stated instructional and educational goal(s). This process should include an up-to-date copy of the student's class schedule, delineation of services provided, an indication that a DSPS professional staff has reviewed the SEC and determined that measurable progress has been made, and the signature of the student showing agreement with the

updated SEC. The review and update can be completed incrementally. Where no major changes in the program or services are made, DSPS classified staff can assist in obtaining the student's signature and preparing the file for review by DSPS professional staff. This review can be completed by the DSPS specialist without the student being present.

Additional educational contracts providing specific objectives, skills and learning strategies, and other goals related to the educational setting may accompany the SEC for the year. These contracts should be signed by the student and the DSPS professional staff person responsible for provision of the instruction or service.

Any format that provides the information specified in this section is acceptable. Whenever possible, the SEC shall satisfy the requirements for a Student Educational Plan under Section 55525 of the Matriculation Regulations.

Documentation

An up-to-date SEC for the current year, signed by the student and the DSPS professional staff person, should be available in the file of each student receiving services paid through the DSPS office. Also, students in noncredit special classes should have included in their SEC a detailed description of the criteria used to evaluate the student's measurable progress.

56026. Support Services.

Support services are those specialized services available to students with disabilities defined in Sections 56002 of this chapter, which are in addition to the regular services provided to all students. Such services enable students to participate in regular activities, programs and classes offered by the college. They may include, but need not be limited to:

(a) Basic fixed cost administrative services, associated with the ongoing administration and operation of the DSPS program. These services include:
   (1) Access to and arrangements for adaptive educational equipment, materials and supplies required by students with disabilities;
   (2) Job placement and development services related to transition to employment;
   (3) Liaison with campus and/or community agencies, including referral to campus or community agencies and follow-up services;
   (4) Registration assistance relating to on- or off-campus college registration, including priority enrollment assistance, application for financial aid and related college services;
   (5) Special parking, including on-campus parking registration or while an application for the State handicapped placard or license plate is pending, provision of a temporary parking permit;
   (6) Supplemental specialized orientation to acquaint students with environmental aspects of the college and community;

(b) Continuing variable cost services which fluctuate with changes in the number of students or the unit load of the students. These services include, but are not limited to:
   (1) Test-taking facilitation, including arrangement, proctoring and modification of tests and test administration for students with disabilities;
   (2) Assessment, including both individual and group assessment not otherwise provided by the college to determine functional educational and vocational levels, or to verify specific disabilities;
   (3) Counseling, including specialized academic, vocational, personal, and peer counseling services specifically for students with disabilities, not duplicated by ongoing general counseling services available to all students;
   (4) Interpreter services, including manual and oral interpreting for hearing-impaired students;
   (5) Mobility assistance (on-campus), including manual or motorized transportation to and from college courses and related educational activities;
   (6) Notetaker services, to provide assistance to students with disabilities in the classroom;
   (7) Reader services, including the coordination and provision of services for students with disabilities in the instructional setting;
   (8) Speech services provided by a licensed speech/ language pathologist for students with verified speech disabilities;

(9) Transcription services, including but not limited to, the provision of braille and print materials;
(10) Transportation assistance (off-campus), only if not otherwise provided by the college to all students, where public accessible transportation is unavailable or is deemed inadequate by the Chancellor's Office;
(11) Specialized tutoring services not otherwise provided by the college;
(12) Outreach activities designed to recruit potential students with disabilities to the college;
(13) Accommodations for participation in co-curricular activities directly related to the student's enrollment in state-funded educational courses or programs; and
(14) Repair of adaptive equipment donated to the DSPS program or purchased with funds provided under this subchapter.

(c) One-time variable costs for purchase of DSPS equipment, such as adapted educational equipment, materials, supplies, and transportation vehicles.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850 Education Code.

Implementation

A college will elect to offer services based on the population of students with disabilities served. All services addressed in Section 56026 are discretionary notwithstanding State and Federal law. The college can determine which services are best provided by the DSPS office or by other departments on the campus. If the college chooses to provide certain services outside of the DSPS office (i.e., parking permits, registration, etc.) these services cannot be used as DSPS contacts with the students and DSPS funds cannot be used to support them. The college should file an addendum to the campus DSPS Program Plan listing any additions or elimination of services. Certain services requiring further discussion are listed below:

(a)(5) **Special Parking**—The provision of special parking is coordinated with the college campus security and facilities offices responsible for parking policies and procedures. While the *Vehicle Code* does allow Districts to set local parking policies and fees, these policies are superseded by state law if there is a conflict. Parking on campus should include: free visitor parking; adequate disabled student and staff parking with spaces configured according to Title 24 of the *Building Code*; no charge for persons (staff, students, or visitors) with the state issued Disabled Person plate or placard at spaces with parking meters. Colleges are allowed to charge students with disabilities parking fees equal to those charged non-disabled students.

(b)(2) **Assessment**—Assessment is the process by which educational functional limitations, academic readiness and vocational level are determined for a student with a particular disability. This assessment process can take the form of reviewing documentation from referring agencies, by giving different assessment

56027. Academic Accommodations.

Each community college district receiving funding pursuant to this subchapter shall, consistent with Section 53203 of this division, establish a policy and procedure for responding, in a timely manner, to accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the Section 504 Coordinator, or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Each community college district receiving DSPS funding should establish a policy and procedure for responding, in a timely manner, to accommodation requests involving academic adjustments in dispute. This procedure should provide for an individualized review of the disputed request. The procedure should also permit the Section 504 coordinator, or other designated official that have knowledge of academic accommodation requirements, to make an interim decision pending final resolution.

A district/college decides whether a college needs to obtain local Board approval for a policy dealing with academic accommodations.

Documentation

A written policy must be accessible to students, faculty and staff of the college.

56028. Special Class Instruction.

Special classes are instructional activities offered consistent with the provisions of Section 56000 and designed to address the educational limitations of students with disabilities who are admitted to the institution pursuant to Educational Code Sections 76000 et seq. and who would be unable to substantially benefit from regular college classes even with appropriate support services or accommodations. Such classes generate revenue based on the number of full-time equivalent students (FTES) enrolled in the classes.

Such classes shall be open to enrollment of students who do not have disabilities; however, to qualify as a special class, a majority of those enrolled in the class must be students with disabilities.

Special classes offered for credit or noncredit shall meet the applicable requirements for degree credit, non-degree credit, or noncredit set forth in Sections 55002 and 55805.5 of this part. In addition, special classes shall:

(a) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire the skills necessary to complete their educational objectives;

(b) Employ instructors who meet minimum qualifications set forth in Section 53414 of this division;

(c) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities. Curriculum committees responsible for reviewing and/or recommending special class offerings shall have or obtain the expertise appropriate for determining whether the requirements of this section are satisfied; and

(d) Utilize student/instructor ratios determined to be appropriate by the district given the educational limitations of the students with disabilities enrolled in each class. Class size should not be so large as to impede measurable progress or to endanger the well-being and safety of students or staff.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56028 defines special classes. In particular, a special class is an activity which:

(1) produces revenue in the same manner as other general college instructional activities;

(2) has been approved through the normal curriculum review process;

(3) is designed to overcome a student's educational limitations or assist the student in acquiring skills necessary for completion of the goals set forth in the SEC;

(4) is taught by specially trained instructors who hold the appropriate DSPS minimum qualifications; and

(5) utilizes materials or instructional methods adapted to the disability-related needs of the students.

It is critical that special classes meet all of the provisions of Section 56000 which require that these classes not duplicate other instructional offerings and that the classes cannot be provided in an effective manner in an integrated setting with support services. A special class is differentiated from a regular class on the basis of whether it meets the criteria of Section 56028 and whether it serves students with disabilities as defined in Sections 56032-56044.

Special class curriculum, as curriculum for all offerings of the college, must go through a review process for approval as established by the district and the state Chancellor's Office. On the local level, districts are required to assure that college curriculum committees obtain input from persons who have expertise related to DSPS in their review of special class offerings. It is often useful if DSPS staff serve on curriculum committees to provide such expertise and to facilitate integration of the DSPS program with the overall college program. DSPS staff designing curriculum should follow the policies and procedures outlined in the 1995 Curriculum Standards issued by the state Chancellor's Office.

The cost of special classes can be considered an appropriate DSPS expenditure if the special classes meet the criteria of Section 56028 and are approved by the appropriate process as established by the state Chancellor's Office. The DSPS Program Plan should list all of the special classes to be offered by the college.

In addition, colleges providing special classes should note Section 56070 of the regulations outlining the requirements for the return of special class FTES revenues to the DSPS program.

Documentation

The college should have verification of course approval by the college curriculum committee for each special class offered. This documentation should be available in the Instructional Dean's or other designated staff persons' office. The DSPS coordinator should be aware of the location of this information and should have access to it when needed. In addition, the college/district personnel/credentials office should have minimum qualifications on file for all DSPS staff teaching special classes. Information documenting that special classes meet the criteria specified above will be required as part of the DSPS Program Plan.

56029. Special Class Course Repeatability.

Repetition of special classes is subject to the provisions of Sections 55761-63 and 58161 of this division. However, districts are authorized to permit additional repetitions of special classes to provide an accommodation to a student's educational limitations pursuant to state and federal nondiscrimination laws. Districts shall develop policies and procedures providing for repetition under the following circumstances:

(a) When continuing success of the student in other general and/or special classes is dependent on additional repetitions of a specific class;

(b) When additional repetitions of a specific special class are essential to completing a student's preparation for enrollment into other regular or special classes; or

(c) When the student has a student educational contract which involves a goal other than completion of the special class in question and repetition of the course will further the achievement of that goal.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56029 defines the circumstances under which special classes can be repeated above and beyond ordinary course repetition standards for credit courses as set forth in Sections 55761-63 and 58161 of Title 5. However, districts are authorized to permit additional repetitions of special classes to provide an accommodation to a student's educational limitations pursuant to state and federal nondiscrimination laws. Although colleges have the ultimate responsibility for setting policy on this subject, the regulation indicates that repetition should be permitted whenever it is necessary to allow the student to make progress toward fulfilling the goals of the SEC, either by acquiring additional skills or by preparing for other courses. Thus, any repetition which facilitates measurable progress is permitted under Section 56029. Students may not audit special classes to avoid the limit on repeatability.

It should be noted that although Section 56029 does not address additional repetitions of regular classes, colleges are encouraged to provide for repetition of such classes where repetition is required for an individual student with a disability as reasonable accommodation under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) nor does Section 56029 impose limits on repetition of noncredit classes. Districts which do not offer noncredit may wish to enter into special arrangements with their K-12 counterparts to address the need for additional course repetitions.

Repetitions are allowed if the circumstances described in a, b, or c of Section 56029 apply to the individual student's situation. How many times an individual student is allowed to enroll in adaptive physical education beyond the four semesters or six quarters depends on how long the

circumstances apply. The college should have such students apply at each enrollment period for reevaluation of their circumstances.

Documentation

Each district must establish procedures for tracking repetitions and a process for students to invoke a special class course repeatability accommodation on a case-by-case basis. The DSPS program will need to monitor the information to assure that the above requirements are met.

ARTICLE 3.

REPORTS, PLANS, AND PROGRAM RQUIREMENTS

56030. Reporting Requirements.

Each community college district receiving funding pursuant to this subchapter shall submit such reports (including budget and fiscal reports described in Article 4) as the Chancellor may require. When submitting such reports, districts shall use the disability categories set forth in Sections 56032-44 and shall conform to the reporting format, procedures, and deadlines the Chancellor may additionally prescribe.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56030 requires the submission of periodic reports to the state Chancellor's Office. Colleges will be required to submit revised reports to correct errors on these reports as necessary.

Documentation

The colleges will be required to complete and submit the reports described above. These reports shall be submitted on forms provided by the state Chancellor's Office.

State Chancellor's Office staff will inservice DSPS staff responsible for the compilation of this data. The colleges should maintain up-to-date files of the completed reports in the DSPS Office and the Business Office.

56032. Physical Disability.

Physical disability means a visual, mobility or orthopedic impairment.
(a) Visual impairment means total or partial loss of sight.
(b) Mobility and orthopedic impairments mean a serious limitation in locomotion or motor function.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56032 defines "physical disability."

(1) Visual impairment includes but is not limited to the following conditions:

(a) Blindness is visual acuity of 20/200 or less in the better eye after correction; or visual loss so severe that it no longer serves as a major channel for information processing.

(b) Partial sightedness is visual acuity of 20/70 or less in the better eye after correction, with vision which is still capable of serving as a major channel for information processing.

Visual impairment does not apply where the loss or impairment is the result of psychological condition or an acquired brain impairment (ABI). This disability can be verified by a physician, a licensed vision professional or through documentation from a referring agency relying upon verification from a physician or other licensed vision professional.

(2) Mobility impairment includes but is not limited to the following conditions:

(a) impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.);

(b) impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.); and

(c) impairments from other causes (e.g., cerebral palsy, amputation, and fractures and burns which can cause contractures).

Mobility impairment does not apply to mobility limitation due to seeing, hearing, or psychological limitations or mobility limitation resulting from an acquired brain impairment (ABI).

Mobility impairments can be verified, if possible, by the personal observation of a DSPS professional staff member with the DSPS coordinator review, by documentation from a physician, or by the documentation of the referring agency if the verification is done by a physician.

Documentation

Files should contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the appropriate professional.

56034. Communication Disability.

Communication disability is defined as an impairment in the processes of speech, language or hearing.

(a) Hearing impairment means a total or partial loss of hearing function which impedes the communication process essential to language, educational, social and/or cultural interactions.

(b) Speech and language impairments mean one or more speech/language disorders of voice, articulation, rhythm and/or the receptive and expressive processes of language.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-2 and 84850, Education Code.

Implementation

Section 56034 defines "communication disability."

Hearing impairment means total deafness or a hearing loss so severe that a student is impaired in processing information through hearing, with or without amplification. Hearing impairment is defined as:

(1) deaf means a total or partial loss of hearing function so severe that it no longer serves as a major channel for information processing. For purposes of this definition, deafness is defined as a condition that requires the use of communication in a mode other than oral language including sign language, telephone devices for the deaf, etc.; or

(2) hearing limitation is defined as a functional loss in hearing which is still capable of serving as a major channel for information processing and is measured as follows:

Hearing limitation is interpreted to mean a functional loss in hearing which is measured as follows:

(a) a mild to moderate hearing-impaired person is one whose average unaided hearing loss in the better ear is 35 to 54 db in the conversational range or average aided hearing loss in the better ear is 20 to 54 db.

(b) a severely hearing-impaired person is one whose average hearing loss in the better ear (unaided or aided) is 55 db or greater in the conversational range, or a person with one of the following:

(i) speech discrimination of less than 50 percent.

(ii) medical documentation of rapidly progressing hearing loss.

This disability can be verified by an appropriate hearing professional or through documentation from a referring agency that obtains its verification from a medical doctor or other licensed ear professional. This disability can be verified by a DSPS staff member only if that person has the appropriate license.

Speech impairment is defined as one or more speech and language disorders of voice, articulation, rhythm and/or the receptive and expressive processes of language that limits the quality, accuracy, intelligibility or fluency of producing the sounds that comprise spoken language.

Speech limitation is interpreted to mean an impairment in the quality, accuracy, intelligibility or fluency of producing the sounds that comprise spoken language.

Speech impairment does not apply to language having to do with a foreign accent. It also does not apply to any limitation that is caused by a physical or hearing impairment, psychological disability, or acquired brain impairment (ABI).

This disability can be verified by a licensed speech professional or through documentation from a referring agency that obtains its verification from a licensed speech professional. This disability can be verified by a DSPS staff member only if that person has the appropriate license.

Documentation

Files should contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the appropriate professional.

56036. Learning Disability.

Learning disability is defined as a persistent condition of presumed neurological dysfunction which may exist with other disabling conditions. This dysfunction continues despite instruction in standard classroom situations. To be categorized as learning disabled a student must exhibit:

(a) Average to above-average intellectual ability;
(b) Severe processing deficit(s);
(c) Severe aptitude-achievement discrepancy(ies); and
(d) Measured achievement in an instructional or employment setting.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56036 defines "learning disability."

Learning disability is defined as a persistent condition of a presumed neurological impairment. This dysfunction continues despite instruction in standard classroom situations, to be categorized as learning disabilities a student must exhibit:

(1) average to above-average intellectual ability;

(2) severe processing deficit(s);

(3) severe aptitude-achievement discrepancy(ies); and

(4) measured achievement in an instructional or employment setting.

Learning disability does not apply to learning problems resulting from any physical, visual, or hearing impairments, psychological disability, or any health related disabilities. Learning disability can exist with other disabilities except ABI and DDL.

This disability can be verified in one of the following ways:

(1) a learning disability professional using the California Community College Learning Disability Eligibility Model.

(2) a DSPS learning disability specialist may professionally certify if assessment documentation from a referring agency is deemed to meet the requirements in the California Community College Learning Disability Eligibility Model.

(3) from documentation sent by a referring agency that has entered into an interagency agreement with the state Chancellor's Office. The documentation needs to include the identification of the particular type of learning disability the student has and what the functional limitation the disability imposes on the student.

Documentation

Files should contain verification of disability which identifies the particular learning disability, the educational limitation(s) resulting from that disability, and how the student's educational performance is impeded. The verification must be signed by an appropriate licensed professional.

56038. Acquired Brain Impairment.

Acquired brain impairment means a verified deficit in brain functioning which results in a total or partial loss of cognitive, communicative, motor, psycho-social, and/or sensory-perceptual abilities.

Note: Authority cited: Sections 67312, 70901, and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56038 defines "acquired brain impairment (ABI)."

ABI is defined as an acquired brain impairment caused by external or internal trauma, resulting in total or partial functional limitations that adversely affects or limits a student's educational performance by impairing:

(1) cognition, information processing, reasoning, abstract thinking, judgment and/or problem solving;

(2) language and/or speech;

(3) memory and/or attention;

(4) sensory, perceptual and/or motor abilities;

(5) psycho social behavior; or

(6) physical functions.

ABI does not apply to functional limitations resulting from brain trauma induced by birth, present at birth or which is progressive and/or degenerative in nature. ABI can be verified by an appropriate licensed professional, or by the documentation of a referring agency if its verification is done by an appropriate licensed professional.

It is the responsibility of the colleges to define acquired brain impairment in a manner which meets regulatory requirements.

Documentation

Files should contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the appropriate professional.

56040. Developmentally Delayed Learner.

The developmentally delayed learner is a student who exhibits the following:

(a) Below average intellectual functioning;

(b) Potential for measurable achievement in instructional and employment settings.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56040 defines "developmentally delayed learner (DDL)."

DDL is defined as learning deficits resulting from below average intellectual functioning which adversely affects educational performance, existing concurrently with measurable potential for achievement in educational and/or employment settings.

This disability can be verified by the DSPS coordinator or a DDL specialist using the documentation from a referring agency. The student is eligible by meeting one of the three standards described below:

(1) the student has an earned standards score less than or equal to 70 on the specified ability assessment procedure; or

(2) the student has certification from the Regional Center that the student's earned standard score was less than or equal to 70 on an ability assessment procedure; or

(3) the student has an earned standard score between 71 and 80 and at least one of the seven following indicators is documented. For scores greater than 80, the assessment procedure's standard error of measurement may be considered.

(a) history of special education.
(b) history of sheltered or supported employment.
(c) history of unemployment or limited entry level employment.
(d) dependent/semi-independent living environment.
(e) client status with the state Department of Rehabilitation.
(f) client status with the Regional Center.
(g) academic skill deficiency.

The DDL student must be afforded access to the class/program that best meets his/her educational needs and which promotes the maximum independence and integration of these students. Special classes, if provided, may, consistent with this requirement, be offered either on- or off-campus.

Documentation

Files should contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification can be determined by the DSPS coordinator or DDL specialist using documentation from the referral.

56042. Psychological Disability.

(a) Psychological disability means a persistent psychological or psychiatric disorder, or emotional or mental illness;
(b) For purposes of this subchapter, the following conditions are not psychological disabilities;
  (1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
  (2) compulsive gambling, kleptomania, or pyromania; and
  (3) psychoactive substance abuse disorders resulting from current illegal use of drugs.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56042 defines "psychological disability."

Psychological disability is defined as a persistent psychological or psychiatric disorder, emotional or mental illness that adversely affects educational performance. Psychological disability is a condition which:

(1) is listed in the most current American Psychiatric Association Diagnostic and Statistical Manual (DSM) and is coded on Axis I or II as moderate to severe;

(2) reflects a psychiatric or psychological condition that interferes with a major life activity; and

(3) poses a functional limitation in the educational setting.

The term psychological disability does not include:

(1) any condition designated by the most current DSM with a V Code signifying that it is not attributable to a mental disorder;

(2) the following conditions listed in the most current DSM are **not** included in the California Community College definition of psychological disability:

  (a) transvestitism, transsexuals, pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairment, or other sexual behavior disorders;

  (b) compulsive gambling, kleptomania, or pyromania; and

(c) psychoactive substance abuse disorders resulting from current illegal use of drugs; and

(3) any condition designated by the most current DSM as developmental disorders (mental retardation, pervasive developmental disorder, specific development disorders, or other developmental disorder), that is covered by another disability category.

Recovering drug and alcohol abusers are considered psychologically disabled as long as they are in or have completed a recovery program and meet all other conditions for this disability category.

A psychological disability can be verified by a professional with the appropriate license, or by documentation of a referring agency if its verification was done by a professional with the appropriate license. This disability can be verified by a DSPS staff member only if that person is an appropriately licensed professional such as a licensed medical doctor, a licensed clinical psychologist or psychiatrist, a licensed Marriage, Family, and Child Counselor, or a licensed clinical social worker.

Documentation

Verification documents from the licensed professional should include either the DSM and/or ICD disorder code or the name of the disorder and the license number of the professional.

56044. Other Disabilities.

This category includes all students with disabilities, as defined in Section 56002, who do not fall into any of the categories described in Sections 56032-42 but who indicate a need for support services or instruction provided pursuant to Sections 56026 and 56028.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56044 defines "other disabilities."

This category includes all other verifiable disabilities and health related limitations that adversely affect education performance but do not fall into any of the other disability categories. Therefore, it is first necessary to consider whether the condition qualifies in any of the specific disability categories discussed in Sections 56032 thru 56042. If so, the student should be reported under the appropriate disability specific category. A student should only be categorized under "other" if the student has a current verifiable impairment which meets the general definition of disability under Section 56002 and also has an educational limitation as defined in Section 56004, but does not qualify in any of the disability specific categories.

Other disabilities include conditions having limited strength, vitality, or alertness due to chronic or acute health problems. Examples are environmental disabilities, heart conditions, tuberculosis, nephritis, sickle cell anemia, hemophilia, leukemia, epilepsy, acquired immune deficiency syndrome (AIDS), diabetes, etc.

A person may be protected under Section 504 and the Americans with Disabilities Act because he or she has a history of disability or is perceived as having a disability. However, it is important to keep in mind that such individuals may not qualify for services from the DSPS program because they do not have a current impairment or their impairment does not give rise to an educational (functional) limitation.

A disability in the "other disabilities" category must be verified by an appropriate licensed professional or through documentation from a referring agency that obtains its verification from an appropriate licensed professional. A DSPS staff member can verify this disability only if that person is an appropriately licensed professional.

Documentation

Files should contain verification of disability which identifies the particular disability, the educational limitation(s) resulting from the disability, and how the student's educational performance is impeded. The verification must be signed by the appropriate professional.

56046. DSPS Program Plan.

(a) Each district receiving funding pursuant to this subchapter shall submit to the Chancellor, at such times as the Chancellor shall designate a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the district and the Chancellor. Expenditures of funds appropriated pursuant to this subchapter must conform to the approved plan.

(b) Each district shall submit updates to its program plan to the Chancellor upon request.

(c) The program plan shall be in the form prescribed by the Chancellor and shall contain at least all of the following:

(1) the long-term goals of the DSPS program;

(2) the short-term measurable objectives of the program;

(3) the activities to be undertaken to accomplish the goals and objectives; and

(4) a description of the methods used for program evaluation.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56046 sets forth the requirements for the DSPS Program Plan. The form for the plan is set forth in Subsection C(1-4). The Chancellor's Office will notify the colleges of the submission and approval process at a later date.

Documentation

Copies of the plan should be kept on file in the college DSPS office together with the letter of approval by the state Chancellor's Office.

56048. Staffing.

(a) Persons employed pursuant to this subchapter as counselors or instructors of students with disabilities shall meet minimum qualifications set forth in Section 53414 of Subchapter 4 or Chapter 4 of this division.

(b) Each district receiving funds pursuant to this subchapter shall designate a DSPS Coordinator for each college in the district. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day-to-day operation of DSPS. The designated Coordinator must meet the minimum qualifications for a DSPS counselor or instructor set forth in Section 53414(a) through (d) or meet the minimum qualifications for an educational administrator set forth in Section 53420 and, in addition, have two (2) years full-time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) instruction or counseling or both in a higher education program for students with disabilities;

(2) administration of a program for students with disabilities in an institution of higher education;

(3) teaching, counseling, or administration in secondary education, working predominately or exclusively in programs for students with disabilities; or

(4) administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominately or exclusively related to persons with disabilities.

(c) Districts receiving funding pursuant to this subchapter may also employ classified and/or paraprofessional support staff. Support staff shall function under the direction of a DSPS counselor, instructor, or Coordinator as appropriate for the support services or instruction being provided.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56048 identifies the minimum qualification the district must utilize for DSPS counselors and instructors. This section also identifies the additional minimum qualification for the person selected as the coordinator of the DSPS program. The coordinator is the individual who has day-to-day responsibility for the DSPS program. The DSPS coordinator salary is the only administrative cost that can be considered as a legitimate DSPS expenditure.

Documentation

Documentation should indicate that the DSPS coordinator, DSPS counselor and DSPS instructor meet the minimum qualifications as set forth in Section 53414(a) through (d) with the DSPS coordinator meeting the additional minimum qualification set forth in subsection 56048 (b).

56050. Advisory Committee.

Each district receiving funds pursuant to this subchapter shall establish, at each college in the district, an advisory committee which shall meet not less than once per year.

The advisory committee shall, at a minimum, include students with disabilities and representatives of the disability community and agencies or organizations serving persons with disabilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

The advisory committee should give guidance and direction to the DSPS program and college related to needs of the local community.

Documentation

A roster of committee members which indicates the affiliation of the member and dates and minutes of the meetings should be maintained and available for review upon request.

56052. Evaluation.

The Chancellor shall conduct evaluations of DSPS programs to determine their effectiveness. Each college shall be evaluated at least once every five years. The evaluation shall, at a minimum, provide for the gathering of outcome data, pertaining to staff and student perceptions of program effectiveness, access requirements of the Americans with Disabilities Act (42 U.S.C. 12101 et seq.), compliance with Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), compliance with Education Code Section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code Sections 84850.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. References: Sections 67310-12 and 84850, Education Code and 29 U.S.C. Sec. 794.

Implementation

Section 56052 indicates that each college's DSPS program will be evaluated every five years following the same cycle as the college's self-study year for the accreditation process. The DSPS program evaluation will be developed and carried out by the state Chancellor's Office. The college will meet the above requirements by participating in the DSPS Program Evaluation process. The college may be asked to provide a variety of information (budgets, DSPS Program Plans, college's Section 504 and ADA self-evaluation, organizational charts, advisory committee membership rosters, etc.) to the evaluation team as part of the evaluation.

Documentation

The evaluation report should be kept on file in the DSPS office for public review.

56054. Special Projects.

(a) Community college districts receiving funding pursuant to this subchapter shall cooperate to the maximum extent possible with the Chancellor in carrying out special projects. Such projects may include, but are not limited to, task force meetings, research studies, model programs, conferences, training seminars, and other activities designed to foster program development and accountability. Such special projects shall be funded from the three percent set-aside authorized pursuant to Education Code Section 84850(e).

(b) Where such special projects fund services to students, such students need not meet the eligibility criteria otherwise required under this subchapter, but such students shall meet any eligibility requirements which the Chancellor may prescribe.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56054 gives the Chancellor's Office the authority to conduct studies, convene task force, evaluation teams and trainings, etc., that foster program development and accountability.

Documentation

Documentation of special projects shall be maintained by the Chancellor''s Office.

ARTICLE 4.

FUNDING AND ACCOUNTABILITY

56060. Basis of Funding.

Any community college district shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess cost, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56060 authorizes the state Chancellor's Office to calculate the allocation of funds on a college-by-college basis, yet the funds must legally be distributed to the districts. If a multi-college district wants a redistribution of the allocated funds to their individual colleges, the district must request prior written approval from the state Chancellor's Office. Request from a district must include an appropriate justification for the redistribution.

Documentation

When a multi-college district requests a redistribution of funds, each college in the district should maintain on file the written justification for redistribution of funds prepared by the district and submitted to the state Chancellor's Office, along with the state Chancellor's Office response.

56062. Provision of Support Services or Instruction.

A community college district will be deemed to have "provided support services or instruction" to a student with a disability, as required by Section 56060, if the student is enrolled in a special class or is enrolled in a regular class and received four or more service contacts per year with the DSPS program.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56062 outlines the criteria which students must meet in order to be counted as students with disabilities who are receiving services or instruction funded through the DSPS program. According to these criteria a student with a disability must be enrolled in either a special class or a regular class at the college. If the student with a disability is enrolled in a regular class, the student must receive four or more service contacts during the academic year. A service contact is defined as each time a service, as defined in Section 56026, is provided to the student.

A student who is auditing a class or who is taking community service classes is not eligible for services funded through the DSPS program. Although, the college should keep in mind that it has an obligation to provide services to students with disabilities in these and other instances in order to meet the requirements of Section 504 of the 1973 Rehabilitation Act (29 U.S.C. 794) and Assembly Bill 803 (*Government Code* Section 11135 et. seq.) and the Americans with Disabilities Act (ADA).

Documentation

The college should maintain a file for each student reported to the state for funding through the DSPS program. The file should contain a college transcript of general as well as special classes and/or independent study in which the student is enrolled, amount and type of special services received, and verification of disability information.

56064. Direct Excess Costs.

Direct excess costs are those actual fixed, variable, and one-time costs (not including indirect administrative costs, as defined in Section 56068) for providing support services or instruction, as defined in Sections 56026 and 56028, which exceed the combined total of the following:

(a) the average cost to the district of providing comparable services (as defined in Section 56066) to nondisabled students times the number of students receiving such services from DSPS;

(b) the revenue derived from special classes as provided in Section 56070; and

(c) any other funds for serving students with disabilities which the district receives from federal, state, or local sources other than discretionary district funds.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56064 defines direct excess costs as the expenditures, excluding indirect administrative costs, that the college incurs while serving students with disabilities which exceeds expenditures paid by revenue derived from:

(1) comparable services (Section 56066);

(2) special classes (Section 56070); and

(3) other federal, state or local funds received by the college which are directly related to students with disabilities. These are funds that are distributed by the district without discretion, i.e., WorkAbility III or specific grants. Funds not included in this category are those which the district does distribute with discretion, i.e., VATEA.

Direct excess costs are expenditures that can be paid with DSPS categorical funds or money from the college general fund (college effort).

Documentation

Colleges should maintain income and expenditures by accounting codes. This information should be in such a format that colleges can complete the DSPS End-of-Year report as developed by the Chancellor's Office. The information in the report includes total costs of the DSPS program (not including indirect administrative costs as defined in Section 56068) and other income.

56070. Revenue from Special Classes.

(a) For purposes of Section 56064(b), the revenue derived from special classes, for fiscal year 1995-96 and all subsequent years, shall be calculated by adding together the following:
  (1) the FTES instructional noncredit rate times the number of units of FTES in noncredit special classes; and
  (2) the FTES instructional credit rate, not including indirect administrative costs, times the number of units of FTES in credit special classes for each college in the district.

(b) In implementing this section, the Chancellor shall insure that increases or decreases in the amount of special class revenue attributed to a district solely as a result of the adoption of the "disaggregate" method of calculation described in subdivision (a) shall be spread evenly over a three (3) year phase-in period ending with full implementation for fiscal year 1995-96.

(c) Revenue from special classes shall be used for the provision of support services or instruction pursuant to Section 56026 and 56028 and shall not be used for indirect administrative costs as defined in Section 56068.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56070 describes the revenue calculations for special classes. This method uses program based funding as a model. In program based funding each college has a dollar amount for instructional cost of credit FTES depending on the size of the college and there is a statewide FTES rate for noncredit. These rates include only the instructional cost of the class.

The instruction cost rate for credit and noncredit classes will be calculated by the Chancellor's Office using information generated by program based funding during the first principal apportionment. This revenue may be spent in support of the special class and to provide support services.

Special class FTES is generated the same way as regular class FTES. For purposes of reporting, a class is a special class if it meets the criteria outlined in Section 56028 and serves students with disabilities as defined in Sections 56032-56044. The combined special class and regular class FTES is the measure by which the state provides general apportionment funds to the college as a whole.

The college is responsible for ensuring that the amount of funds the DSPS program receives accurately reflects the amount of FTES generated within the program.

Documentation

The district's overall FTES report should be filed with the state Chancellor's Office Fiscal Services Unit and must be maintained at the district business office. Special classes must also be identified as a special class and all sections of these classes have to be identified as a special section in the district's MIS system.

56072. Allocations; Reports; Audits; Adjustments.

(a) The Chancellor shall adopt an allocation formula which is consistent with the requirements of this subchapter. The Chancellor shall use this formula to make advance allocations of funding provided pursuant to Section 56060 to each community college district consistent with the district's approved DSPS program plan and the requirements of this article.

(b) A portion, not to exceed 10 percent, of the allocation may be based on the amount of federal, state, local, or district discretionary funds which the district has devoted to serving students with disabilities. Provided, however, that in no event shall any district be entitled to receive funding which exceeds the direct excess cost, as defined in Section 56064, of providing support services or instruction to students with disabilities.

(c) Each district shall submit such enrollment and budget reports as the Chancellor may require.

(d) The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the reports required pursuant to subdivision (c).

(e) The Chancellor may, based on audit findings or enrollment/budget reports, adjust the allocation of any district to compensate for over- or under- allocated amounts in the current fiscal year or any of the three immediately preceding fiscal years.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56072 provides:

(1) the state Chancellor's Office the ability to adopt an allocation formula and to insure advance allocations.

(2) defines "overspending" the DSPS allocation as "college effort." College effort is used to generate 10 percent of the DSPS allocation. This subsection also defines "unspent" DSPS allocation as funds the state Chancellor's Office can recapture through the apportionment process.

(3) gives the state Chancellor's Office permission to request reports and data from the colleges.

(4) gives the state Chancellor's Office the ability to conduct fiscal audits of the DSPS program at the colleges.

(5) gives the state Chancellor's Office the ability to adjust allocated amounts during the fiscal year and up to three preceding fiscal years.

Documentation

The district should maintain a clear audit trail, enrollment and budget reports.

56074. Accounting for Funds.

Each community college district shall establish a unique budget identifier code to separately account for all funds provided pursuant to this subchapter. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of this subchapter.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56074 indicates that each district shall maintain separate accounting codes for DSPS expenditures and income. These accounting codes are used in completing the DSPS End-of-Year Report. All expenditures using the separate DSPS accounting codes must represent the total cost of the DSPS program **excluding the indirect administrative costs**, defined in Section 56068.

Documentation

The district must keep on file the accounting codes used for the DSPS program.

IMPLEMENTING GUIDELINES FOR TITLE 5 REGULATIONS

DISABLED STUDENT PROGRAMS AND SERVICES

CHANCELLOR'S OFFICE
CALIFORNIA COMMUNITY COLLEGES

STUDENT SERVICES DIVISION/
DISABLED STUDENT PROGRAMS AND SERVICES UNIT

56076. Other Resources.

As a condition of receiving funds pursuant to this subchapter, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56076 indicates that the college make reasonable efforts to utilize all funds available for serving students with disabilities. The college will record, on the DSPS End-of-Year Report, all sources of other income to the DSPS program.

Documentation

The college should keep on file the sources and amounts of other income the program receives.

56066. Comparable Services.

(a) As used in Section 56064, "comparable services" are those services which are comparable to services available from a college to its nondisabled students. These services include, but are not limited to:
  (1) job placement and development as described in Section 56026(a)(2);
  (2) registration assistance as described in Section 56026(a)(4);
  (3) special parking as described in Section 56026(a)(5);
  (4) assessment as described in Section 56026(b)(2);
  (5) counseling as described in Section 56026(b)(3);
  (6) tutoring as described in Section 56026(b)(11); and
  (7) outreach as described in Section 56026(b)(12).

(b) Districts which claim reimbursement for direct excess costs for comparable services as defined in subdivision (a) must, for each college in the district:
  (1) certify that the service in question is not offered to non-disabled students; or
  (2) collect and report to the Chancellor, on forms prescribed by the Chancellor, data showing the number of new and the number of continuing students with disabilities enrolled in credit courses who received one or more such services, in whole or in part, from DSPS.

(c) The Chancellor shall adjust the allocation of each district by the number, if any, of students reported pursuant to subdivision (b)(2), times the applicable credit student services funding rates for new and continuing students calculated pursuant to Article 4 (commencing with Section 58730) of Subchapter 4 of Chapter 9 of this division.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

The Chancellor's Office will provide information on implementation of Section 56066 at a later date.

56068. Indirect Administrative Costs.

As used in Section 56064, the term "indirect administrative costs" means any administrative overhead or operational cost, including but not limited to, the following:

(a) college administrative support costs, such as staff of the college business office, bookstore, reproduction center, etc.;
(b) administrative salaries and benefits, with the exception of the DSPS Coordinator;
(c) indirect costs, such as heat, light, power, telephone, FAX, gasoline, and janitorial;
(d) costs of construction, except for removal or modification of minor architectural barriers;
(e) staff travel costs for other than DSPS-related activities or functions;
(f) costs for on- and off-campus space and plant maintenance;
(g) the cost of office furniture (e.g., desks, bookcases, filing cabinets, etc.);
(h) costs of dues or memberships for DSPS staff;
(i) rent of off-campus space;
(j) costs for legal matters, election campaigns, or audit expenses;
(k) building costs, even if the new building were for exclusive use of DSPS;
(l) books or other resource material purchases for the general or main library; or
(m) equipment which is not, in whole or part, adapted for use by students with disabilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

Implementation

Section 56068 describes expenditures that cannot be considered direct excess costs. These administrative expenditures (with the exception of the DSPS coordinator's salary) are the responsibility of the district and should not be considered, in any part, as a DSPS program expenditure for reporting purposes.

Documentation

Indirect administrative costs, with the exception of the DSPS coordinator's salary, should not be included in any of the accounting codes maintained for DSPS expenditures. These indirect administrative expenditures should not appear in the DSPS End-of-Year report.

IMPLEMENTING GUIDELINES

FOR TITLE 5 REGULATIONS

The *Implementing Guidelines for the Title 5 Regulations for Disabled Student Programs and Services* (DSPS) represent the consensus of the Chancellor's Office regarding interpretation of the regulations. The *Guidelines* are designed to provide technical assistance to college staff in administering DSPS programs. They provide guidance to the colleges in their legal and fiscal responsibilities to DSPS and students with disabilities. This document includes the Title 5 Regulations for DSPS (Title 5, *California Code of Regulations*, Sections 56000-56076), which were rearranged, updated or repealed in November 1992.

It is important to note that the *Guidelines* are not regulations which have gone through the full regulatory approval process. College staff are encouraged, but not required, to use the *Guidelines* in administering the DSPS programs. It is the responsibility of the colleges to establish programs, policies, and procedures which meet the requirements of these and other relevant statutes and regulations. College staff should also note that the *Guidelines* are subject to change as regulations and/or interpretations change. Copies of any changes will be distributed to the colleges by the Chancellor's Office.

The format of the document consists of the text of the Title 5 regulations (printed in small type) followed, where appropriate, by the Implementation and Documentation sections (in larger type).

Additional copies of the *Guidelines* may be obtained by writing to the DSPS Unit, California Community Colleges, Chancellor's Office, 1107 9th Street, Second Floor, Sacramento, California 95814-3607.

LISTING OF CONTENTS

EXHIBIT B

STATE OF CALIFORNIA

CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE
1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
HTTP://WWW.CCCCO.EDU

RECEIVED

MAR 16 2004

COMMISSION ON
STATE MANDATES

March 11, 2004

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Disabled Student Programs and Services; 02-TC-22
West Kern Community College District, Claimant
Education Codes 67300, 67301, 67302, 67310, 67311, 67312, and 84850
California Code of Regulations, title 5 sections 54100, 55522, 55602.5, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, and 56076

Dear Ms. Higashi:

As an interested state agency, the Chancellor's Office has reviewed the above test claim in light of the following questions addressing key issues before the Commission:

- Do the provisions listed above impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and section 17514 of the Government Code? If so, are costs associated with the mandate reimbursable?

- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?

- Have funds been appropriated for this program (e.g., state budget) or are there any other sources of funding available? If so, what is the source?

Education Code section 67300

Education Code section 67300 was first added by statute in 1981. In pertinent parts, this section: 1) requires that services provided for disabled students by the California Community Colleges must, at a minimum, conform with the quality of those provided by the Department of Rehabilitation to its clients prior to July 1, 1981; 2) authorizes the Board of Governors of the California Community Colleges to adopt regulations regarding disabled student services; and 3) specifies that blind community college students under the sponsorship of the Department of Rehabilitation shall have their reader services provided by the Department of Rehabilitation.

The Department of Rehabilitation was established on October 1, 1963. The functions and responsibilities of the Department are contained in the California Welfare and Institutions Code, sections 19000-19856; many of these provisions were first enacted in 1969. The Department of Rehabilitation may have information regarding the level of service required by the Department prior to the enactment of Education Code section 67300 in 1981 which would speak to the issue of whether the statute imposes a cost mandated by the state within the meaning of Government Code section 17514.

In addition, even if the Commission determines that Education Code section 67300 requires a higher level of service, the state is already funding this service at community colleges. In 1981, the responsibility for providing services to disabled students who were clients of the Department of Rehabilitation was transferred from the Department of Rehabilitation to the community colleges. At that time, funds were also transferred from the Department of Rehabilitation's budget and added to the base budget of the Disabled Students Programs and Services. The Department of Finance should have documentation reflecting the amount of this transfer of funds. Thus, funding to implement section 76300 is now part of the annual appropriation for Disabled Student Programs and Services (DSPS) in Schedule (8) of Item 6870-101-0001 of the Budget Act. For 2003-04 the total funding for DSPS is $82,583,000. Authority for funding the DSPS program is found in Education Code section 84850. Comparable appropriations were made in other fiscal years. The majority of these funds were allocated to districts based on an allocation formula approved by the Board of Governors of the California Community Colleges. DSPS funds are specifically appropriated to fund disabled student services. Since revenue was provided to fund the costs of disabled programs, it appears that Government Code section 17556(e) may preclude the Commission from finding that section 67300 imposes state mandated costs.

Furthermore, in 1973, Congress passed Section 504 of the Rehabilitation Act of 1973. It forbade discrimination against persons with disabilities by federally funded programs and activities, federal agencies, and specifically provided as follows:

> "No otherwise qualified individual with disabilities in the United States . . . shall, solely by reason of his/her disability, 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. . . ." (29 U.S.C. § 794(a).)

In May 1977 the U.S. Department of Health, Education and Welfare issued regulations implementing Section 504 of the Rehabilitation Act of 1973. Since federal law requires reasonable accommodation for disabled community college students and Education Code section 67300 can be viewed as implementing federal law, it appears that Government Code section 17556(c) would preclude the Commission from finding that section 67300 imposes state mandated costs.

Education Code section 67302
Education Code section 67302 was first added by statute in 1999. It provides in summary that the publisher of instructional materials for students in California public postsecondary education must, upon receipt of an appropriate request, make those materials available in an electronic form mutually agreed upon by the college and the publisher at no additional cost to the educational institution.

Education Code section 67302 does not impose a state mandate or higher level of service upon districts as defined by Government Code section 17514. The statute requires publishers of certain instructional materials to provide electronic versions of those materials to community colleges, upon request, at no cost to the college. However, the statute is not mandatory since colleges are not required to use the mechanism established by section 67302 or to ask publishers to provide texts in electronic form. Of course, to the extent that colleges do call upon publishers to provide the electronic texts, the statute creates a potential savings to districts since federal law requires districts to provide students with visual impairments access to print and computer-based information. (See Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.).) Education Code section 67302 assists districts in meeting their pre-existing obligations to provide instructional materials in alternate media.

Disabled Student Services and Programs (DSPS)

Education Code section 67310
Education Code section 67310 was first enacted in 1987. Section 67310 sets forth the legislative findings, declarations, and intent with respect to the state's responsibility to provide equal access to public postsecondary education for persons with disabilities which has been mandated by federal law since the enactment of section 504 in 1973. Section 67310 states, in pertinent part, as follows:

> "The Legislature recognized its responsibility to provide and adequately fund postsecondary programs and services for disabled students attending a public postsecondary institution. (Ed. Code, § 67310(b).)
>
> "It is the intent of the Legislature that, through the state budget process, the public postsecondary institutions request, and the state provide, funds to cover the actual cost of providing services and instruction . . . to disabled students in their respective postsecondary institutions." (Ed. Code, § 67310(d).)

Education Code section 67310 does not expressly require community college districts to begin a new program or undertake any higher level of service within the meaning of Government Code section 17514. The statute merely sets forth the state's recognition of responsibility to provide and adequately fund programs and services for disabled students with funds provided by the state.

Education Code section 67311
Education Code section 67311 was first enacted in 1987. Section 67311 sets forth three categories of costs associated with programs for disabled students: 1) fixed administrative and operational costs; 2) continuing variable costs that fluctuate with changes in the number of students served and units attempted; and 3) one time costs associated with the purchase of equipment or supplies and repairs.

Education Code section 67311 does not expressly require community college districts to begin a new program or undertake any higher level of service within the meaning of Government Code section 17514. The statute merely sets forth categories of costs for community college districts to observe in providing postsecondary programs and services for disabled students with funds provided by the state.

Education Code section 67312
Education Code section 67312 was first enacted in 1987. Section 67312 requires the Board of Governors of the California Community Colleges to: 1) work with the California Postsecondary Education Commission and the Department of Finance when developing allocation formulas for disabled student funding; 2) adopt regulations for disabled student programs funded by the state; 3) maintain intersegmental efforts in coordinating planning and development of disabled student programs; and 4) develop an evaluation system in consultation with students and staff.

Education Code section 67312 does not expressly require community college districts to begin a new program or undertake any higher level of service. The statute merely sets forth requirements for the Board of Governors of the California Community Colleges.

Education Code section 84850 and California Code of Regulations, title 5, sections 56000 - 56076.
The origins of current Education Code section 84850, which was added by Statutes 1990, chapter 1206, can be traced back at least as far as former Education Code section 18151, which was added by Statutes 1972, chapter 1619. While the statute has changed significantly since 1972, from inception it has been a funding authority providing payments to community college districts to offset the costs of providing programs and services for disabled students.

In 1972, section 18151 authorized the Superintendent of Public Instruction to apportion $400 for each physically handicapped student who has demonstrated financial need and is 21 years of age or older to districts that voluntarily applied for the funds. Current section 84850 directs the Board of Governors of the California Community Colleges to adopt regulations for the administration of the Disabled Student Programs and Services (DSPS) and provides authority for funding the program to offset the direct costs of disabled student programs.

Under the authority of Education Code section 84850, the 2003-04 Budget Act appropriates $82,583,000 for DSPS in Schedule (8) of Item 6870-101-0001. Comparable allocations were provided in other fiscal years.

Thus, additional funds specifically intended to fund the costs of the DSPS program are provided by the state and it could be argued that Government Code section 17556(e) precludes the

Commission from finding that section 84850 and the implementing regulations for the DSPS program set forth in title 5 of the California Code of Regulations commencing with section 56000 impose state mandated costs.

However, the Commission need not rely on Government Code section 17556(e) because Education Code section 84850 and the implementing regulations for the DSPS program set forth in title 5 of the California Code of Regulations commencing with section 56000 do not require community college districts to begin a new program or undertake any higher level of service. District participation in the DSPS program is entirely voluntary.

In a recent California Supreme Court case, *Department of Finance v. Commission on State Mandates (Kern High School)* (2003) 30 Cal.4th 727, the Kern High School District sought reimbursement for the costs of preparing notices and agenda items related to certain programs it offered. The Supreme Court found that no state mandates exist when a school district is not legally compelled, but instead voluntarily participates in a state-funded program because the benefits of the funded program are too beneficial to refuse. (*Id.*, at p. 731.)

Similarly, the DSPS program is essentially a mechanism by which districts may seek to have the state reimburse them for the direct excess costs of providing certain services or instruction to students with disabilities. Under federal law, districts are required to provide accommodations for students with disabilities by section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, but nothing compels a district to apply for DSPS funds or claim reimbursement from the state for services it does provide. In pertinent part, Education Code section 84850(c) states:

> "The regulations adopted by the board of governors shall provide for the apportionment of funds to each community college district to offset the direct excess cost of providing specialized support services or instruction, or both, to disabled students enrolled in state-supported educational programs or courses."

The voluntary nature of the program is also reflected in the following regulatory language:

1) "This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code Sections 67310-12 and 84850." (Cal. Code Regs., tit. 5, § 56000.)
2) "Each community college district receiving funds pursuant to this subchapter shall...." (Cal. Code Regs., tit. 5, § 56020.)
3) "Each district receiving funds pursuant to this subchapter shall...." (Cal. Code Regs., tit. 5, §§ 56048(b), 56050.)
4) "Each community college district receiving funding pursuant to this subchapter shall ..." (Cal. Code Regs., tit. 5, §§ 56027, 56030.)
5) "Each district receiving funding pursuant to this subchapter shall ..." (Cal. Code Regs., tit. 5, § 56046.)

6) "Community college districts receiving funding pursuant to this subchapter shall ..." (Cal. Code Regs., tit. 5, §§ 56054.)
7) "Any community college district shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess cost, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs." (Cal. Code Regs., tit. 5, § 56060.)

Applying the rationale and holding in *Kern High School* to this test claim, we conclude that since community college districts are not legally compelled to participate in the DSPS program, but do so voluntarily, Education Code section 84850 and the implementing regulations commencing with section California Code of Regulations section 56000 cannot be found to constitute a reimbursable state mandate.

It is, however, important to note that nonparticipation in the DSPS program would not in any way alter a community college district's responsibility to provide accommodations and support services to disabled students under federal law as discussed above. (See Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.).) Rather than imposing an additional state mandate, the DSPS program should be viewed as a substantial effort by the state to materially assist community college districts in meeting their preexisting federal responsibility to provide accommodation and access for disabled students. The DSPS program does provide for certain services that would not be required under federal law, such as classes specifically designed for students with disabilities. However, each district decides for itself what services it will provide and districts may choose to offer only those services required by federal law. Moreover, as previously stated DSPS funds are provided by the Legislature to cover the costs of the program and participation in the DSPS program is voluntary.

Disabled Student Parking

Education Code section 67301

Education Code section 67301 was renumbered from section 67311.5 which was first added by statute in 1990. In pertinent part, current Education Code section 67301 specifies that the Board of Governors of the California Community Colleges may adopt regulations prescribing requirements similar to those provided by Vehicle Code section 22511.5 and all other applicable Vehicle Code sections relating to parking exemptions for disabled persons. The statute specifies that such regulations must include authorization for disabled persons to: 1) park in time-restricted zones for unlimited periods, 2) park in metered parking spaces without being required to pay, and 3) display only the specialized parking permit for disabled persons when parking at campus facilities and grounds requiring parking permits provided those spaces are otherwise available to the public. However, the statute specifies that except as otherwise provided, disabled students and persons providing transportation to disabled students are required to display a valid campus-parking permit, if applicable. The statute also requires that the regulations adopted must: 1) exempt disabled students and persons providing transportation to disabled students from applicable parking restrictions; 2) provide free visitor parking for disabled students and persons providing transportation to disabled students; and 3) provide

accommodations for disabled persons when required for access to parking facilities controlled by mechanical gates. Finally, the statute provides that parking fees charged by community college districts may be used to offset costs incurred in providing parking accommodations for disabled persons pursuant to the section.

Vehicle Code section 22511.5 was added by Statutes 1959, chapter 716, section 1 and appears to be substantially similar to the present Vehicle Code section 22511.5. The current Vehicle Code section 22511.5 allows disabled persons, displaying authorized special identification to park in various restricted zones, including metered parking at no fee, for unlimited periods. The Department of Motor Vehicles may have information regarding the level of service required by the Department prior to 1981 which would speak to the issue of whether Education Code section 63701 imposed a new program or higher level of service within an existing program upon local entities within the meaning of Government Code section 17514.

However, even if the Commission determined that a higher level of service for disabled students was required by the pertinent portions of Education Code section 67301, the statute provides that the community colleges may offset the costs of implementing the statute with parking fees charged by the community college districts. Education Code section 76360(a) authorizes districts to require students and employees to pay a fee of up to $40 per semester ($20 per intersession) for parking services. For students who are ridesharing or carpooling, section 76360(a) reduces the maximum fee to $30 per semester and $10 per intersession. In addition, districts may charge parking fees above these limits under specific circumstances as follows:

> "The governing board may require payment of a parking fee at a campus in excess of the limits set forth in subdivision (a) for the purpose of funding the construction of on-campus parking facilities if both of the following conditions exist at the campus:
>
> > (1) The full-time equivalent (FTES) per parking space on the campus exceeds the statewide average FTES per parking space on community college campuses.
> >
> > (2) The market price per square foot of land adjacent to the campus exceeds the statewide average market price per square foot of land adjacent to community college campuses." (Ed. Code, § 76360(b).)

Since community college districts have the authority to levy parking fees to offset costs of providing disabled parking, it appears that Government Code section 17556(d) may preclude the Commission from finding that section 67300 imposes state mandated costs. However, the Chancellor's Office does not collect information on actual district revenues or costs associated with parking services.

<u>California Code of Regulations, title 5, section 54100</u>
Title 5, section 54100, was filed on January 16, 1992, and became effective February 18, 1992. The regulation implements former Education Code section 67311.5 which has since been renumbered to Education Code section 67301 and is substantially similar to the former section.

As discussed above under the analysis of Education Code section 67301, the Legislature directed the Board of Governors of the California Community Colleges to adopt regulations to implement the provisions of the statute regarding disabled student parking. By enacting title 5 section 54100 the Board of Governors responded to that legislative directive.

Consistent with Education Code section 67301, title 5, section 54100 provides that each community college district shall provide parking to students with disabilities and those providing transportation for students with disabilities. The regulation provides that students with disabilities may be required to pay parking permit fees pursuant to former Education Code section 72247, currently Education Code section 76360, and may be required to display a distinguishing Department of Motor Vehicles license plate or placard. The regulation also specifies certain parking areas and zones where students with disabilities may park without being required to pay any other charge or be subjected to time limitations or other restrictions.

Regarding costs of disabled parking, title 5, section 54100 provides as follows:

> "Students with disabilities may be required to pay parking permit fees pursuant to Education Code section 72247 [currently Education Code section 76360]. . . . (Cal. Code Regs., tit. 5, § 54100(d).)
>
> "Revenue from parking fees collected pursuant to Education Code section 72247 [currently Education Code section 76360] may be used to offset the costs of implementing this section." (Cal. Code Regs., tit. 5, § 54100(h).)

Since community college districts have the authority to levy parking fees to offset costs of providing disabled parking in accordance with the statute, it appears that Government Code section 17556(d) may preclude the Commission from finding that title 5 section 54100 imposes state mandated costs. The fiscal impact statement prepared to accompany this regulatory proposal stated that there was no fiscal impact on local government because, "costs associated with this implementation are to be covered from fees collected for parking by students and employees pursuant to Education Code 72247 [currently Education Code section 76360]." The Department of Finance concurred with this finding on December 12, 1991.

However, as mentioned above, the Chancellor's Office does not collect information on actual district revenues or costs associated with parking services.

Matriculation

California Code of Regulations, title 5, section 55522
Title 5, section 55522, was filed on June 5, 1990, and became effective July 6, 1990. Section 55522 is but one of a cluster of regulations enacted to implement the Seymour-Campbell Matriculation Act of 1986. (See Ed. Code, §§ 78210 et seq. and Cal. Code Regs., tit. 5, §§ 55520 et seq.)

Section 55522 provides, in the portion pertinent to disabled students, that community college districts should provide accommodations in the matriculation process through services

appropriate to the needs of disabled students where necessary. The regulation notes that both the Extended Opportunity Programs and Services (EOPS) and Disabled Student Services Programs and Services (DSPS) are authorized to provide special, modified, or alternative matriculation services to students. Notwithstanding the authorization, student participation in both these programs is voluntary and no student may be denied necessary accommodations in the matriculation process because he or she does not participate in EOPS or DSPS.

The Board of Governors determined and on December 15, 1989, the Department of Finance concurred that the matriculation regulations, including section 55522 did not impose a state mandate on local government because the Seymour-Campbell Matriculation Act specifically states, in Education Code section 78218, that the provisions are only operative in fiscal years when funds are appropriated for the implementation of the Act. Under the authority of Education Code section 78216, in fiscal year 1989-1990, the State Budget Act appropriated $35,870,000 in Item 6870-101-0001-20.10.070.

For 2003-04, the Budget Act appropriates $54,307,000 for Matriculation in Schedule (12) of Item 6870-101-0001. Since additional funds specifically intended to fund the costs of the Matriculation program are provided by the state, it appears that Government Code section 17556(e) may preclude the Commission from finding that section 67300 imposes state mandated costs.

In addition, under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) community college districts have a preexisting responsibility to provide reasonable accommodation to disabled students that would include making matriculation services accessible. Thus, title 5, section 55522 can be viewed as implementing federal law, and it appears that Government Code section 17556(c) would also preclude the Commission from finding that section 55522 imposes state mandated costs.

Vocational Education

California Code of Regulations, title 5, section 55602.5
Title 5, section 55602.5 authorizes a district governing board to contract with specified entities for the education of physically impaired community college students in vocational education classes conducted by the specified entities.

Title 5 section 55602.5, was filed on March 4, 1991, and became effective April 5, 1991, as part of a conversion of Education Code sections into title 5 sections mandated by Senate Bill 1854 (Stats. 1990, ch. 1372). Section 55602.5 was previously Education Code section 78012, which in turn was renumbered from former Education Code section 25514.5 which was added by Statutes 1974, chapter 1020 and is substantially similar to the current regulation. Since current title 5 section 55602.5 predates the enactment of the state mandate provisions in 1975, it cannot be found to be a cost mandated by the state as defined by Government Code section 17514.

In addition, authorizing a community college district to enter into a contractual agreement with specified entities for the vocational education of physically disabled students does not constitute a new program or higher level of service. It is merely an enabling law.

Sincerely,

Frederick E. Harris

FREDERICK E. HARRIS, Assistant Vice Chancellor
College Finance and Facilities Planning

Exhibit C

SixTen and Associates
Mandate Reimbursement Services

H B. PETERSEN, MPA, JD, President
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April 1, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 02-TC-22
West Kern Community College District
Disabled Student Programs and Services

Dear Ms. Higashi:

I have received the comments of the Chancellor's Office of the California Community Colleges ("CCC") dated March 11, 2004[1], to which I now respond on behalf of the test claimant.

A. The Comments of CCC are Incompetent and Should be Excluded

Test claimant objects to the comments of CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief."

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the response since CCC has failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

---

[1] Although dated March 11, 2004, the comments were e-mailed to my office on March 16, 2004, along with comments for 13 other test claims.

> "If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

The comments of CCC do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of CCC not be included in the Staff's analysis.

B. Government Code Section 17556(c) Does Not Preclude a Finding That the Test Claim Legislation Imposes State Mandated Costs

CCC cites subdivision (c) of Government Code Section 17556:

> "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...
> (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation..."

as authority for its conclusion that it would preclude the Commission from finding that several sections of the test claim legislation impose state mandated costs. At page 2, CCC states:

> "In May 1977 the U.S. Department of Health, Education and Welfare issued regulations implementing Section 504 of the Rehabilitation Act of 1973.[2] Since federal law requires reasonable accommodation for disabled community college students...(those Education Code sections and Title 5 regulations) can be viewed as implementing federal law..."

---

[2] In other parts of its comments, CCC also refers to the Americans with Disabilities Act of 1990

This argument was rejected by *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. (hereinafter "*Hayes*") The issue in *Hayes* was whether the special education programs in question constituted new programs or higher levels of service mandated by the state entitling school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them, or whether these programs were instead mandated by the federal government for which no reimbursement is due. (Opinion, at page 1570)

The Board of Control adopted a decision holding that all special education costs under Statutes 1977, Chapter 1247, and Statutes 1980, chapter 797, were state-mandated costs subject to subvention reasoning that the federal Education of the Handicapped Act was a discretionary program and that section 504 of the Rehabilitation Act did not require school districts to implement any programs in response to federal law and that special education programs were optional in the absence of a state mandate. (Opinion, at page 1576)

On petition for writ of mandate, the superior court concluded that the Board of Control did not apply the appropriate standard and that the definition of a federal mandate set forth by the Supreme Court in City of Sacramento v. State of California[3] marked a departure from the previous (and narrower) "no discretion" test. Accordingly, the superior court issued a peremptory writ of mandate directing the Commission on State Mandates to set aside the decision of the Board of Control, to reconsider the claims in light of *Sacramento II*, and to ascertain whether the costs arising from the test claim legislation were federally mandated, and if so, the extent, if any, to which the state-mandated costs exceed the federal mandate.[4] The appeal to the Court of Appeal followed. (Opinion, at page 1577)

Then, at pages 1577 through 1582, the *Hayes* court discussed the principles of subvention and concluded:

> "In its (*Sacramento II*) opinion...the high court noted that the vast bulk of cost-producing federal influence on state and local government is by

---

[3] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, hereinafter referred to as "*Sacramento II*"

[4] The negative finding in subsection (c) of Government Code Section 17556 has an exception: "unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

inducement or incentive rather than direct compulsion...The test for determining whether there is a federal mandate is whether compliance with federal standards 'is a matter of true choice,' that is, whether participation in the federal program 'is truly voluntary.' (citation)"

The court went on to say:

"Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Citation)

The *Hayes* court then discussed special education at pages 1582 through 1592, including section 504 of the Rehabilitation Act of 1973 and the 1970 version of the Education of the Handicapped Act. Commencing at page 1587 the court stated:

"In 1974 Congress became dissatisfied with the progress under earlier efforts...Congress greatly increased federal funding for education of the handicapped and simultaneously required recipient states to adopt a goal of providing full educational opportunities to all handicapped children... The following year Congress amended the Education of the Handicapped Act by enacting the Education for All Handicapped Children Act of 1975...

"Since the 1975 amendment, the Education of the Handicapped Act has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education...The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states...The substantive requirements of the act have been interpreted in a manner which is 'strikingly similar' to the requirements of section 504 of the Rehabilitation Act of 1973..."

At page 1588, the court again relied on the decision in *Sacramento II*:

"In order to gain a state and local acceptance of its substantive provisions, the Education of the Handicapped Act employs a 'cooperative

> federalism' scheme, which has also been referred to as the 'carrot and stick' approach. (Citing Sacramento II) As an incentive Congress made substantial federal financial assistance available to states and local educational agencies that would agree to adhere to the substantive and procedural terms of the act...We cannot say that such assistance on an ongoing basis is trivial or insubstantial.
>
> "...Congress intended the act to serve as a means by which state and local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act (citation) and section section 504 of the Rehabilitation Act of 1973, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives..."

Then, at page 1592, the court concluded that the Education of the Handicapped Act constitutes a federal mandate:

> "Under the circumstances we have no doubt that enactment of the 1975 amendments to the Education of the Handicapped Act constituted a federal mandate under the criteria set forth in (Sacramento II). The remaining question is whether the state's participation in the federal program was a matter of 'true choice' or was 'truly voluntary.' The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of the handicapped children in any event. We conclude that so far as the state is concerned the Education of the Handicapped Act constitutes of federal mandate."

Finally, at pages 1592 through 1595, the Hayes court discussed subvention for Special Education and answers the state versus local agency issue:

> "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has

adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no 'true choice' in the manner of implementation of the federal mandate.

"This reasoning would not hold true where the manner of implementation of the federal program was left to the discretion of the state...Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government...If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.

"The Education of the Handicapped Act...leaves primary responsibility for implementation to the state...In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention."

Therefore, in the words of subsection (c) of Government Code Section 17556, the test claim does not allege costs mandated by the federal government upon local school districts.

C. Government Code Section 17556(e) Does Not Preclude a Finding That the Test Claim Legislation Imposes State Mandated Costs

CCC cites subdivision (e) of Government Code Section 17556:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount

sufficient to fund the cost of the state mandate..."

as authority for its conclusion that it would preclude the Commission from finding that several sections of the test claim legislation impose state mandated costs. At page 2, CCC states:

> "...the state is already funding this service at community colleges...funding to implement section 76300 is now part of the annual appropriation for (DSPS) in Schedule (8) of Item 6870-101-0001 of the Budget Act...The majority of these funds were allocated to districts based on an allocation formula approved by the Board of Governors..."

CCC makes similar arguments relative to parking fees at pages 6-8.

First, the funding which is provided in the Budget Act is not provided in the test claim statutes or executive orders as required by section 17556(e). Next, the allocation to districts is based upon an allocation formula and not on actual costs. CCC has offered no evidence that funding will continue to be provided sufficient to cover the costs, or at all. Finally, there is absolutely no evidence before the Commission that the allocations result "in no net costs to the school districts" or that the allocations are "in an amount sufficient to fund the costs of the state mandate."

As to parking fees, CCC recognizes that amount of fees that can be charged is limited.[5] In fact, at page 8, CCC admits that it does not collect information on actual district revenues or costs associated with parking services. How then can CCC argue that these parking fees result in no net costs to districts, or are in an amount sufficient to fund the cost of the state mandate?

In any event, the test claim has provided for the funding and fees:

> "Some revenue may be received or attributable from the apportionment of

[5] CCC also argues that fees can be charged that exceed these maximums. These additional fees, however, are limited to the purpose of funding the construction of on-campus parking facilities and not to offset the cost of providing special parking privileges to DSPS students.

funds[6], special classes[7], federal and state vocational rehabilitation funds[8], and proceeds from parking fees charged to students[9]. To the extent actually appropriated and/or received, such revenue will reduce the costs incurred by these mandated duties." (Test Claim, page 98, lines 8-11)

The comments of CCC do not provide any justification for the denial of the test claim. To the extent funding or fees are received in the past and in the future, the amounts received will be an offset to the annual claim.

D. Legal Compulsion is not Necessarily Required For a Finding of a Mandate

In response to the test claim activities required by several test claim code sections and Title 5 regulations[10], CCC responds by saying that those code sections and regulations do not impose a state mandate or higher level of service because the statutes and regulations do not "expressly require" the districts to perform those activities. As authority, CCC cites *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("*Kern*"). It interprets *Kern* to hold that school districts are not entitled to reimbursement "when a school district is not legally compelled" to participate. This is not a correct interpretation of *Kern*. A finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate. The controlling case law on the subject of legal *vis-a-vis* non-legal compulsion is still *City of Sacramento v. State of California* (*Sacramento II*).

(1) *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified"

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[6] Education Code Section 84850, Subdivision (c).

[7] Title 5, California Code of Regulations, Section 56028.

[8] Education Code Section 67305.

[9] Education Code Section 67301.

[10] For example, Education Code sections 67302 (at page 3), 67310 (at page 3), 67311 (at page 4), 67312 (at page 4), and regulations 56000-56076 (at page 4)

unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[11]

In other words, *Sacramento I* concluded, *inter alia*, that the loss of federal funds and tax credits did not amount to "compulsion".

---

[11] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

(3) *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled.

However, the court also overruled that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion".

(4) *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion" to do otherwise.

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

(5) The "Kern" Case Did Not Change the Standard

In *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 736, ("Kern") the supreme court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6,[12] because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining added)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court reaffirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

> "In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate.

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[12] This *Kern* disclaimer that "we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement" refutes CCC's interpretation that legal compulsion is necessary for a finding of a mandate.

> Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes*, (supra at 1582) Under the "carrot and stick" analysis of both *Kern* and *Hayes*, community college districts' participation is not truly voluntary, the carrot is too large and the stick is too short.

E. Title 5, California Code of Regulations Section 55602.5 is a New Program

CCC asserts that Title 5, California Code of Regulations Section 55602.5 is not a new program because it is "substantially similar" to former Education Code Section 25514.5 enacted by Chapter 1020, Statutes of 1974.

Former Education Code Section 25514.5 was renumbered as section 78012 and recodified by Chapter 1010, Statutes of 1976.

Former Education Code Section 78012 was repealed by Section 455.9 of Chapter 1372, Statutes of 1990. The statute directed that the section "is repealed." It did not say "may be repealed." It did not say "might be repealed" if (a subsequent event occurs). It states the section "is repealed." It was repealed and became inoperative on January 1, 1991.

Section 708 of Chapter 1372, Statutes of 1990, directed the Board of Governors of the California Community Colleges to "initially" adopt and put into effect regulations which incorporate the text of the repealed section. Since an "initial" adoption was anticipated, the section only permitted grammatical or technical changes, renumbering or reordering sections, removal of outdated terms or references to inapplicable or repealed statutory authorities, and the correction of gender references. This "initial" cut-and-paste operation was ordered to done "[P]rior to January 1, 1991."

While it is recognized that subdivision (2) of Section 708 contains exculpatory language, the "intent" of the legislature cannot undo the clear language that the section

"is repealed."

The Board of Governors did not obey the directive until March 4, 1991 (operative April 3, 1991). Therefore Section 55602.5 of Title 5, California Code of Regulations is a new regulation enacted after 1975 and is subject to reimbursement. (Government Code Section 17514)

F. What the Department of Rehabilitation Provided is Irrelevant

Responding to Education Code Section 67300, CCC notes that the section requires that services provided for disabled students by the California Community Colleges must, at a minimum, conform with the quality of those provided by the Department of Rehabilitation to its clients prior to July 1, 1981. CCC then suggests that test claimant may be able to only claim reimbursement for services performed over and above those performed previously by the Department.

In *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, at 835-836, the California Supreme Court found that section 6 of article XIII B was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services. The Department of Rehabilitation is a state agency. Therefore, because Education Code Section 67300 shifts financial responsibility for the education of disabled students from this state agency to community college districts, it calls for those districts to support a "new program" within the meaning of section 6.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Disabled Student Programs and Services 02-TC-22
CLAIMANT: West Kern Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of April 1, 2004 , addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

FAX: (916) 445-0278

AND per mailing list attached

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 4/1/04 , at San Diego, California.

D Bramwell
Diane Bramwell

Commission on State Mandates

Original List Date: 6/18/2003
Updated: 6/19/2003
List Print Date: 08/11/2003
Claim Number: 02-TC-22
Issue: Disabled Student Programs and Services

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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SixTen and Associates
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Exhibit D

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RECEIVED
NOV 0 5 2007
COMMISSION ON
STATE MANDATES

November 01, 2007

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: CSM. 02-TC -22
Disabled Student Program & Services

Dear Ms. Higashi:

Please find enclosed a supplement to the test claim filing, specifically, a history of the Title 5, CCR, sections included in the test claim.

Sincerely,

Keith B. Petersen

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Supplement to the:	)	No. CSM. 02-TC -22
	)	
Test Claim Filed May 23, 2003	)	Disabled Student Program & Services
	)	
	)	History Index for
	)	Title 5, California Code of Regulations
by West Kern Community College District	)	
	)	
	)	Section 54100
	)	Section 55522
	)	Section 55602.5
	)	Section 56000
	)	Section 56002
	)	Section 56004
	)	Section 56006
	)	Section 56008
	)	Section 56010
	)	Section 56020
	)	Section 56022
	)	Section 56026
	)	Section 56027
	)	Section 56028
	)	Section 56029
	)	Section 56030
	)	Section 56032
	)	Section 56034
	)	Section 56036
	)	Section 56038
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)	Section 56044
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)	Section 56060
)	Section 56062
)	Section 56064
)	Section 56066
)	Section 56068
)	Section 56070
)	Section 56072
)	Section 56074
)	Section 56076
)	

REQUEST FOR SUPPLEMENTAL INFORMATION

This supplement to the test claim provides an index and copy of each change to the Title 5, CCR, sections included in the test claim. The Registers cited are attached as Exhibit A. Amended language is underlined (new language) or stricken out (deleted language).

HISTORY OF TITLE 5, CCR, SECTIONS INCLUDED IN THE TEST CLAIM

Register 73-44 Prior History of Chapter 1, §§ 56000 - 56067 (Repealed in 76-51).

Register 76-51 § 56000: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56002: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56004: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56006: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56008: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56010: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56016: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56018: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56020: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56022: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56024: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56026: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56028: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56030: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56032: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56034: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56036: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56038: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56040: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56042: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56044: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56046: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56048: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56052: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56054: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56056: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56058: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56060: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56062: Repealed, added a new section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56064: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56066: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56080: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56082: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56084: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56086: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

§ 56088: Added section as emergency, effective upon filing. Designated inoperative 90 days after filing.

Register 77-12 § 56000: Repealed, added a new section.

§ 56002: Repealed, added a new section.

§ 56004: Repealed, added a new section.

§ 56006: Repealed, added a new section.

§ 56008: Repealed, added a new section.

§ 56010: Repealed, added a new section.

§ 56016: Repealed, added a new section.

§ 56018: Repealed, added a new section.

§ 56019: Added.

§ 56020: Repealed, added a new section.

§ 56022: Repealed, added a new section.

§ 56024: Repealed, added a new section.

§ 56026: Repealed, added a new section.

§ 56028: Repealed.

§ 56030: Repealed, added a new section.

§ 56032: Repealed, added a new section.

§ 56034: Repealed, added a new section.

§ 56036: Repealed, added a new section.

§ 56038: Repealed, added a new section.

§ 56040: Repealed, added a new section.

§ 56042: Repealed, added a new section.

§ 56044: Repealed, added a new section.

	§ 56046: Repealed, added a new section.
	§ 56048: Repealed, added a new section.
	§ 56052: Repealed, added a new section.
	§ 56054: Repealed, added a new section.
	§ 56056: Repealed, added a new section.
	§ 56058: Repealed, added a new section.
	§ 56060: Repealed, added a new section.
	§ 56062: Repealed, added a new section.
	§ 56064: Repealed, added a new section.
	§ 56066: Repealed, added a new section.
	§ 56080: Added.
	§ 56082: Added.
	§ 56084: Added.
	§ 56088: Added.
Register 77-45	§ 56000: Amendment of section and NOTE.
	§ 56040: Amendment of section.
	§ 56042: Amendment of section.
	§ 56058: Amendment of section.
	§ 56080: Amendment of section.
Register 79-46	§ 56040: Amendment of section.
	§ 56042: Amendment of section.
	§ 56044: Amendment of section.

1 § 56082: Amendment of subsection (c).

2 **Register 83-18** § 56000: Amendment of section and NOTE.

3 § 56002: New NOTE section.

4 § 56004: Amendment of section.

5 § 56006: New NOTE section.

6 § 56008: Amendment of subsection (c).

7 § 56010: New NOTE section.

8 § 56016: Amendment to section.

9 § 56018: New NOTE section.

10 § 56019: New NOTE section.

11 § 56020: New NOTE section.

12 § 56022: New NOTE section.

13 § 56024: New NOTE section.

14 § 56026: New NOTE section.

15 § 56030: New NOTE section.

16 § 56032: New NOTE section.

17 § 56034: New NOTE section.

18 § 56036: Amendment of section.

19 § 56038: New NOTE section.

20 § 56040: Repealed.

21 § 56042: Repealed.

22 § 56044: Amendment of NOTE section.

1 § 56046: New NOTE section.

2 § 56048: Amendment of section and new NOTE.

3 § 56052: Amendment of section.

4 § 56054: New NOTE section.

5 § 56056: New NOTE section.

6 § 56058: Amendment of section.

7 § 56060: New NOTE section.

8 § 56062: New NOTE section.

9 § 56064: New NOTE section.

10 § 56066: Amendment of Section.

§ 56080: New NOTE section.

12 § 56082: Amendment of section.

13 § 56084: New NOTE section.

14 § 56088: Amendment of section.

15 **Register 88-16** § 56000: Repealed, added a new section.

16 § 56002: Repealed, added a new section.

17 § 56004: Repealed, added a new section.

18 § 56006: Repealed, added a new section.

19 § 56008: Repealed, added a new section.

20 § 56010: Repealed, added a new section.

21 § 56012: Added.

§ 56014: Added.

1 § 56016: Repealed, added a new section.

2 § 56018: Repealed, added a new section.

3 § 56019: Repealed.

4 § 56020: Repealed, added a new section.

5 § 56022: Repealed, added a new section.

6 § 56024: Repealed, added a new section.

7 § 56026: Repealed, added a new section.

8 § 56028: Added.

9 § 56030: Repealed, added a new section.

0 § 56032: Repealed, added a new section.

1 § 56034: Repealed, added a new section.

2 § 56036: Repealed, added a new section.

3 § 56038: Repealed, added a new section.

14 § 56040: Added.

15 § 56042: Added.

16 § 56044: Repealed, added a new section.

17 § 56046: Repealed, added a new section.

18 § 56048: Repealed, added a new section.

19 § 56050: Added.

20 § 56052: Repealed, added a new section.

21 § 56054: Repealed, added a new section.

22 § 56056: Repealed, added a new section.

1		§ 56058: Repealed, added a new section.
2		§ 56060: Repealed, added a new section.
3		§ 56062: Repealed, added a new section.
4		§ 56064: Repealed, added a new section.
5		§ 56066: Repealed, added a new section.
6		§ 56068: Added.
7		§ 56070: Added.
8		§ 56072: Added.
9		§ 56074: Added.
10		§ 56076: Added.
		§ 56078: Added.
12		§ 56080: Repealed, added a new section.
13		§ 56082: Repealed, added a new section.
14		§ 56084: Repealed, added a new section.
15		§ 56086: Added.
16		§ 56088: Repealed, added a new section.
17	**Register 91-23**	§ 55602.5: Added.
18	**Register 91-31**	§ 56062: Editorial correction of printing error in first paragraph.
19		§ 56064: Editorial correction of printing error.
20	**Register 91-43**	§ 55602.5: Editorial correction of printing error.
21	**Register 92-12**	§ 54100: Added.
	Register 93-06	§ 56000: Amendment of first and second paragraphs, repealer of

subsections (a) and (f), amendment of newly designated subsections (a)-(d), new subsection (e), and amendment of NOTE.

§ 56002: Repealed, added a new section.

§ 56004: Repealed, added a new section.

§ 56005: Added.

§ 56006: Repealed, added a new section.

§ 56008: Repealed, added a new section.

§ 56010: Repealed, added a new section.

§ 56012: Repealed.

§ 56014: Repealed.

§ 56016: Repealed.

§ 56018: Repealed.

§ 56020: Amendment and repositioning of article 2 heading. Repealed, added a new section.

§ 56022: Amendment of section heading, section and NOTE.

§ 56024: Repealed.

§ 56026: Amendment of section heading, section and NOTE.

§ 56027: Added.

§ 56028: Amendment of section heading, section, and NOTE.

§ 56029: Added.

§ 56030: Amendment and repositioning of article 3 heading. Repealed, added a new section.

1 § 56032: Repealed, added a new section.

2 § 56034: Repealed, added a new section.

3 § 56036: Repealed, added a new section.

4 § 56038: Repealed, added a new section.

5 § 56040: Repealed, added a new section.

6 § 56042: Repealed, added a new section.

7 § 56044: Repealed, added a new section.

8 § 56046: Amendment of section heading, section, and NOTE.

9 § 56048: Repealed, added a new section.

10 § 56050: Repealed, added a new section.

§ 56052: Amendment of section and NOTE.

12 § 56054: Repealed, added a new section.

13 § 56056: Repealed.

14 § 56058: Repealed.

15 § 56060: Amendment and repositioning of article heading.

16 Repealed, added a new section.

17 § 56062: Repealed, added a new section.

18 § 56064: Repealed, added a new section.

19 § 56066: Repealed, added a new section.

20 § 56068: Repealed, added a new section.

21 § 56070: Repealed, added a new section.

§ 56072: Repealed, added a new section.

§ 56074: Repealed, added a new section.

§ 56076: Repealed, added a new section.

§ 56078: Repealed.

§ 56080: Repealed.

§ 56082: Repealed.

§ 56084: Repealed.

§ 56086: Repealed.

§ 56088: Repealed.

Register 95-22 § 55602.5: Editorial correction of HISTORY 2.

§ 55603: Editorial correction of HISTORY 2.

Subsequent Registers: There may be changes to the regulations after the date the test claim was filed, which are not included.

1 CERTIFICATION

2 By my signature below, I hereby declare, under penalty of perjury under the laws
3 of the State of California, that the information in this document is true and complete to
4 the best of my own knowledge or information or belief, and that the attached regulations
5 are true and correct copies of documents from archives of a recognized law library.

6 EXECUTED this 31 day of October 2007, at Sacramento, California

7 _____

8 FOR THE TEST CLAIMANT

9 Keith Petersen, President

SixTen and Associates

11 ATTACHMENT

12 Exhibit A Title 5, CCR Registers

§ 56000	§ 56030	§ 56044	§ 56055	§ 56066
§ 56001	§ 56031	§ 56045	§ 56056	§ 56067
§ 56010	§ 56032	§ 56046	§ 56057	
§ 56011	§ 56033	§ 56047	§ 56058	
§ 56012	§ 56034	§ 56048	§ 56059	
§ 56020	§ 56035	§ 56049	§ 56060	
§ 56021	§ 56036	§ 56050	§ 56061	
§ 56022	§ 56040	§ 56051	§ 56062	
§ 56023	§ 56041	§ 56052	§ 56063	
§ 56024	§ 56042	§ 56053	§ 56064	
§ 56025	§ 56043	§ 56054	§ 56065	

SUBCHAPTER 4. STUDENTS 21 YEARS OF AGE OR OLDER

CHAPTER 1. EDUCATIONALLY HANDICAPPED MINORS

SUBCHAPTER 1. GENERAL PROVISIONS

56000. Scope of Chapter. This chapter applies only to special education classes and programs for educationally handicapped students for which allowances may be made under Education Code Section 18102.6.

NOTE: Authority cited for Chapter 1: Sections 193, 197, 6756, 6757 and 6758, Education Code. Reference: Ch. 7.1 (commencing with Sec. 6750), Div. 6, Education Code.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56001. Definitions. For the purposes of this chapter:

(a) An "educational handicap" means a marked learning problem described in functional terms sufficient to indicate the specific characteristics of the student's problem and to suggest the nature of an educational approach to this problem.

The learning problem as stated in Education Code Section 6750 shall be such that the student cannot receive the reasonable benefit of ordinary educational programs and does not qualify the student:

(1) As a physically handicapped student defined in Education Code Sections 6801 and 6802.

(2) As a mentally retarded student defined in Education Code Sections 6901, 6902, and 6903.

(b) "Class" means any special education class for educationally handicapped students described in Education Code Section 6750 that meets the general and specific standards set forth in this chapter and is further qualified by Section 56030 of this chapter.

(c) "Admissions Committee" means the admission committee specified in Education Code Section 6755(a) and Subchapter 2 (commencing with Section 56010) of this chapter (hereinafter referred to as the "Committee"). The membership shall include a designated administrator, an experienced special education instructor, a college nurse and a college psychologist. In the case of the nurse and psychologist, if the college does not have persons filling such positions, appropriate persons with similar responsibilities may be designated to serve on the committee. The committee shall utilize the services of other qualified persons as the committee may require or request.

(d) "Transfer" means enrolling the student in any of the following:

(1) A special class authorized by Education Code Section 6751.

(2) A regular class.

(3) Another special program authorized by law.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

SUBCHAPTER 2. THE ADMISSIONS COMMITTEE

Article 1. General Provisions

56010. Admissions Committee. The chief administrative officer of the Community College district shall designate members of an admissions committee, which shall include, but not be limited to, the persons specified in Education Code Section 6755(a).

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56011. Recommendations. Admissions recommendations shall be made by all members of the committee specified in Education Code Section 6755(a) and such other specialists as necessary.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56012. Capacity. No member of the committee shall serve in more than one capacity.

History: 1. Repealer of former Section 56012 and renumbering from Section 56013 filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

Article 2. Powers

56020. Standards for Admission. The admissions committee shall make an evaluation of each individual student referred to it by making a thorough study of the records and reports together with all other available information.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56021. Written Record. A confidential written record of the committee's study shall be filed with the chief administrative officer of the college district. The record shall include all of the following: Education Code Sections 6755(a) and 6755.1.

(a) The committee's findings regarding the nature and extent of the student's educational handicaps and the relationship of those handicaps to his educational needs.

(b) The committee's findings regarding the ability of the student to profit from participation in a special class or program.

(c) The committee's decision regarding eligibility of the student in the most appropriate class or program.

(d) The name and role of the members present at the meeting of the committee where recommendations are made.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56022. Trial Admission. Whenever the recommendation of the committee for admission of a student is not unanimous, any admission is a trial admission only. Those persons enrolled for a trial admission shall be re-evaluated by the committee every six months. Assignments or reassignments shall be made in accordance with specific guidelines and recommendations of the admissions committee. (Education Code Section 6757)

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56023. Diagnostic Classes. Whenever a sizeable number of students is referred to the committee for whom the committee has sufficient information to determine eligibility of the student for special education, and does not have sufficient information to complete its determination of the most appropriate program or special education provisions, the administrative head of a college may designate one special class as a diagnostic class for the purpose of providing an ongoing diagnosis and evaluation of such students. A diagnostic special class shall meet the following requirements:

(a) It is one of the special classes for educationally handicapped students provided under Education Code Section 6751.

(b) It meets the requirements of this chapter.

(c) It is taught by an appropriately credentialed instructor.

(d) No such student remains in the diagnostic class for more than six months.

(e) A student is re-evaluated by the committee at the end of 90 days.

(f) The class has adequate education, psychological, and student personnel consultation services.

History: 1. Repealer and new section filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56024. Diagnostic Classes.

History: 1. Repealer filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56025. Requirements for Diagnostic Classes.

History: 1. Repealer filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

SUBCHAPTER 3. CRITERIA FOR SPECIAL CLASSES AND PROGRAMS

56030. General Criteria. Every educationally handicapped student's class and programs shall meet the following general standards:

(a) Criteria described in Education Code Section 6751.

(b) A special class (Education Code Section 6751(a)) shall meet the same as for regular college classes. Each clock hour by the instructor, as defined by Education Code Section 11480, constitutes a day of attendance.

(c) Learning disability groups (Education Code Section 6751(b)) are for students scheduled for small group instruction given by a qualified instructor. One to four students in such a group receive credit for attendance on the basis of one unit (3 class hours) of attendance for each 60 minutes of instruction.

(d) Specialized consultation (Education Code Section 6751(c)) is provided instructors, counselors, and supervisors concerning learning disabilities of students and any special services they may require.

(1) Specialists give consultation in subject areas such as education, speech, social work, medicine and psychology.

(2) Consultation relates to instruction, counseling, supervision, and in-service training of staff.

(3) Consultation allowances are only for persons other than district personnel concerned with the program.

(e) Home and hospital instruction (Education Code Section 6751(d)) shall be provided for students unable to function in college or to attend classes. Such students shall receive at least 3 class hours of instruction per week.

History: 1. Amendment filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56031. Appropriate Class Size and Maximum Enrollment. The maximum enrollment for special classes and learning disability groups are prescribed by Education Code Section 6751.1.

(a) Instructors must be provided on a proportionate basis, depending on the number of students in learning disability groups.

(b) Deviations from these stated maximums may be made for all or part of an academic year by prior written approval of the Chancellor.

History: 1. Amendment filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56032. Specific Standards for a Special Day Class.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56033. Specific Standards for a Learning Disability Group.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56034. Specific Standards for Home and Hospital Instruction.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56035. Specific Standards for Specialized Consultation.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56036. Appropriate Class Size and Maximum Enrollment Limits.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

SUBCHAPTER 4. ELIGIBILITY

56040. Eligibility. A student who has one or more of the following characteristics is eligible for admission to a special class:

(a) His learning and psychological problems are specific learning disabilities in the psychological processes involved in understanding or using spoken or written language.

(b) He exhibits a significant discrepancy between ability and achievement, but may be expected to benefit from a program designed to meet his particular problems.

(c) The Admissions Committee decides the student's handicap is of such a nature and extent that he may be expected to participate in a class designed to meet his particular problems.

(d) The Admissions Committee finds the student to have serious communication problems as distinguished from mental retardation as defined by Education Code Sections 6901, 6902 and 6903.

(e) The student's learning problems are associated with a serious emotional disturbance to the degree that he cannot participate in regular classes. One or more of the following characterstics may be exhibited to a marked degree:

(1) Inability to learn that cannot be explained by intellectual, sensory, or health factors.

(2) Inability to maintain satisfactory relationships with peers.

(3) Inappropriate behavior under normal circumstances.

(4) A pervasive depression or unhappiness.

(5) A tendency to develop psychosomatic symptoms associated with school or personal problems.

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. New section filed 11-2-73, effective thirtieth day thereafter (Register 73, No. 44).

56041. Standards for Student Identification. A student described in Section 56046 shall be identified by individual evaluation as called for by Education Code Section 6755(a).

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. New section filed 11-2-73, effective thirtieth day thereafter (Register 73, No. 44).

56042. Educational Case Study. An educational case study of the student includes:

(a) Educational history and progress of the student and specific measurements of his levels of academic functioning.

(b) Specific steps taken to assist the student in areas of his educational handicap and the results of such assistance.

(c) Reason for referral.

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. New section filed 11-2-73, effective thirtieth day thereafter (Register 73, No. 44).

56043. Psychological Case Study. A psychological case study of the student includes:

(a) Identification of specific learning disabilities and relationship of these disabilities to school achievement. Specific handicapping conditions must be described in functional terms.

(b) Evidence of significant discrepancy between ability and achievement and a prognosis for reduction of such discrepancy.

(c) Recommendations regarding methods and services from which a student may be expected to profit in the program.

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. New section filed 11-2-73, effective thirtieth day thereafter (Register 73, No. 44).

56044. Health Study.

(a) Review by a college nurse or licensed physician of the student's health record and status, including results of visual and auditory screening.

(b) For every student whose health review indicates a possibility of related health problems, a functional evaluation of the physical, neurological and emotional basis for the student's learning problems by a physician.

NOTE: Authority cited: Sections 192, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. New section filed 11-2-73, effective thirtieth day thereafter (Register 73, No. 44).

56045. Re-evaluation. An annual examination and evaluation shall be made of the educational progress of each student enrolled in a special class. The administrative head of the college district shall specify the personnel and methods to be used in the examination and maintain a written statement of such procedures. The procedures shall provide for consistency in the specific measurements used in determining academic progress. A confidential written report shall be made of the examination and evaluation of each student and a copy thereof added to the student's case study file.

History: 1. Repealer and new section filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56046. Retention. A student failing to make appropriate college adjustment or satisfactory educational progress shall be considered for removal from the program. The Admissions Committee shall make recommendations concerning appropriate student disposition.

History: 1. Repealer and new section filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56047. Eligibility.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56048. Eligibility.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56049. Eligibility.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

SUBCHAPTER 5. THE INSTRUCTIONAL PROGRAM

56050. Content of Special Classes. The content of any special class shall contain the following provisions:

(a) A content designed to fit developmental and learning needs of each student as determined and reported by the committee. Adjustments are made in the content as the student's progress requires.

(b) An amelioration of the learning problems determined for each student is emphasized by giving specialized instruction in the areas of disability.

(c) Adaptations in methodology are made in the presentation of instruction, in the sensory modalities employed, and in the performance required of each student, whenever such adaptations will enhance learning potential.

NOTE: Authority cited: Sections 198, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. Repealer of Subchapter 5 (§§ 56080, 56081, 56082) filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).
2. Repealer and new section filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56051. Instructor Qualifications. An instructor may be assigned to give the instruction, as specified in Education Code Section 6751, who possesses a valid credential authorizing teaching of special education at the Community College level and who, in the judgment of the chief administrative officer of the college district, possesses the necessary specific preparation, experience, and personal attributes.

History: 1. Repealer and new section filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56052. Program Supervision. A college district shall provide proper program supervision. Supervision may be provided by employees of the district or furnished through contracts with other districts or county superintendent of schools.

History: 1. Repealer and new section filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56053. Health Study.

History: 1. Repealer filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56054. Other Studies or Reports.

History: 1. Repealer filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56055. Standards for Identification of Students Described in Sections 56048 and 56049.

History: 1. Repealer filed 11-2-78; effective thirtieth day thereafter (Register 78, No. 44).

56056. Studies Described in Sections 56051 and 56054.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56057. Psychological Case Study.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56058. Medical Study.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56059. Adequacy of Program.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56060. Program Approval. The notice of intention required by Education Code Section 6754 to initiate or amend a program for educationally handicapped students shall be submitted to the Chancellor for approval prior to beginning the program.

History: 1. Repealer and new section filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56061. Waivers. Waivers shall obtain prior authorization of the Chancellor:

(a) A college district maintaining a program for educationally handicapped students shall not enroll at any given time more than 2% of total district enrollment in such program(s) except as permitted by approval of the Chancellor. (Education Code Section 6752.)

(b) Extension of an existing program in any fiscal year by a college district which exceeds 120 percent of the enrollment at the end of the sixth college month of the prior year shall require prior approval of the Chancellor (Education Code Section 6752.1) before any state apportionments are made.

History: 1. Repealer and new section filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56062. Program Evaluation. Community Colleges shall conduct annual written evaluations of any programs they provide for educationally handicapped students. These evaluations shall be available for public review and furnished upon request to the Chancellor. Such evaluations shall include information concerning student progress, specific information on classes, groups and programs, information on training and expertise of staff, physical facilities, materials and equipment utilized and stated program objectives used in evaluation.

History: 1. Repealer and new section filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56063. Re-evaluation, Retention, and Transfer.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56064. Student Report.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56065. Summary of Re-evaluation Reports.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56066. Unsatisfactory Student.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

56067. Further Study and Evaluation.

History: 1. Repealer filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

SUBCHAPTER 5. THE INSTRUCTIONAL PROGRAM

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. Repealer of Subchapter 5 (§§ 56080 through 56082) filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

SUBCHAPTER 6. APPROVALS

NOTE: Authority cited: Sections 193, 197, 6756, 6757, 6758, Education Code. Reference: Chapter 7.1 (commencing with Section 6750) of Division 6, Education Code.

History: 1. Repealer of Subchapter 6 (§§ 56090, 56091, 56092) filed 11-2-73; effective thirtieth day thereafter (Register 73, No. 44).

§ 56000	§ 56026	§ 56048	§ 56084
§ 56002	§ 56028	§ 56052	§ 56086
§ 56004	§ 56030	§ 56054	§ 56088
§ 56006	§ 56032	§ 56056	
§ 56008	§ 56034	§ 56058	
§ 56010	§ 56036	§ 56060	
§ 56016	§ 56038	§ 56062	
§ 56018	§ 56040	§ 56064	
§ 56020	§ 56042	§ 56066	
§ 56022	§ 56044	§ 56080	
§ 56024	§ 56046	§ 56082	

CHAPTER 1. HANDICAPPED PROGRAMS AND SERVICES

Article 1. General

56000. Scope of Chapter. This chapter applies to special education services and programs for handicapped students for which allowances may be made to Community College districts, pursuant to Education Code Sections 18151 and 25506.5.

NOTE: Authority cited for Chapter 1 (Sections 56000–56088, not consecutive): Sections 193, 18151 and 25506.5, Education Code. Reference: Sections 18151 and 25506.5, Education Code.

History: 1. Repealer of Chapter 1 (Sections 56000–56062) and New Chapter 1 (Sections 56000–56088, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51).

56002. Support Services and Programs. Support services and programs for students will focus on integrating them into the regular college programs and ultimate placement in economic or social areas in the community. Such services or programs shall not be provided if or when they are not facilitating measurable progress. These services and programs may include, but need not be limited to: assessment of basic skills and potential, prescriptive planning and instruction, support personnel and equipment, specific purpose counseling on group or individual basis, work preparation or training and job placement. In addition to support services and programs to meet the exceptional needs of students, all activities and services available to the regular college community shall be available to students with disabilities commensurate with their specific needs. Before a student is assigned to special classes or programs, the college, in concert with the student, shall determine that support services in regular classes are not adequate to meet the particular student's needs.

56004. Participation. Participation by a student in any supportive services or programs shall not preclude participation in any other service or program which may be offered by the college.

Participation in any aspect of the supportive services and programs shall be voluntary. Each Community College district shall employ reasonable means of informing the general college population as to the availability of supportive services and programs.

The student shall not continue participation in services or programs beyond the time when such services and programs are required to meet the educational needs of the individual.

56006. Student Rights. Students aided under this chapter are guaranteed freedom of choice, equal access to all activities and courses offered by the colleges, the right to privacy, the right to review personal information and records, and all other rights available to the general college population.

No program or course shall be denied a student without due consideration of the student's potential and abilities and the additional assistance provided by adaptive or sensory aids or other supportive services or programs.

56008. Regional, State and Federal Coordination. Faculty and staff from the districts with competencies in specific areas may be

requested by the Chancellor's Office to assist in management and accountability tasks, including processing appropriate data for required reports.

(a) Data for regional, state and federal needs assessments and resource surveys pertaining to direct excess cost services and programs shall be requested from various colleges and districts, and shall be provided by their respective administrators.

(b) As a means of enhancing network communication and coordination, the Chancellor and Director of Rehabilitation shall develop such task forces as they jointly deem necessary to implement the provisions of this chapter.

(c) The cost of activities specified in this section may be charged to Program Developmental Services as defined in Section 56026(f).

56010. Regular Average Daily Attendance (ADA) Funds. Student services and programs shall not be entitled to funds in excess of those needed to deliver such services and programs. The state allocation provided by law for direct excess costs is intended to only provide the districts reimbursement for such costs up to $785.00 for each student served.

Direct excess cost funds as provided for in this chapter shall be approved only after all revenue generated from regular average daily attendance (ADA) has been completely utilized.

The average daily attendance (ADA) generated by students in a special class or program must be expended for that class or program to help pay for the direct costs incurred for lowered instructor-student ratios or other support services.

Article 2. Definitions

56016. Handicapped Students. Handicapped students are persons with exceptional needs enrolled at a Community College who, because of a professionally verified physical, communication or learning disability, cannot benefit from the regular education classes, activities and services provided by the Community College without specific additional support services and programs. Wherever in this chapter the term "students" is used, such reference shall be deemed to mean handicapped students.

56018. Severely Disabled Student. A severely disabled student is a person who, because of a physical, communication or learning disability, cannot achieve full academic, vocational or social potential without the use of special classes or programs or extra high cost support services. No student shall be designated as severely disabled until there is on file a statement from a physician, psychologist, audiologist, speech pathologist or other appropriate professional which identifies the disability, describes the degree and progression factor, and describes the limiting effects of the disability.

56020. Physical Disability. Physical disability means a disability attributable to vision, mobility, orthopedic or other health impairments.

(a) **Visual Limitation** means blindness or partially sighted as defined below.

Those identified as having visual limitations for the purposes of funding, shall be able to effectively utilize one or more of the special supportive services enumerated in Sec453n 56030 of this chapter.

(1) **Blindness** is visual acuity in the better eye, after correction, that is 20/200 or less; or visual loss so severe that it no longer serves as a major channel for learning.

(2) **Partially sighted** is visual acuity of 20/70 or less in the better eye, after correction, and vision which is capable of serving as a major channel for learning.

(b) **Mobility and Orthopedic Limitation** means a serious limitation in locomotion or motor functions which indicate a need for one or more of the services or programs as described in Sections 56030 and 56032 of this chapter.

(c) **Other Health Limitation** means a serious dysfunction of a body part or process which necessitates the use of one or more of the supportive services or programs described in Sections 56030 and 56032 of this chapter.

56022. Communication Disability. Communication disability means a limitation in the processes of speech, language or hearing.

(a) **Hearing Limitation** means a functional loss in hearing which:

(1) Impedes the learning process or acquisition of speech and language; and,

(2) Which necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter; and,

(3) Which is not inconsistent with the following: A mild to moderately hearing impaired person is one whose average unaided hearing loss in the better ear is 35 to 54 db in the conversational range or average aided hearing loss in the better ear is 20 to 54 db. A severely hearing impaired person is one whose average hearing loss in the better ear (unaided or aided) is 55 db or greater in the conversational range or a person with one of the following:

(A) Speech discrimination of less than 50%.

(B) Medical documentation of rapidly progressive hearing loss.

(b) **Speech Limitation** means an impairment in the quality, accuracy, intelligibility or fluency of producing the sounds that comprise spoken language.

56024. Learning Disability. Learning Disability refers to students with exceptional learning needs who have neurological, biochemical or developmental limitations. These limitations result from atypical perception, cognition or response to environmental stimuli, manifested by inadequate ability to manipulate educational symbols in an expected manner. Typical limitations include inadequate ability to listen, speak, read, write, spell, concentrate, remember or do computation. These students demonstrate a significant discrepancy between their achievement and potential levels because of one or more of the following:

(a) **Neurological Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of genetic aberrations; disease; birth complications; traumatic brain insult; or poor nutrition. These conditions may range from mild to severe, and are associated with deviations of the function of the central nervous system.

(b) **Biochemical Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of excesses or depletions of hormonal, neurochemical or metabolic substances associated with diminished motoric, perceptual or cognitive capabilities.

(c) **Developmental Limitation** refers to the exceptional learning needs of students who may or may not possess average academic potential. Their learning needs are a result of delayed educational development, incurred through maturational delays and/or any combination of limitations described in subsections (a) or (b) above.

56026. Direct Excess Costs. Direct excess costs are categorical expenditures by Community College districts as defined in subsections (a) through (f) below, which are expenses incurred as a result of meeting the exceptional needs of students.

(a) **Special facilities costs** are expenditures for space, equipment or furniture acquired or modified by the district and used by the student.

(b) **Special educational material costs** are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) **Educational assistance costs** are expenditures for specific persons employed and support resources used to assist students.

(d) **Mobility assistance costs** are expenditures for persons or equipment provided to assist handicapped students to move about the educational setting.

(e) **Transportation costs** are expenditures for persons, equipment, modifications or related costs for transporting students for educational purposes.

(f) **Program developmental services costs** are expenditures for college, regional and statewide activities for staff and program development which are approved by the Chancellor's Office and designed to implement the provisions of this chapter.

56028. Indirect Costs. Indirect costs, such as indirect administrative costs, parking areas, utilities, office supplies, office furniture, regular campus space, shall not be entitled to funding pursuant to Section 18151 of the Education Code.

56030. Supportive Services. Supportive services are those services available to students with physical, communication or learning limitations which are in addition to the regular services provided to all students. Such services enable students to participate in the regular activities, programs and classes offered by the college. They may include, but need not be limited to, specific purpose counseling; special registration assistance; college orientation; specific assessment for academic, career or vocational planning and placement; special facilities; specific educational material; mobility, housing or transportation assistance; developing and maintaining attendant, reader and interpreter rosters; on-campus aides; equipment loan and repair; and other services appropriate to the student's particular needs as described in Sections 56020 through 56024 of this chapter.

56032. Special Classes or Programs. Special Classes or Programs means prescribed special instruction for students with specific educational needs. Such classes and programs may also be designed:

(a) For severely disabled students who cannot initially attend regular classes.

(b) To provide preparatory or supportive instruction to enable students to participate in regular activities.

56034. Prescriptive Planning and Instruction. Prescriptive Planning and Instruction is an individual educational plan developed with the student which details those special classes and programs requested by the student, and which is designed to meet the specific needs of the student. The delivery of supportive services alone does not require developing a prescriptive plan.

56036. Cooperative Agreements. Cooperative Agreements are agreements among Community Colleges or districts and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with exceptional needs.

56038. Advocacy. Advocacy is activity directed toward establishing equal educational opportunity for students with exceptional needs.

56040. Allocation. Allocation is the total amount available in a fiscal year for all Community College districts in the State in accordance with the formula specified in Section 17303.6(b) of the Education Code.

56042. Apportionment. An Apportionment is funds paid to a district pursuant to Section 18151 of the Education Code, to reimburse monies spent or encumbered on approved services or programs.

56044. Handicapped Student Enrolled. A Handicapped Student Enrolled is a handicapped student who is enrolled in three or more contact hours per week or three or more units of approved Coordinated Instruction Systems (CIS) classes or programs.

56046. Comprehensive Plan. Comprehensive Plan means the proposed structure of services and programs for each college submitted by the district for approval to the Chancellor's Office pursuant to Section 56064 of this chapter.

Article 3. Administration

56048. Personnel. The designated certification requirements for faculty and staff shall be commensurate with the Community College certification requirements.

(a) The following positions shall be established on a statewide basis for the accountability and management of services and programs:

(1) **State Specialist.** One or more State Specialists shall be employed by the Chancellor's Office to effect statewide coordination and facilitate services and programs for students with exceptional needs.

(2) **District Coordinator.** One or more coordinators shall be designated by the district to coordinate activities in handicapped programs.

(3) **College Specialist.** Each participating Community College shall designate one or more certificated employees as College Specialists to plan, develop, and coordinate; and who may also administer services and programs for students.

(b) Depending upon the nature of services and programs needed by a Community College or Community College District, the following positions may be established:

(1) **Instructional or Counseling Specialist.** Each participating Community College or Community College district may designate one or more Instructional Specialists who shall be certified instructors or counselors with specific competency in the education of adult individuals with exceptional needs.

(2) **Other Support Staff.** Each Community College or Community College District may employ Other Support Staff, which includes, but need not be limited to, paraprofessionals, peer counselors, student assistants, instructional and non-instructional aides, interpreters and other "specially assigned assistants."

56052. Student/Instructor Ratio. By July 1, 1977, the Chancellor's Office, after consultation with college staff and students, shall establish student-instructor ratios for special classes addressing the specific needs of students. Deviations from these prescribed ratios shall require prior written approval from the Chancellor's Office.

56054. In-Service Training. Each college shall develop a plan for relevant and effective in-service training for all college personnel involved in meeting the special needs of students.

56056. Advisory Committee. Each college or district which provides services or programs for which the district receives direct excess cost funds shall establish an advisory committee. The advisory committee shall be composed of representatives of appropriate agencies, consumer groups, students, and any other appropriate organizations or individuals as determined by program needs.

56058. Planning. The Community College District Master Plan, as provided for in Section 55402 of this Part, shall include planning for supportive services and programs for students with exceptional needs. Space and capital outlay needs for supportive services shall be incorporated into the plan for capital construction provided for in the Education Code, Section 20066.

56060. Program Placement and Individualized Educational Planning. (a) Assessment of the student's educational competency and needs shall be made by the appropriately certified special instructor in conjunction with the student and other appropriate college staff.

If requested by the student, all prescriptive, individualized plans shall be reviewed and amended as needed each semester or quarter by a designated specialist with expertise in the appropriate areas of physical, communication and learning disability.

(b) Each individual educational plan should specifically include:

(1) The academic and career assessment tools, if any, utilized to identify the competency level of the student upon enrollment.

(2) A clear description of the courses, programs or activities the student will now engage in to improve academic or career competency.

(3) Functional recommendations for the use of appropriate instructional materials and equipment.

(4) A clear description of monitoring devices or procedures which assess improvement of competency based on the education program design being implemented.

(5) Evidence of measurable improvement at the conclusion of each semester in which the student is enrolled.

(c) Academic and career assessment is not a prerequisite to the delivery of supportive services such as parking, equipment loan, transportation or mobility assistance.

56062. Enrollment and Budget Surveys. The administrator responsible for comprehensive planning for each college shall, upon request, submit to the Chancellor's Office, on forms to be provided, enrollment data, projected expenditures, income for supportive services and programs, and such other pertinent data as required. Such information shall be used to determine the state's direct excess cost balance, and to inform districts of such balance so that they may plan for a potential allocation deficit.

56064. College Comprehensive Plan. (a) Comprehensive annual plans shall be prepared separately by each college to be submitted by its district to the Chancellor and Director of Rehabilitation. Such plans shall be submitted on or before May 1st of each year, or at such other time during the fiscal year as designated by the Chancellor.

(b) Each plan shall include, but need not be limited to, the following components:

(1) Statement of philosophy and needs
(2) Population to be served
(3) Proposed services and programs
(4) Program goals and objectives
(5) Proposed activities to meet those objectives
(6) A plan for coordination of college resources
(7) A plan for in-service training
(8) A statement of the evaluation plan
(9) A plan for interagency coordination of resources
(10) Budget summary

56066. Evaluation. (a) **District and College Evaluation.** On or before July 15th, or as otherwise directed by the Chancellor, each college shall submit an evaluation of its total program for the fiscal year to the Chancellor's Office and to the Director of Rehabilitation. Forms for the evaluation shall be developed and provided by the Chancellor's Office. The components of this evaluation shall include, but need not be limited to:

(1) A description of each program or service provided.

(2) The number of students benefiting from each service or program.

(3) Information and supporting data indicating the extent to which each specific program objective, as set forth in the comprehensive plan, was achieved.

(4) Explanations of discrepancies between objectives and achievements.

(5) Total expenditures for each program or service provided.

(6) Characteristics of the population served, including age, sex, minority status, and an unduplicated count of disability conditions.

(b) **Statewide Evaluation.** Each Community College district or college utilizing direct excess cost funds shall participate in a statewide evaluation of the effectiveness of services and programs authorized by this chapter.

Article 4. Funding

56080. Scope. The provisions of this article apply to the budget requirements for approval of comprehensive college plans and for expenditures made on the basis of plans approved for direct excess cost pursuant to Section 18151 of the Education Code.

56082. Application for Direct Excess Cost Funds. (a) Application by districts for Direct Excess Cost Funds shall be on the forms designated by the Chancellor, reported at the same time as regular average daily attendance (ADA) apportionment reports after census week. Reimbursement will be made to the district in the same manner as regular apportionment.

(b) Up to $785 per student served is allowable for reimbursement to a district for direct excess costs as authorized by Section 56026 of this chapter.

(c) Exception. For high cost services and particular programs for the severely disabled, upon recommendation of the Director of Rehabilitation, on forms to be provided, the Chancellor may allocate, as available, amounts up to $1,570.00 per student served per fiscal year to provide for direct excess costs for such services and programs. Allocations in excess of seven hundred eighty five ($785) per student served shall be provided only to programs identified by the Chancellor and Director of Rehabilitation after consideration of at least the following factors:

(1) Projected fiscal costs of the comprehensive plan

(2) The number of students served according to their category of disability

(3) The number of severely disabled students as included in the count in (2)

(4) The student instructor ratio

(5) Identification of the specific high cost expenditures relating to the severely disabled students

56084. Other Support Funds. Districts applying for direct excess cost funds must certify on a form supplied by the Chancellor that reasonable efforts have been made to secure federal or state funds other than short-term grants; but net costs as submitted are in addition to other federal or state funds received.

56086. Withholding of Apportionment. If the Chancellor determines that the current expense of support services and programs for students with exceptional needs is not equal to, or in excess of, the cost per average daily attendance (ADA) for regular students, the amount of such deficiency shall be withheld from State apportionment in the succeeding fiscal year.

56088. Applications Exceeding State Allocations. In the event that applications for apportionment exceed state funds statutorily available, the Chancellor shall apportion the statutorily available funds among Community College districts applying for such funds in accordance with guidelines established by the Chancellor and the Director of Rehabilitation, and approved by the Board of Governors.

CHAPTER 1. HANDICAPPED PROGRAMS AND SERVICES

Article 1. General

56000. Scope of Chapter. This chapter applies to special education services and programs for handicapped students for which allowances may be made to Community College districts, pursuant to Education Code Sections 18151 and 25506.5.

NOTE: Authority cited for Chapter 1 (Sections 56000–56088, not consecutive): Sections 193, 18151 and 25506.5, Education Code. Reference: Sections 18151 and 25506.5, Education Code.

History: 1. Repealer of Chapter 1 (Sections 56000–56062) and New Chapter 1 (Sections 56000–56088, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of Chapter 1 (Sections 56000–56088, not consecutive) and new Chapter 1 (Sections 56000–56088) filed 3-15-77; effective thirtieth day thereafter (Register 77, No. 12).

56002. Support Services and Programs. Support services and programs for students will focus on integrating them into the regular college programs or placement in economic or social areas in the community. Such services or programs shall not be provided if or when they are not facilitating measurable progress. These services and programs may include, but need not be limited to: assessment of basic skills and potential, prescriptive planning and instruction, support personnel and equipment, specific purpose counseling on group or individual basis, work preparation or training and job placement. In addition to support services and programs to meet the exceptional needs of students, all activities and services available to the regular college community shall be available to students with disabilities commensurate with their specific needs. Before a student is assigned to special classes or programs, the college, in concert with the student, shall determine that support services in regular classes are not adequate to meet the particular student's needs.

56004. Participation. Participation by a student in any supportive services or programs shall not preclude participation in any other service or program which may be offered by the college.

Participation in any aspect of the supportive services and programs shall be voluntary. Each Community College district shall employ reasonable means of informing the general college population as to the availability of supportive services and programs.

The student shall not continue participation in services or programs beyond the time when such services and programs are required to meet the educational needs of the individual.

56006. Student Rights. Students aided under this chapter are guaranteed freedom of choice, equal access to all activities and courses offered by the colleges, the right to privacy, the right to review personal information and records, and all other rights available to the general college population.

No program or course shall be denied a student without due consideration of the student's potential and abilities and the additional assistance provided by adaptive or sensory aids or other supportive services or programs.

56008. Regional, State and Federal Coordination. Faculty and staff from the districts with competencies in specific areas may be requested by the Chancellor's Office to assist in management and accountability tasks, including processing appropriate data for required reports.

(a) Data for regional, state and federal needs assessments and resource surveys pertaining to direct excess cost services and programs shall be requested from various colleges and districts, and shall be provided by their respective administrators.

(b) As a means of enhancing network communication and coordination, the Chancellor and Director of Rehabilitation shall develop such task forces as they jointly deem necessary to implement the provisions of this chapter.

(c) The cost of activities specified in this section may be charged to Program Developmental Services as defined in Section 56026(f).

56010. Regular Average Daily Attendance (ADA) Funds. Student services and programs shall not be entitled to funds in excess of those needed to deliver such services and programs. The state allocation provided by law for direct excess costs is intended to only provide the districts reimbursement for such costs up to $785.00 for each student served, with the exception of those students identified as "severely disabled" as defined by Section 56018 of this Chapter.

Direct excess cost funds for special classes or programs shall be approved only after regular average daily attendance (ADA) generated in these special classes has been completely utilized.

The average daily attendance (ADA) generated by students in a special class or program must be expended for that class or program to help pay for the direct costs incurred for lowered instructor-student ratios or other support services.

Article 2. Definitions

56016. Handicapped Students. Handicapped students are persons with exceptional needs enrolled at a Community College who, because of a professionally verified physical, communication or learning disability, cannot benefit from the regular education classes, activities and services provided by the Community College without specific additional support services and programs. Wherever in this chapter the term "students" is used, such reference shall be deemed to mean handicapped students.

56018. Severely Disabled Student. A severely disabled student is a handicapped student who, because of extensive or multiple disability, cannot achieve full academic, vocational or social potential without the use of substantially higher-cost special classes, programs, or support services.

56019. Professionally Verified Disability. A professionally verified physical, communication or learning disability means a handicapping condition as documented by a certified or licensed physician, psychologist, audiologist, speech pathologist or other appropriate professional. The documentation must identify the disability, describe the degree and progressional factor, and describe the limiting effects of the disability. The records must be available to the appropriate community college upon request but need not be maintained at such college.

56020. Physical Disability. Physical disability means a disability attributable to vision, mobility, orthopedic or other health impairments.

(a) **Visual Limitation** means blindness or partially sighted to the degree that it:

(1) Impedes the learning process, and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) **Mobility and Orthopedic Limitation** means a serious limitation in locomotion or motor functions which indicate a need for one or more of the services or programs as described in Sections 56030 and 56032 of this chapter.

(c) **Other Health Limitation** means a serious dysfunction of a body part or process which necessitates the use of one or more of the supportive services or programs described in Sections 56030 and 56032 of this chapter.

56022. Communication Disability. Communication disability means a limitation in the processes of speech, language or hearing.

(a) **Hearing Limitation** means a loss in hearing function which:

(1) Impedes the learning process or acquisition of speech and language; and,

(2) Which necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) **Speech and Language Limitation** refers to one or more speech-language disorders of hearing, voice, articulation, rhythm and/or the receptive and expressive processes of language to the degree that it:

(1) Interferes with communication, education, and social interaction; and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

56024. Learning Disability. Learning Disability refers to students with exceptional learning needs who have neurological, biochemical or developmental limitations. These limitations result from atypical perception, cognition or response to environmental stimuli, manifested by inadequate ability to manipulate educational symbols in an expected manner. Typical limitations include inadequate ability to listen, speak, read, write, spell, concentrate, remember or do computa-

tion. These students demonstrate a significant discrepancy between their achievement and potential levels because of one or more of the following:

(a) **Neurological Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of genetic aberrations, disease, birth complications, traumatic brain insult, or poor nutrition. These conditions may range from mild to severe, and are associated with deviations of the function of the central nervous system.

(b) **Biochemical Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of excesses or depletions of hormonal, neurochemical or metabolic substances associated with diminished motoric, perceptual or cognitive capabilities.

(c) **Developmental Limitation** refers to:

(1) The exceptional learning needs of a student with average academic potential. Their learning needs are a result of delayed educational development, incurred through maturational delays and/or any combination of limitations described in subsections (a) or (b) above.

(2) Exceptional learning needs of a student who has limited learning potential, with substantial and/or severe functional limitations and whose limitations can be expected to continue indefinitely.

56026. Direct Excess Costs. Direct excess costs are categorical expenditures by Community College districts as defined in subsections (a) through (f) below, which are expenses incurred as a result of meeting the exceptional needs of students.

(a) **Special facilities costs** are expenditures for space, equipment or furniture acquired or modified by the district and used by the student.

(b) **Special educational material costs** are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) **Educational assistance costs** are expenditures for specific persons employed and support resources used to assist students.

(d) **Mobility assistance costs** are expenditures for persons or equipment provided to assist handicapped students to move about the educational setting.

(e) **Transportation costs** are expenditures for persons, equipment, modifications or related costs for transporting students for educational purposes.

(f) **Program developmental services costs** are expenditures for college, regional and statewide activities for staff and program development which are approved by the Chancellor's Office and designed to implement the provisions of this chapter.

56030. Supportive Services. Supportive services are those serv-

ices available to students with physical, communication or learning limitations which are in addition to the regular services provided to all students. Such services enable students to participate in the regular activities, programs and classes offered by the college. They may include, but need not be limited to, specific purpose counseling; special registration assistance; college orientation; specific assessment for academic, career or vocational planning and placement; special facilities; specific educational material; mobility, housing or transportation assistance; developing and maintaining attendant, reader and interpreter rosters; on-campus aides; equipment loan and repair; and other services appropriate to the student's particular needs as described in Sections 56020 through 56024 of this chapter.

56032. Special Classes or Programs. Special Classes or Programs means prescribed special instruction for students with specific educational needs. Such classes and programs may also be designed:

(a) For severely disabled students who cannot initially attend regular classes.

(b) To provide preparatory or supportive instruction to enable students to participate in regular activities.

56034. Prescriptive Planning and Instruction. Prescriptive Planning and Instruction is an individual educational plan developed with the student which details those special classes and programs requested by the student, and which is designed to meet the specific needs of the student. The delivery of supportive services alone does not require developing a prescriptive plan.

56036. Cooperative Agreements. Cooperative Agreements are agreements among Community Colleges or districts and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with exceptional needs.

56038. Advocacy. Advocacy is activity directed toward establishing equal educational opportunity for students with exceptional needs.

56040. Allocation. Allocation is the total amount available in a fiscal year for all Community College districts in the State in accordance with the formula specified in Section 17303.6(b) of the Education Code.

56042. Apportionment. An Apportionment is funds paid to a district pursuant to Section 18151 of the Education Code, to reimburse monies spent or encumbered on approved services or programs.

56044. Handicapped Student Enrolled. A Handicapped Student Enrolled is a handicapped student who is enrolled in three or more contact hours per week or three or more units of approved Coordinated Instruction Systems (CIS) classes or progr ms.

56046. Comprehensive Plan. Comprehensive Plan means the proposed structure of services and programs for each college submitted

by the district for approval to the Chancellor's Office pursuant to Sec. 56064 of this chapter.

Article 3. Administration

56048. Personnel. Each professional faculty or staff member shall be required to have a valid Community College credential which is appropriate for the services being provided.

(a) The following positions shall be established on a statewide basis for the accountability and management of services and programs:

(1) **State Specialist.** One or more State Specialists shall be employed by the Chancellor's Office to effect statewide coordination and facilitate services and programs for students with exceptional needs.

(2) **District Coordinator.** One or more coordinators shall be designated by the district to coordinate activities in handicapped programs.

(3) **College Specialist.** Each participating Community College shall designate one or more certificated employees as College Specialists to plan, develop, and coordinate; and who may also administer services and programs for students. A College Specialist may be designated as a District Coordinator.

(b) Depending upon the nature of services and programs needed by a Community College or Community College District, the following positions may be established:

(1) **Instructional Specialist.** Each participating Community College or Community College district may designate one or more Instructional Specialists who shall be credentialed instructors, and, when the specific disability areas of vision, hearing, speech or learning are involved, shall also be certified or licensed in the specific disability area for which services are provided.

(2) **Other Support Staff.** Each Community College or Community College District may employ Other Support Staff, which includes, but need not be limited to, paraprofessionals, peer counselors, student assistants, instructional and non-instructional aides, interpreters and other "specially assigned assistants."

Supportive staff shall function in accordance with existing professional standards and shall be under the supervision of persons certificated, licensed or credentialed in the area for which services are provided.

56052. Student/Instructor Ratio. By July 1, 1977, the Chancellor's Office, after consultation with college staff and students, shall establish student-instructor ratios for special classes addressing the specific needs of students. Deviations from these prescribed ratios shall require prior written approval from the Chancellor's Office.

56054. In-Service Training. Each college shall develop a plan for relevant and effective in-service training for all college personnel involved in meeting the special needs of students.

56056. Advisory Committee. Each college or district which provides services or programs for which the district receives direct excess cost funds shall establish an advisory committee. The advisory committee shall be composed of representatives of appropriate agencies, consumer groups, students, and any other appropriate organizations or individuals as determined by program needs.

56058. Planning. The Community College District Master Plan, as provided for in Section 55402 of this Part, shall include planning for supportive services and programs for students with exceptional needs. Space and capital outlay needs for supportive services shall be incorporated into the plan for capital construction provided for in the Education Code, Section 20066.

56060. Program Placement and Individualized Educational Planning. (a) Assessment of the student's educational competency and needs shall be made by the appropriately certified, licensed or credentialed special instructor(s) in conjunction with the student, other appropriate college staff, and professional persons from the community or other agencies that are working with the student.

If requested by the student, all prescriptive, individualized plans shall be reviewed and amended as needed each semester or quarter by designated specialists, certified, licensed or credentialed in the area of physical, communication and learning disability, and after consultation with all appropriate professional persons working with the student.

(b) Each individual educational plan should specifically include:

(1) The academic and career assessment tools, if any, utilized to identify the competency level of the student upon enrollment.

(2) A clear description of the courses, programs or activities the student will now engage in to improve academic or career competency.

(3) Functional recommendations for the use of appropriate instructional materials and equipment.

(4) A clear description of monitoring devices or procedures which assess improvement of competency based on the education program design being implemented.

(5) Evidence of measurable improvement at the conclusion of each semester in which the student is enrolled.

(c) Academic and career assessment is not a prerequisite to the delivery of supportive services such as parking, equipment loan, transportation or mobility assistance.

56062. Enrollment and Budget Surveys. The administrator responsible for comprehensive planning for each college shall, upon request, submit to the Chancellor's Office, on forms to be provided, enrollment data, projected expenditures, income for supportive services and programs, and such other pertinent data as required. Such information shall be used to determine the state's direct excess cost balance, and to inform districts of such balance so that they may plan for a potential allocation deficit.

56064. College Comprehensive Plan. (a) Comprehensive annual plans shall be prepared separately by each college to be submitted by its district to the Chancellor and Director of Rehabilitation. Such plans shall be submitted on or before May 1st of each year, or at such other time during the fiscal year as designated by the Chancellor.

(b) Each plan shall include, but need not be limited to, the following components:

(1) Statement of philosophy and needs
(2) Population to be served
(3) Proposed services and programs
(4) Program goals and objectives
(5) Proposed activities to meet those objectives
(6) A plan for coordination of college resources
(7) A plan for in-service training
(8) A statement of the evaluation plan
(9) A plan for interagency coordination of resources
(10) Budget summary

56066. Evaluation. (a) **District and College Evaluation.** On or before July 15th, or as otherwise directed by the Chancellor, each college shall submit an evaluation of its total program for the fiscal year to the Chancellor's Office and to the Director of Rehabilitation. Forms for the evaluation shall be developed and provided by the Chancellor's Office. The components of this evaluation shall include, but need not be limited to:

(1) A description of each program or service provided.

(2) The number of students benefiting from each service or program.

(3) Information and supporting data indicating the extent to which each specific program objective, as set forth in the comprehensive plan, was achieved.

(4) Explanations of discrepancies between objectives and achievements.

(5) Total expenditures for each program or service provided.

(6) Characteristics of the population served, including age, sex, minority status, and an unduplicated count of disability conditions.

(b) **Statewide Evaluation.** Each Community College district or college utilizing direct excess cost funds shall participate in a statewide evaluation of the effectiveness of services and programs authorized by this chapter.

Article 4. Funding

56080. Scope. The provisions of this article apply to the budget requirements for approval of comprehensive college plans and for expenditures made on the basis of plans approved for direct excess cost pursuant to Section 18151 of the Education Code.

56082. Application for Direct Excess Cost Funds. (a) Application by districts for Direct Excess Cost Funds shall be on the forms

designated by the Chancellor, reported at the same time as regular average daily attendance (ADA) apportionment reports after census week. Reimbursement will be made to the district in the same manner as regular apportionment.

(b) Up to $785 per student served is allowable for reimbursement to a district for direct excess costs as authorized by Section 56026 of this chapter.

(c) **Exception.** For high cost services and particular programs for the severely disabled, upon recommendation of the Director of Rehabilitation, on forms to be provided, the Chancellor may allocate, as available, amounts up to $1,570.00 per student served per fiscal year to provide for direct excess costs for such services and programs. Allocations in excess of seven hundred eighty five ($785) per student served shall be provided only to programs identified by the Chancellor and Director of Rehabilitation after consideration of at least the following factors:

(1) Projected fiscal costs of the comprehensive plan

(2) The number of students served according to their category of disability

(3) The number of severely disabled students as included in the count in (2)

(4) The student instructor ratio

(5) Identification of the specific high cost expenditures relating to the severely disabled students

56084. Other Support Funds. Districts applying for direct excess cost funds must certify on a form supplied by the Chancellor that reasonable efforts have been made to secure federal or local funds other than short-term grants for handicapped programs.

56088. Applications Exceeding State Allocations. In the event that applications for apportionment exceed state funds statutorily available, the Chancellor shall apportion the statutorily available funds among Community College districts applying for such funds in accordance with guidelines established by the Chancellor and the Director of Rehabilitation, and approved by the Board of Governors.

Register 77-45

§ 56000
§ 56040
§ 56042
§ 56058
§ 56082

CHAPTER 1. HANDICAPPED PROGRAMS AND SERVICES

Article 1. General

56000. Scope of Chapter. This chapter applies to special education services and programs for handicapped students for which allowances may be made to Community College districts, pursuant to Education Code Sections 84850 and 78014.

NOTE: Authority cited for Chapter 1: Sections 71020, 84850, and 78014, Education Code. Reference: Sections 84850 and 78014, Education Code.

History: 1. Repealer of Chapter 1 (Sections 56000–56062) and New Chapter 1 (Sections 56000–56088, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of Chapter 1 (Sections 56000–56088, not consecutive) and new Chapter 1 (Sections 56000–56088) filed 3-15-77; effective thirtieth day thereafter (Register 77, No. 12).
3. Amendment of section and NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

56002. Support Services and Programs. Support services and programs for students will focus on integrating them into the regular college programs or placement in economic or social areas in the community. Such services or programs shall not be provided if or when they are not facilitating measurable progress. These services and programs may include, but need not be limited to: assessment of basic skills and potential, prescriptive planning and instruction, support personnel and equipment, specific purpose counseling on group or individual basis, work preparation or training and job placement. In addition to support services and programs to meet the exceptional needs of students, all activities and services available to the regular college community shall be available to students with disabilities commensurate with their specific needs. Before a student is assigned to special classes or programs, the college, in concert with the student, shall determine that support services in regular classes are not adequate to meet the particular student's needs.

56004. Participation. Participation by a student in any supportive services or programs shall not preclude participation in any other service or program which may be offered by the college.

Participation in any aspect of the supportive services and programs shall be voluntary. Each Community College district shall employ reasonable means of informing the general college population as to the availability of supportive services and programs.

The student shall not continue participation in services or programs beyond the time when such services and programs are required to meet the educational needs of the individual.

56006. Student Rights. Students aided under this chapter are guaranteed freedom of choice, equal access to all activities and courses offered by the colleges, the right to privacy, the right to review personal information and records, and all other rights available to the general college population.

No program or course shall be denied a student without due consideration of the student's potential and abilities and the additional assistance provided by adaptive or sensory aids or other supportive services or programs.

56008. Regional, State and Federal Coordination. Faculty and staff from the districts with competencies in specific areas may be requested by the Chancellor's Office to assist in management and accountability tasks, including processing appropriate data for required reports.

(a) Data for regional, state and federal needs assessments and resource surveys pertaining to direct excess cost services and programs shall be requested from various colleges and districts, and shall be provided by their respective administrators.

(b) As a means of enhancing network communication and coordination, the Chancellor and Director of Rehabilitation shall develop such task forces as they jointly deem necessary to implement the provisions of this chapter.

(c) The cost of activities specified in this section may be charged to Program Developmental Services as defined in Section 56026(f).

56010. Regular Average Daily Attendance (ADA) Funds. Student services and programs shall not be entitled to funds in excess of those needed to deliver such services and programs. The state allocation provided by law for direct excess costs is intended to only provide the districts reimbursement for such costs up to $785.00 for each student served, with the exception of those students identified as "severely disabled" as defined by Section 56018 of this Chapter.

Direct excess cost funds for special classes or programs shall be approved only after regular average daily attendance (ADA) generated in these special classes has been completely utilized.

The average daily attendance (ADA) generated by students in a special class or program must be expended for that class or program to help pay for the direct costs incurred for lowered instructor-student ratios or other support services.

Article 2. Definitions

56016. Handicapped Students. Handicapped students are persons with exceptional needs enrolled at a Community College who, because of a professionally verified physical, communication or learning disability, cannot benefit from the regular education classes, activities and services provided by the Community College without specific additional support services and programs. Wherever in this chapter the term "students" is used, such reference shall be deemed to mean handicapped students.

56018. Severely Disabled Student. A severely disabled student is a handicapped student who, because of extensive or multiple disability, cannot achieve full academic, vocational or social potential without the use of substantially higher-cost special classes, programs, or support services.

56019. Professionally Verified Disability. A professionally verified physical, communication or learning disability means a handicapping condition as documented by a certified or licensed physician, psychologist, audiologist, speech pathologist or other appropriate professional. The documentation must identify the disability, describe the degree and progressional factor, and describe the limiting effects of the disability. The records must be available to the appropriate community college upon request but need not be maintained at such college.

56020. Physical Disability. Physical disability means a disability attributable to vision, mobility, orthopedic or other health impairments.

(a) **Visual Limitation** means blindness or partially sighted to the degree that it:

(1) Impedes the learning process, and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) **Mobility and Orthopedic Limitation** means a serious limitation in locomotion or motor functions which indicate a need for one or more of the services or programs as described in Sections 56030 and 56032 of this chapter.

(c) **Other Health Limitation** means a serious dysfunction of a body part or process which necessitates the use of one or more of the supportive services or programs described in Sections 56030 and 56032 of this chapter.

56022. Communication Disability. Communication disability means a limitation in the processes of speech, language or hearing.

(a) **Hearing Limitation** means a loss in hearing function which:

(1) Impedes the learning process or acquisition of speech and language; and,

(2) Which necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) **Speech and Language Limitation** refers to one or more speech-language disorders of hearing, voice, articulation, rhythm and/or the receptive and expressive processes of language to the degree that it:

(1) Interferes with communication, education, and social interaction; and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

56024. Learning Disability. Learning Disability refers to students with exceptional learning needs who have neurological, biochemical or developmental limitations. These limitations result from atypical perception, cognition or response to environmental stimuli, manifested by inadequate ability to manipulate educational symbols in an expected manner. Typical limitations include inadequate ability to listen, speak, read, write, spell, concentrate, remember or do computation. These students demonstrate a significant discrepancy between their achievement and potential levels because of one or more of the following:

(a) **Neurological Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of genetic aberrations, disease, birth complications, traumatic brain insult, or poor nutrition. These conditions may range from mild to severe, and are associated with deviations of the function of the central nervous system.

(b) **Biochemical Limitation** refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of excesses or depletions of hormonal, neurochemical or metabolic substances associated with diminished motoric, perceptual or cognitive capabilities.

(c) **Developmental Limitation** refers to:

(1) The exceptional learning needs of a student with average academic potential. Their learning needs are a result of delayed educational development, incurred through maturational delays and/or any combination of limitations described in subsections (a) or (b) above.

(2) Exceptional learning needs of a student who has limited learning potential, with substantial and/or severe functional limitations and whose limitations can be expected to continue indefinitely.

56026. Direct Excess Costs. Direct excess costs are categorical expenditures by Community College districts as defined in subsections (a) through (f) below, which are expenses incurred as a result of meeting the exceptional needs of students.

(a) **Special facilities costs** are expenditures for space, equipment or furniture acquired or modified by the district and used by the student.

(b) **Special educational material costs** are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) **Educational assistance costs** are expenditures for specific persons employed and support resources used to assist students.

(d) **Mobility assistance costs** are expenditures for persons or equipment provided to assist handicapped students to move about the educational setting.

(e) **Transportation costs** are expenditures for persons, equipment, modifications or related costs for transporting students for educational purposes.

(f) **Program developmental services costs** are expenditures for college, regional and statewide activities for staff and program development which are approved by the Chancellor's Office and designed to implement the provisions of this chapter.

56030. Supportive Services. Supportive services are those services available to students with physical, communication or learning limitations which are in addition to the regular services provided to all students. Such services enable students to participate in the regular activities, programs and classes offered by the college. They may include, but need not be limited to, specific purpose counseling; special

registration assistance; college orientation; specific assessment for academic, career or vocational planning and placement; special facilities; specific educational material; mobility, housing or transportation assistance; developing and maintaining attendant, reader and interpreter rosters; on-campus aides; equipment loan and repair; and other services appropriate to the student's particular needs as described in Sections 56020 through 56024 of this chapter.

56032. Special Classes or Programs. Special Classes or Programs means prescribed special instruction for students with specific educational needs. Such classes and programs may also be designed:

(a) For severely disabled students who cannot initially attend regular classes.

(b) To provide preparatory or supportive instruction to enable students to participate in regular activities.

56034. Prescriptive Planning and Instruction. Prescriptive Planning and Instruction is an individual educational plan developed with the student which details those special classes and programs requested by the student, and which is designed to meet the specific needs of the student. The delivery of supportive services alone does not require developing a prescriptive plan.

56036. Cooperative Agreements. Cooperative Agreements are agreements among Community Colleges or districts and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with exceptional needs.

56038. Advocacy. Advocacy is activity directed toward establishing equal educational opportunity for students with exceptional needs.

56040. Allocation. Allocation is the total amount available in a fiscal year for all Community College districts in the State in accordance with the formula specified in Section 84301 of the Education Code.

History: 1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

56042. Apportionment. An Apportionment is funds paid to a district pursuant to Section 84850 of the Education Code, to reimburse monies spent or encumbered on approved services or programs.

History: 1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

56044. Handicapped Student Enrolled. A Handicapped Student Enrolled is a handicapped student who is enrolled in three or more contact hours per week or three or more units of approved Coordinated Instruction Systems (CIS) classes or programs.

56046. Comprehensive Plan. Comprehensive Plan means the proposed structure of services and programs for each college submitted by the district for approval to the Chancellor's Office pursuant to Section 56064 of this chapter.

Article 3 Administration

56048. Personnel. Each professional faculty or staff member shall be required to have a valid Community College credential which is appropriate for the services being provided.

(a) The following positions shall be established on a statewide basis for the accountability and management of services and programs:

(1) **State Specialist.** One or more State Specialists shall be employed by the Chancellor's Office to effect statewide coordination and facilitate services and programs for students with exceptional needs.

(2) **District Coordinator.** One or more coordinators shall be designated by the district to coordinate activities in handicapped programs.

(3) **College Specialist.** Each participating Community College shall designate one or more certificated employees as College Specialists to plan, develop, and coordinate; and who may also administer services and programs for students. A College Specialist may be designated as a District Coordinator.

(b) Depending upon the nature of services and programs needed by a Community College or Community College District, the following positions may be established:

(1) **Instructional Specialist.** Each participating Community College or Community College district may designate one or more Instructional Specialists who shall be credentialed instructors, and, when the specific disability areas of vision, hearing, speech or learning are involved, shall also be certified or licensed in the specific disability area for which services are provided.

(2) **Other Support Staff.** Each Community College or Community College District may employ Other Support Staff, which includes, but need not be limited to, paraprofessionals, peer counselors, student assistants, instructional and non-instructional aides, interpreters and other "specially assigned assistants."

Supportive staff shall function in accordance with existing professional standards and shall be under the supervision of persons certificated, licensed or credentialed in the area for which services are provided

56052. Student/Instructor Ratio. By July 1, 1977, the Chancellor's Office, after consultation with college staff and students, shall establish student-instructor ratios for special classes addressing the specific needs of students. Deviations from these prescribed ratios shall require prior written approval from the Chancellor's Office.

56054. In-Service Training. Each college shall develop a plan for relevant and effective in-service training for all college personnel involved in meeting the special needs of students.

56056. Advisory Committee. Each college or district which provides services or programs for which the district receives direct excess cost funds shall establish an advisory committee. The advisory committee shall be composed of representatives of appropriate agencies, consumer groups, students, and any other appropriate organizations or individuals as determined by program needs.

56058. Planning. The Community College District Master Plan, as provided for in Section 55402 of this Part, shall include planning for supportive services and programs for students with exceptional needs. Space and capital outlay needs for supportive services shall be incorporated into the plan for capital construction provided for in the Education Code, Section 81821.

History: 1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

56060. Program Placement and Individualized Educational Planning. (a) Assessment of the student's educational competency and needs shall be made by the appropriately certified, licensed or credentialed special instructor(s) in conjunction with the student, other appropriate college staff, and professional persons from the community or other agencies that are working with the student.

If requested by the student, all prescriptive, individualized plans shall be reviewed and amended as needed each semester or quarter by designated specialists, certified, licensed or credentialed in the area of physical, communication and learning disability, and after consultation with all appropriate professional persons working with the student.

(b) Each individual educational plan should specifically include:

(1) The academic and career assessment tools, if any, utilized to identify the competency level of the student upon enrollment.

(2) A clear description of the courses, programs or activities the student will now engage in to improve academic or career competency.

(3) Functional recommendations for the use of appropriate instructional materials and equipment.

(4) A clear description of monitoring devices or procedures which assess improvement of competency based on the education program design being implemented.

(5) Evidence of measurable improvement at the conclusion of each semester in which the student is enrolled.

(c) Academic and career assessment is not a prerequisite to the delivery of supportive services such as parking, equipment loan, transportation or mobility assistance.

56062. Enrollment and Budget Surveys. The administrator responsible for comprehensive planning for each college shall, upon request, submit to the Chancellor's Office, on forms to be provided, enrollment data, projected expenditures, income for supportive services and programs, and such other pertinent data as required. Such information shall be used to determine the state's direct excess cost balance, and to inform districts of such balance so that they may plan for a potential allocation deficit.

56064. College Comprehensive Plan. (a) Comprehensive annual plans shall be prepared separately by each college to be submitted by district to the Chancellor and Director of Rehabilitation. Such plans shall be submitted on or before May 1st of each year, or at such other time during the fiscal year as designated by the Chancellor.

(b) Each plan shall include, but need not be limited to, the following components:

(1) Statement of philosophy and needs
(2) Population to be served
(3) Proposed services and programs
(4) Program goals and objectives
(5) Proposed activities to meet those objectives
(6) A plan for coordination of college resources
(7) A plan for in-service training
(8) A statement of the evaluation plan
(9) A plan for interagency coordination of resources
(10) Budget summary

56066. Evaluation. (a) **District and College Evaluation.** On or before July 15th, or as otherwise directed by the Chancellor, each college shall submit an evaluation of its total program for the fiscal year to the Chancellor's Office and to the Director of Rehabilitation. Forms for the evaluation shall be developed and provided by the Chancellor's Office. The components of this evaluation shall include, but need not be limited to:

(1) A description of each program or service provided.

(2) The number of students benefiting from each service or program.

(3) Information and supporting data indicating the extent to which each specific program objective, as set forth in the comprehensive plan, was achieved.

(4) Explanations of discrepancies between objectives and achievements.

(5) Total expenditures for each program or service provided.

(6) Characteristics of the population served, including age, sex, minority status, and an unduplicated count of disability conditions.

(b) **Statewide Evaluation.** Each Community College district or college utilizing direct excess cost funds shall participate in a statewide evaluation of the effectiveness of services and programs authorized by this chapter.

Article 4. Funding

56080. Scope. The provisions of this article apply to the budget requirements for approval of comprehensive college plans and for expenditures made on the basis of plans approved for direct excess cost pursuant to Section 84850 of the Education Code.

History: 1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

56082. Application for Direct Excess Cost Funds. (a) Application by districts for Direct Excess Cost Funds shall be on the forms

Register 79-46

§ 56040
§ 56042
§ 56044
§ 56082

registration assistance; college orientation; specific assessment for academic, career or vocational planning and placement; special facilities; specific educational material; mobility, housing or transportation assistance; developing and maintaining attendant, reader and interpreter rosters; on-campus aides; equipment loan and repair; and other services appropriate to the student's particular needs as described in Sections 56020 through 56024 of this chapter.

56032. Special Classes or Programs.

Special Classes or Programs means prescribed special instruction for students with specific educational needs. Such classes and programs may also be designed:

(a) For severely disabled students who cannot initially attend regular classes.

(b) To provide preparatory or supportive instruction to enable students to participate in regular activities.

56034. Prescriptive Planning and Instruction.

Prescriptive Planning and Instruction is an individual educational plan developed with the student which details those special classes and programs requested by the student, and which is designed to meet the specific needs of the student. The delivery of supportive services alone does not require developing a prescriptive plan.

56036. Cooperative Agreements.

Cooperative Agreements are agreements among Community Colleges or districts and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with exceptional needs.

56038. Advocacy.

Advocacy is activity directed toward establishing equal educational opportunity for students with exceptional needs.

56040. Apportionment.

Apportionment is the total amount available in a fiscal year for all Community College districts in the State in accordance with Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code.

NOTE: Authority cited: Sections 71020, 78014, 84850, Education Code. Reference: Sections 78014, 84850, and Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code.

HISTORY:

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).

56042. Allocation.

An Allocation is funds paid to a district pursuant to Sections 84709, 84729 and 84850 of the Education Code, to reimburse monies spent or encumbered on approved services or programs.

NOTE: Authority cited: Sections 71020, 78014, 84850, Education Code. Reference: Sections 78014, 84850, and Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code.

HISTORY:

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).

56044. Handicapped Student Enrolled.

A Handicapped Student Enrolled is a handicapped student who is enrolled in three or more contact hours per week or three or more units of approved independent study classes or programs.

NOTE: Authority cited: Sections 71020, 78014, 84500, 84850, Education Code. Reference: Sections 78014, 84500, 84850, Education Code.

HISTORY:

1. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).

56046. Comprehensive Plan.

Comprehensive Plan means the proposed structure of services and programs for each college submitted by the district for approval to the Chancellor's Office pursuant to Section 56064 of this chapter.

Article 3. Administration

56048. Personnel.

Each professional faculty or staff member shall be required to have a valid Community College credential which is appropriate for the services being provided.

(a) The following positions shall be established on a statewide basis for the accountability and management of services and programs:

(1) State Specialist. One or more State Specialists shall be employed by the Chancellor's Office to effect statewide coordination and facilitate services and programs for students with exceptional needs.

(2) District Coordinator. One or more coordinators shall be designated by the district to coordinate activities in handicapped programs.

(3) College Specialist. Each participating Community College shall designate one or more certificated employees as College Specialists to plan, develop, and coordinate; and who may also administer services and programs for students. A College Specialist may be designated as a District Coordinator.

(b) Depending upon the nature of services and programs needed by a Community College or Community College District, the following positions may be established:

(1) Instructional Specialist. Each participating Community College or Community College district may designate one or more Instructional Specialists who shall be credentialed instructors, and, when the specific disability areas of vision, hearing, speech or learning are involved, shall also be certified or licensed in the specific disability area for which services are provided.

(2) Other Support Staff. Each Community College or Community College District may employ Other Support Staff, which includes, but need not be limited to, paraprofessionals, peer counselors, student assistants, instructional and non-instructional aides, interpreters and other "specially assigned assistants."

Supportive staff shall function in accordance with existing professional standards and shall be under the supervision of persons certificated, licensed or credentialed in the area for which services are provided.

56052. Student/Instructor Ratio.

By July 1, 1977, the Chancellor's Office, after consultation with college staff and students, shall establish student-instructor ratios for special classes addressing the specific needs of students. Deviations from these prescribed ratios shall require prior written approval from the Chancellor's Office.

56054. In-Service Training.

Each college shall develop a plan for relevant and effective in-service training for all college personnel involved in meeting the special needs of students.

designated by the Chancellor, reported at the same time as regular average daily attendance (ADA) apportionment reports after census week. Reimbursement will be made to the district in the same manner as regular apportionment.

(b) Up to $785 per student served is allowable for reimbursement to a district for direct excess costs as authorized by Section 56026 of this chapter.

(c) Exception. For high cost services and particular programs for the severely disabled, upon recommendation of the Director of Rehabilitation, on forms to be provided, the Chancellor may allocate, as available, amounts up to $2,355.00 per student served per fiscal year to provide for direct excess costs for such services and programs. Allocations in excess of seven hundred eighty five ($785) per student served shall be provided only to programs identified by the Chancellor and Director of Rehabilitation after consideration of at least the following factors:

(1) Projected fiscal costs of the comprehensive plan
(2) The number of students served according to their category of disability
(3) The number of severely disabled students as included in the count in (2)
(4) The student instructor ratio
(5) Identification of the specific high cost expenditures relating to the severely disabled students

NOTE: Authority cited: Sections 71020, 78014, 84850, Education Code. Reference: Sections 78014, 84850, Education Code.

HISTORY:

1. Amendment of subsection (c) filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).

56084. Other Support Funds.

Districts applying for direct excess cost funds must certify on a form supplied by the Chancellor that reasonable efforts have been made to secure federal or local funds other than short-term grants for handicapped programs.

56088. Applications Exceeding State Allocations.

In the event that applications for apportionment exceed state funds statutorily available, the Chancellor shall apportion the statutorily available funds among Community College districts applying for such funds in accordance with guidelines established by the Chancellor and the Director of Rehabilitation, and approved by the Board of Governors.

§ 56000	§ 56024	§ 56048	§ 56084
§ 56002	§ 56026	§ 56052	§ 56088
§ 56004	§ 56030	§ 56054	
§ 56006	§ 56032	§ 56056	
§ 56008	§ 56034	§ 56058	
§ 56010	§ 56036	§ 56060	
§ 56016	§ 56038	§ 56062	
§ 56018	§ 56040	§ 56064	
§ 56019	§ 56042	§ 56066	
§ 56020	§ 56044	§ 56080	
§ 56022	§ 56046	§ 56082	

CHAPTER 1. HANDICAPPED PROGRAMS AND SERVICES

Article 1. General

56000. Scope of Chapter.

This chapter applies to and should be read in conjunction with special education services and programs for handicapped students for which allowances may be made to Community College districts, pursuant to Education Code Sections 78600 and 84850.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer of Chapter 1 (Sections 56000–56062) and New Chapter 1 (Sections 56000–56088, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of Chapter 1 (Sections 56000–56088, not consecutive) and new Chapter 1 (Sections 56000–56088) filed 3-15-77; effective thirtieth day thereafter (Register 77, No. 12).
3. Amendment of section and NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
4. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56002. Support Services and Programs.

Support services and programs for students will focus on integrating them into the regular college programs or placement in economic or social areas in the community. Such services or programs shall not be provided if or when they are not facilitating measurable progress. These services and programs may include, but need not be limited to: assessment of basic skills and potential, prescriptive planning and instruction, support personnel and equipment, specific purpose counseling on group or individual basis, work preparation or training and job placement. In addition to support services and programs to meet the exceptional needs of students, all activities and services available to the regular college community shall be available to students with disabilities commensurate with their specific needs. Before a student is assigned to special classes or programs, the college, in concert with the student, shall determine that support services in regular classes are not adequate to meet the particular student's needs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56004. Participation.

Participation by a student in any supportive services or programs shall not preclude participation in any other service or program which may be offered by the college.

Participation in any aspect of the supportive services and programs shall be voluntary. Each community college district shall employ reasonable means of informing the general college population as to the availability of supportive services and programs.

The student shall not continue participation in services or programs beyond the time when such services and programs are required to meet the educational needs of the individual.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56006. Student Rights.

Students aided under this chapter are guaranteed freedom of choice, equal access to all activities and courses offered by the colleges, the right to privacy, the right to review personal information and records, and all other rights available to the general college population.

No program or course shall be denied a student without due consideration of the student's potential and abilities and the additional assistance provided by adaptive or sensory aids or other supportive services or programs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56008. Regional, State and Federal Coordination.

Faculty and staff from the districts with competencies in specific areas may be requested by the Chancellor's Office to assist in management and accountability tasks, including processing appropriate data for required reports.

(a) Data for regional, state and federal needs assessments and resource surveys pertaining to direct excess cost services and programs shall be requested from various colleges and districts, and shall be provided by their respective administrators.

(b) As a means of enhancing network communication and coordination, the Chancellor and Director of Rehabilitation shall develop such task forces as they may deem necessary to implement the provisions of this chapter.

(c) The cost of activities specified in this section may be charged to Program Developmental Services as defined in subsection (f) of Section 56026.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56010. Regular Average Daily Attendance (ADA) Funds.

Student services and programs shall not be entitled to funds in excess of those needed to deliver such services and programs. The state allocation provided by law for direct excess costs is intended to only provide the districts reimbursement for such costs up to $785.00 for each student served, with the exception of those students identified as "severely disabled" as defined by Section 56018 of this Chapter.

Direct excess cost funds for special classes or programs shall be approved only after regular average daily attendance (ADA) generated in these special classes has been completely utilized.

The average daily attendance (ADA) generated by students in a special class or program must be expended for that class or program to help pay for the direct costs incurred for lowered instructor-student ratios or other support services.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

Article 2. Definitions

56016. Handicapped Students.

Handicapped students are persons with exceptional needs enrolled at a community college who, because of a professionally verified physical, communication or learning disability, cannot benefit from the regular education classes, activities and services provided by the community college without specific additional support services and programs. Wherever in this chapter the term "students" is used, such reference shall be deemed to mean handicapped students.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56018. Severely Disabled Student.

A severely disabled student is a handicapped student who, because of extensive or multiple disability, cannot achieve full academic, vocational or social potential without the use of substantially higher-cost special classes, programs, or support services.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56019. Professionally Verified Disability.

A professionally verified physical, communication or learning disability means a handicapping condition as documented by a certified or licensed physician, psychologist, audiologist, speech pathologist or other appropriate professional. The documentation must identify the disability, describe the degree and progressional factor, and describe the limiting effects of the disability. The records must be available to the appropriate community college upon request but need not be maintained at such college.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56020. Physical Disability.

Physical disability means a disability attributable to vision, mobility, orthopedic or other health impairments.

(a) Visual Limitation means blindness or partially sighted to the degree that it:

(1) Impedes the learning process, and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) Mobility and Orthopedic Limitation means a serious limitation in locomotion or motor functions which indicate a need for one or more of the services programs as described in Sections 56030 and 56032 of this chapter.

(c) Other Health Limitation means a serious dysfunction of a body part or process which necessitates the use of one or more of the supportive services or programs described in Sections 56030 and 56032 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56022. Communication Disability.

Communication disability means a limitation in the processes of speech, language or hearing.

(a) Hearing Limitation means a loss in hearing function which:

(1) Impedes the learning process or acquisition of speech and language; and,

(2) Which necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

(b) Speech and Language Limitation refers to one or more speech-language disorders of hearing, voice, articulation, rhythm and/or the receptive and expressive processes of language to the degree that it:

(1) Interferes with communication, education, and social interaction; and

(2) Necessitates procurement of supportive services or programs as enumerated in Sections 56030 and 56032 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56024. Learning Disability.

Learning Disability refers to students with exceptional learning needs who neurological, biochemical or developmental limitations. These limitations result from atypical perception, cognition or response to environmental stimuli, manifested by inadequate ability to manipulate educational symbols in an expected manner. Typical limitations include inadequate ability to listen, speak, read, write, spell, concentrate, remember or do computation. These students demonstrate a significant discrepancy between their achievement and potential levels because of one or more of the following:

(a) Neurological Limitation refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of genetic aberrations, disease, birth complications, traumatic brain insult, or poor nutrition. These conditions may range from mild to severe, and are associated with deviations of the function of the central nervous system.

(b) Biochemical Limitation refers to the exceptional learning needs of a student with average academic potential. Their learning needs are a result of excesses or depletions of hormonal, neurochemical or metabolic substances associated with diminished motoric, perceptual or cognitive capabilities.

(c) Developmental Limitation refers to:

(1) The exceptional learning needs of a student with average academic potential. Their learning needs are a result of delayed educational development, incurred through maturational delays and/or any combination of limitations described in subsections (a) or (b) above.

(2) Exceptional learning needs of a student who has limited learning potential, with substantial and/or severe functional limitations and whose limitations can be expected to continue indefinitely.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56026. Direct Excess Costs.

Direct excess costs are categorical expenditures by Community College districts as defined in subsections (a) through (f) below, which are expenses incurred as a result of meeting the exceptional needs of students.

(a) Special facilities costs are expenditures for space, equipment or furniture acquired or modified by the district and used by the student.

(b) Special educational material costs are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) Educational assistance costs are expenditures for specific persons employed and support resources used to assist students.

(d) Mobility assistance costs are expenditures for persons or equipment provided to assist handicapped students to move about the educational setting.

(e) Transportation costs are expenditures for persons, equipment, modifications or related costs for transporting students for educational purposes.

(f) Program developmental services costs are expenditures for college, regional and statewide activities for staff and program development which are approved by the Chancellor's Office and designed to implement the provisions of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56030. Supportive Services.

Supportive services are those serv-ices available to students with physical, communication or learning limitations which are in addition to the regular services provided to all students. Such services enable students to participate in the regular activities, programs and classes offered by the college. They may include, but need not be limited to, specific purpose counseling; special registration assistance; college orientation; specific assessment for academic, career or vocational planning and placement; special facilities; specific educational material; mobility, housing or transportation assistance; developing and maintaining attendant, reader and interpreter rosters; on-campus aides; equipment loan and repair; and other services appropriate to the student's particular needs as described in Sections 56020 through 56024 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56032. Special Classes or Programs.

Special Classes or Programs means prescribed special instruction for students with specific educational needs. Such classes and programs may also be designed:

(a) For severely disabled students who cannot initially attend regular classes.
(b) To provide preparatory or supportive instruction to enable students to participate in regular activities.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:
1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56034. Prescriptive Planning and Instruction.

Prescriptive Planning and Instruction is an individual educational plan developed with the student which details those special classes and programs requested by the student, and which is designed to meet the specific needs of the student. The delivery of supportive services alone does not require developing a prescriptive plan.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:
1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56036. Cooperative Agreements.

Cooperative Agreements are agreements among community colleges or districts and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with exceptional needs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:
1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56038. Advocacy.

Advocacy is activity directed toward establishing equal educational opportunity for students with exceptional needs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:
1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56040. Apportionment.

NOTE: Authority cited: Sections 71020, 78014, 84850, Education Code. Reference: Sections 78014, 84850, and Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code.

HISTORY:
1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).
3. Repealer filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56042. Allocation.

NOTE: Authority cited: Sections 71020, 78014, 84850, Education Code. Reference: Sections 78014, 84850, and Chapter 5 (commencing with Section 84700) of Part 50 of the Education Code.

HISTORY:
1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).
3. Repealer filed 4-27-83; effective thirtieth day thereafter (Register 83, No 18).

56044. Handicapped Student Enrolled.

A Handicapped Student Enrolled is a handicapped student who is enrolled in three or more contact hours per week or three or more units of approved independent study classes or programs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).
2. Amendment of NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56046. Comprehensive Plan.

Comprehensive Plan means the proposed structure of services and programs for each college submitted by the district for approval to the Chancellor's Office pursuant to Section 56064 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

Article 3. Administration

56048. Personnel.

Each professional faculty or staff member shall be required to have a valid community college credential which is appropriate for the services being provided.

(a) The following positions shall be established on a statewide basis for the accountability and management of services and programs:

(1) One or more District Coordinators shall be designated by the district to coordinate activities in handicapped programs.

(2) Each participating community college shall designate one or more certificated employees as College Specialists to plan, develop, and coordinate; and who may also administer services and programs for students. A College Specialist may be designated as a District Coordinator.

(b) Depending upon the nature of services and programs needed by a community college or community college district, the following positions may be established:

(1) Each participating community college or community college district may designate one or more Instructional Specialists who shall be credentialed instructors, and, when the specific disability areas of vision, hearing, speech or learning are involved, shall also be certified or licensed in the specific disability area for which services are provided.

(2) Each community college or community college district may employ other support staff, which includes, but need not be limited to, paraprofessionals, peer counselors, student assistants, instructional and non-instructional aides, interpreters and other "specially assigned assistants."

Supportive staff shall function in accordance with existing professional standards and shall be under the supervision of persons certificated, licensed or credentialed in the area for which services are provided.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56052. Student/Instructor Ratio.

The Chancellor's Office, after consultation with college staff and students, shall establish student-instructor ratios for special classes addressing the specific needs of students. Deviations from these prescribed ratios shall require prior written approval from the Chancellor's Office.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56054. In-Service Training.

Each college shall develop a plan for relevant and effective in-service training for all college personnel involved in meeting the special needs of students.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56056. Advisory Committee.

Each college or district which provides services or programs for which the district receives direct excess cost funds shall establish an advisory committee. The advisory committee shall be composed of representatives of appropriate agencies, consumer groups, students, and any other appropriate organizations or individuals as determined by program needs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56058. Planning.

The community college district master plan, as provided for in Section 55402 of this Part, shall include planning for supportive services and programs for students with exceptional needs. Space and capital outlay needs for supportive services shall be incorporated into the plan for capital construction provided for in the Education Code, Section 81821.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56060. Program Placement and Individualized Educational Planning.

(a) Assessment of the student's educational competency and needs shall be made by the appropriately certified, licensed or credentialed special instructor(s) in conjunction with the student, other appropriate college staff, and professional persons from the community or other agencies that are working with the student.

If requested by the student, all prescriptive, individualized plans shall be reviewed and amended as needed each semester or quarter by designated specialists, certified, licensed or credentialed in the area of physical, communication and learning disability, and after consultation with all appropriate professional persons working with the student.

(b) Each individual educational plan should specifically include:

(1) The academic and career assessment tools, if any, utilized to identify the competency level of the student upon enrollment.

(2) A clear description of the courses, programs or activities the student will now engage in to improve academic or career competency.

(3) Functional recommendations for the use of appropriate instructional materials and equipment.

(4) A clear description of monitoring devices or procedures which assess improvement of competency based on the education program design being implemented.

(5) Evidence of measurable improvement at the conclusion of each semester in which the student is enrolled.

(c) Academic and career assessment is not a prerequisite to the delivery of supportive services such as parking, equipment loan, transportation or mobility assistance.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56062. Enrollment and Budget Surveys.

The administrator responsible for comprehensive planning for each college shall, upon request, submit to the Chancellor's Office, on forms to be provided, enrollment data, projected expenditures, income for supportive services and programs, and such other pertinent data as required. Such information shall be used to determine the state's direct excess cost balance, and to inform districts of such balance so that they may plan for a potential allocation deficit.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56064. College Comprehensive Plan.

(a) Comprehensive annual plans shall be prepared separately by each college to be submitted by its district to the Chancellor and Director of Rehabilitation. Such plans shall be submitted on or before May 1st of each year, or at such other time during the fiscal year as designated by the Chancellor.

(b) Each plan shall include, but need not be limited to, the following components:

(1) Statement of philosophy and needs
(2) Population to be served
(3) Proposed services and programs
(4) Program goals and objectives
(5) Proposed activities to meet those objectives
(6) A plan for coordination of college resources
(7) A plan for in-service training
(8) A statement of the evaluation plan
(9) A plan for interagency coordination of resources
(10) Budget summary

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56066. Evaluation.

(a) On or before July 15th, or as otherwise directed by the Chancellor, each college shall submit an evaluation of its total program for the fiscal year to the Chancellor's Office and to the Director of Rehabilitation. Forms for the evaluation shall be developed and provided by the Chancellor's Office. The components of this evaluation shall include, but need not be limited to:

(1) A description of each program or service provided.

(2) The number of students benefiting from each service or program.

(3) Information and supporting data indicating the extent to which each specific program objective, as set forth in the comprehensive plan, was achieved.

(4) Explanations of discrepancies between objectives and achievements.

(5) Total expenditures for each program or service provided.

(6) Characteristics of the population served, including age, sex, minority status, and an unduplicated count of disability conditions.

(b) Each community college district or college utilizing direct excess cost funds shall participate in a statewide evaluation of the effectiveness of services and programs authorized by this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

Article 4. Funding

56080. Scope.

The provisions of this article apply to the budget requirements for approval of comprehensive college plans and for expenditures made on the basis of plans approved for direct excess cost pursuant to Section 84850 of the Education Code.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56082. Application for Direct Excess Cost Funds.

(a) Application by districts for Direct Excess Cost Funds shall be on the forms designated by the Chancellor, reported at the same time as regular average daily attendance (ADA) apportionment reports after census week. Reimbursement will be made to the district in the same manner as regular apportionment.

(b) Except as provided in subsection (c), up to $785 per student served is allowable for reimbursement to a district for direct excess costs as authorized by Section 56026 of this chapter.

(c) For high cost services and particular programs for the severely disabled, upon recommendation of the Director of Rehabilitation, on forms to be provided, the Chancellor may allocate, as available, amounts up to $2,355.00 per student served per fiscal year to provide for direct excess costs for such services and programs. Allocations in excess of seven hundred eighty five ($785) per student served shall be provided only to programs identified by the Chancellor and Director of Rehabilitation after consideration of at least the following factors:

(1) Projected fiscal costs of the comprehensive plan
(2) The number of students served according to their category of disability
(3) The number of severely disabled students as included in the count in (2)
(4) The student instructor ratio
(5) Identification of the specific high cost expenditures relating to the severely disabled students.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment of subsection (c) filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).
2. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56084. Other Support Funds.

Districts applying for direct excess cost funds must certify on a form supplied by the Chancellor that reasonable efforts have been made to secure federal or local funds other than short-term grants for handicapped programs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

56088. Applications Exceeding State Allocations.

In the event that applications for apportionment exceed state funds statutorily available, the Chancellor shall apportion the statutorily available funds among community college districts applying for such funds in accordance with guidelines established by the Chancellor and the Director of Rehabilitation, and approved by the Board of Governors.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

* CHAPTER 2. EXTENDED OPPORTUNITY PROGRAMS AND SERVICES

NOTE: Authority cited: Sections 66948, 66952, 71020, Education Code. Reference: Chapter 2, Article 8 (commencing with Section 69640) of Part 42 of the Education Code.

HISTORY:

1. Repealer of Chapter 2 (Sections 56100–56198) filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46). For prior history, see Registers 78, No. 3; 74, No. 26; 73, No. 26; 72, No. 29; 71, No. 8; and 70, No. 50.

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* Chapter 2 (Sections 56100–56198) superseded by provisions of Chapter 2.5 (Sections 56200–56296) as of 7-1-77.

CHAPTER 1. DISABLED STUDENT PROGRAMS AND SERVICES

Article 1. General Provisions and Definitions

56000. Scope of Chapter.

This chapter applies to community college districts offering educational programs and support services, on and/or off campus, to students with disabilities pursuant to Education Code Sections 78600 and 84850.

Programs receiving funds apportioned pursuant to Education Code Section 84850 shall meet the requirements of this chapter. Any expenditures under the authority of this chapter must meet the following conditions:

(a) The service or instruction is consistent with the stated purpose of programs for students with disabilities as set forth in section 56030 of this chapter;

(b) The service or instruction does not duplicate services or instruction which are otherwise available to all students;

(c) The educational need for the service or instruction is directly related to the functional limitations of the verifiable disabilities of the students to be served;

(d) The need for the service or instruction is directly related to the student's participation in the educational process;

(e) The goals of services and/or instruction are independence and maximum integration of students with disabilities. Services and/or instruction should lead to successful participation in the general college curriculum, vocational preparation and enhanced potential for achieving personal/social goals;

(f) Services or instruction are provided in the most integrated setting possible consistent with the mission of the community colleges.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer of Chapter 1 (Sections 56000–56062) and New Chapter 1 (Sections 56000–56068, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of Chapter 1 (Sections 56000–56068, not consecutive) and new Chapter 1 (Sections 56000–56068) filed 3-15-77; effective thirtieth day thereafter (Register 77, No. 12).
3. Amendment of section and NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
4. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
5. Repealer of Chapter 1 (Sections 56000–56068, not consecutive) and new Chapter 1 (Sections 56000–56068, not consecutive) filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56002. Disabled Students.

Disabled students are persons with exceptional needs enrolled at a community college who, because of a verified disability, cannot fully benefit from general education classes, activities, and services without specific additional specialized services and/or educational programs.

Disabilities do not include those which are solely attributable to economic, cultural, or language disadvantages; or those temporary disabilities that are expected to continue less than forty-five days as determined in section 56008.

Wherever in this chapter the term "student" is used, such reference means a disabled student served in Disabled Student Programs and Services (hereinafter DSP&S) pursuant to Sections 56010–56020 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56004. Appropriate Adaptive Behavior.

Appropriate adaptive behavior is the behavior of a student who assumes the social responsibility necessary to participate in the educational setting in which the student is enrolled. When a determination is needed, appropriate adaptive behavior shall be determined by certificated DSP&S staff.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56006. Functional Limitation.

A functional limitation results from a disability defined in Sections 56010 and 56020 of this chapter. A functional limitation inhibits the student's ability to participate in the general educational offerings(s) of the college.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56008. Verification of Disability.

Verification of a primary disability as defined in Sections 56010–56020 of this chapter is necessary to establish eligibility for participation in Disabled Student Programs and Services. The disability shall be verified by credentialed DSP&S personnel based upon observation or documents provided by credentialed, certificated, or licensed professionals. The verification must identify the disability and its functional limitations.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56010. Physical Disability.

Physical disability means a visual, mobility, orthopedic or other health impairment.

(a) Visual impairment means total or partial loss of sight.

(b) Mobility and orthopedic impairment mean a serious limitation in locomotion or motor functions which indicate a need for one or more of the services or programs described in Sections 56026 and 56028 of this chapter.

(c) Other health impairment means a serious dysfunction of a body part or system which necessitates the use of one or more of the supportive services or programs described in Sections 56026 and 56028 of this chapter.

The student with a physical disability must exhibit appropriate adaptive behavior as defined in Section 56004 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56012. Communication Disability.

Communication disability is defined as an impairment in the processes of speech, language or hearing.

(a) Hearing impairment means a total or partial loss of hearing function which impedes the communication process essential to language, educational, social and/or cultural interactions.

(b) Speech and language impairment means one or more speech/language disorders of voice, articulation, rhythm and/or the receptive and expressive processes of language.

The student with a communication disability must exhibit appropriate adaptive behavior as defined in Section 56004 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56014. Learning Disability.

Learning disability is defined as a persistent condition of presumed neurological dysfunction which may exist with other disabling conditions. This dysfunction continues despite instruction in standard classroom situations. Learning disabled adults, a heterogeneous group, are characterized as having:

(a) Average to above average intellectual ability;
(b) Severe processing deficit(s);
(c) Severe aptitude-achievement discrepancy(-ies);
(d) Measured achievement in an instructional or employment setting; and
(e) Measured appropriate adaptive behavior in an instructional or employment setting as defined in Section 56004 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56016. Acquired Brain Injury.

Acquired brain injury means a deficit in brain functioning which is medically verifiable, non-degenerative or progressive, resulting in a total or partial loss of one or more of the following: cognitive, communication, motor, psycho-social and sensory perceptual abilities.

The student with an acquired brain injury must exhibit appropriate adaptive behavior as defined in Section 56004 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56018. Developmentally Delayed Learner.

The developmentally delayed learner is a student who exhibits the following:

(a) Below average intellectual functioning;

(b) Impaired social functioning;

(c) Potential for measurable achievement in instructional and employment settings;

(d) Measured appropriate adaptive behavior in an instructional or employment setting as defined in Section 56004 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56019. Professionally Verified Disability.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56020. Multiple Disabilities.

Multiple disabilities are defined as two or more functional impairments described in Sections 56010, 56012, 56014, 56016 and 56018 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56022. Individual Educational Plan.

(a) An individual educational plan (IEP) is a plan to address specific needs of the student. An IEP must be established at the beginning of each academic year and updated each term for every disabled student enrolled. The IEP specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSP&S credentialed personnel as necessary to meet the student's specific educational needs. The IEP shall be reviewed each term by a credentialed DSP&S staff person to determine whether the student had made progress toward his/her stated goal(s).

(b) Each IEP shall include, but need not be limited to:

(1) A statement of the student's long-term and short-term educational goals and objectives;

(2) A verification of the need for enrollment in special classes and/or provision of support services;

(3) A description of the process by which the student will reach his/her stated goal(s), including enrollment in regular and/or special classes;

(4) A description of the criteria used to evaluate the student's progress.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56024. Measurable Progress.

Measurable progress is defined as documented progress towards meeting the goals and objectives stated in the Individual Educational Plan.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56026. Special Services.

Special services are those support services available to students defined in Sections 56010–56020 of this chapter, which are in addition to the regular services provided to all students. Such services enable students to participate in regular activities, programs and classes offered by the college. They may include, but need not be limited to:

(a) Basic DSP&S administrative services, including program development, accountability and evaluation;

(b) Access to and arrangements for adaptive educational equipment, materials and supplies required by disabled students;

(c) Job placement and development services related to transition to employment;

(d) Liaison with campus and/or community agencies, including referral to campus or community agencies and follow-up services;

(e) Registration assistance relating to on or off-campus college registration, including priority enrollment assistance, application for financial aid and related college services;

(f) Special parking, including on-campus parking registration and temporary parking permit arrangements while an application is made for the State handicapped placard;

(g) Supplemental specialized orientation to acquaint students with environmental aspects of the college and community;

(h) Test-taking facilitation, including arrangement, proctoring and modification of tests and test administration for disabled students;

(i) Assessment, including both individual and group assessment not otherwise provided by the college to determine functional educational and vocational levels or to verify specific disabilities;

(j) Counseling, including specialized academic, vocational, personal, and peer counseling services specifically for disabled students, not duplicated by ongoing general counseling services available to all students;

(k) Interpreter services, including manual and oral interpreting for hearing-impaired students;

(l) Mobility assistance (on-campus), including manual or motorized transportation to and from college courses and related educational activities;

(m) Notetaker services, to provide assistance to disabled students in the classroom;

(n) Reader services, including the coordination and provision of services for disabled students in the instructional setting;

(o) Special class instruction designed to meet the unique educational needs of particular groups of disabled students, which does not duplicate existing college courses;

(p) Speech services provided by a licensed speech/language pathologist for students with verified speech disabilities;

(q) Transcription services, including the provision of adapted materials including braille and print;

(r) Transportation assistance (off-campus), only if not otherwise provided by the college to all students, where public accessible transportation is unavailable, and is deemed inadequate by the Chancellor's Office;

(s) Specialized tutoring services not otherwise provided by the college;

(t) Purchase and/or repair of DSP&S equipment, such as adapted educational equipment, materials, supplies and transportation vehicles;

(u) Outreach activities designed to recruit potential students with disabilities to the college;

(v) Extracurricular activities directly related to the student's educational goals as specified in the student's IEP as defined in Section 56022.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56028. Special Classes.

Special classes are instructional activities which produce average daily attendance (ADA) and are authorized by Education Code Sections 78400, 78441, 84500, and 84520. Such classes are designed for students with specific disabilities to accommodate functional limitations which would otherwise inhibit the student's ability to succeed in general college classes. Special classes offered for credit or noncredit shall meet the applicable requirements for degree credit, non-degree credit, or noncredit set forth in Sections 55002 and 55705.5 of this part. In addition, special classes:

(a) Shall have as their purpose the provision of intervention strategies that enable disabled students to compensate for functional limitations and/or acquire the skills necessary to complete their educational objectives;

(b) Shall utilize specialized instructional methods and/or materials to facilitate the educational success of disabled students enrolled. Instructors and support staff trained in the use of adaptive devices and/or special instructional methodologies for the disabled shall also be utilized. Such methods and/or materials may include, but are not limited to:

(1) Adapted instructional methods;
(2) Tactile devices;
(3) Readers, notetakers, and interpreters;
(4) Specialized educational equipment and materials;
(5) Braille and large-print materials; taped textbooks.

District governing boards shall ensure, when meeting the requirements of Sections 55002(a)(1), 55002(b)(1), 55002(c)(1) of this part, that curriculum committees responsible for reviewing and/or recommending special class offerings have or obtain the expertise appropriate for determining whether the requirements of this section are satisfied.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-29-88 (Register 88, No. 16).

Article 2. General Administration

56030. Educational Programs and Special Services.

The purpose of special programs and services funded pursuant to this chapter shall be: to integrate the disabled student into the general college program; to provide educational intervention leading to vocational preparation, transfer to general education; and to increase independence or referral of the student to community resources most appropriate to the student's needs. Such programs or services shall only be provided when they are facilitating the student's measurable progress towards his or her educational goals. Programs and services funded pursuant to this chapter may include, but need not be limited to:

(a) Assessment of essential skills and abilities;
(b) Prescriptive planning;
(c) Special class instruction;
(d) Counseling or guidance on a group or individual basis;
(e) Vocational preparation, training and job placement;
(f) Special services.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Section 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56032. Participation.

(a) Participation by a student in special programs and services shall not preclude participation in any other program or service which may be offered by the college;

(b) Participation of a student with a verified disability shall be deemed appropriate if the results of the identification and assessment process meet the criteria specified in Sections 56010-56020. Local assessment and identification processes shall be approved by the Chancellor in the DSP&S program plan.

(c) In assigning the student to special classes or services funded pursuant to this chapter, the college shall verify the disability through an assessment class or service. Together with the student, the college shall determine whether general supportive services and college classes are adequate to meet the student's particular needs.

(d) Each student served in DSP&S shall have an Individual Educational Plan.

(e) Community colleges shall employ reasonable means of informing all community college students and staff of the programs and services offered pursuant to this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56034. Student Rights and Responsibilities.

Students benefiting from the provisions of this chapter shall:

(a) Make measurable progress toward an educational goal and will disclose any health condition which may affect the safety and welfare of themselves, staff, and other students of the college;

(b) Be afforded all rights available to other community college students;

(c) Be assured that all student medical related health records and DSP&S records shall not be made available to anyone other than the following:

(1) DSP&S staff, college health personnel or other appropriate college personnel with a legitimate educational interest pursuant to 20 U.S.C.1232g(b)(1);

(2) Pursuant to Education Code Section 67143(b), to personnel from the Chancellor's Office and other State agencies to evaluate, audit or validate the DSP&S program.

Authorization by the student is needed for release of medical or health records to any other persons.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code; and 20 U.S.C. 1231g(b)(1).

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56036. Regional, State and Federal Coordination.

The Chancellor may request and the colleges shall provide data in response to requests from regional, state and federal agencies for needs assessments, resource surveys and policy development.

As a means of conducting special projects and enhancing communication between college programs and the Chancellor's Office, the Chancellor shall develop task forces and/or committees as deemed necessary.

The Chancellor's Office shall design and implement regional, local or statewide in-service training programs for professional and support staff. In-service training programs will be developed to meet needs identified at regional and local levels.

The cost of activities specified in this section may be charged to Program Accountability and Development Services (PADS).

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56038. Cooperative Agreements.

Cooperative agreements may be established among college districts, the Chancellor's Office, and other agencies or organizations for sharing equipment, facilities, staff and other resources in order to provide comprehensive support services and programs for students with disabilities.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56040. Student/Instructor Ratio.

Student/Instructor ratios shall be established by each district in order to meet the exceptional needs of the students enrolled. Class size should not be so large as to impede measurable progress or endanger the well-being and safety of students and staff. Student/Instructor ratios shall be reported in the annual program plan pursuant to Section 56046, and in budget reports to the Chancellor's Office as part of Section 56048 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For history of former Section 56040, see Register 83, No. 18.

56042. Advisory Committee.

Each community college providing services or programs for which the college receives funds pursuant to this chapter shall establish an advisory committee which shall meet not less than once per year.

The advisory committee shall be composed of representatives of the community served, public agencies and organizations serving the disabled.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For history of former Section 56042, see Register 83, No. 18.

56044. Special Class Course Repeatability.

(a) Repetition of special classes is subject to the provisions of Section 58161 of this part. However, districts are authorized to permit additional repetitions to meet the requirements of Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. Section 794. Districts shall develop local implementing policies and procedures providing for repetition under, but not limited to, the following circumstances:

(1) When continuing success of the student in other general and/or special classes is dependent on additional repetitions of a specific class;

(2) When additional repetitions of a specific special class are required for the student to meet the performance criteria of that class;

(3) When additional repetitions of a specific special class are essential to completing a student's preparation for enrollment into other courses which meet the requirements of a student's educational objectives.

(b) Repetitions of adaptive physical education are allowed, provided the student participates in at least one additional credit course that is not a physical education class within the general offerings of the college; and if the student makes progress towards the stated educational goal as documented in the Individual Educational Plan. Students enrolled only in adaptive physical education may repeat adaptive physical education for credit for three semesters or five quarters. Additional repetitions of adaptive physical education over three semesters or five quarters for such students must be offered as noncredit. Districts/colleges shall develop and implement mechanisms for monitoring special class repeatability and determining credit/noncredit applicability to satisfy the requirements of this subsection.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code; and 29 U.S.C. 794.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Article 3. Plans and Program Requirements

56046. DSP&S Program Plan.

Requirements for the DSP&S program are as follows:

(a) A DSP&S program plan shall be submitted on a five year cycle by districts for each college within the district. Upon approval by the Chancellor, the DSP&S plan shall be a contract between the District and the Chancellor. Expenditures of funds appropriated pursuant to the chapter must conform to the approved plan. Each district shall submit annual updates to its DSP&S program plan.

(b) The DSP&S program plan as updated shall be submitted annually to the Chancellor, on forms developed by the Chancellor's Office. These forms shall include the information set forth in subparagraph (c). These forms will be transmitted to the colleges at least 60 days prior to the deadline for submission.

(c) The DSP&S program plans shall contain the following:

(1) Long-term goals of the DSP&S program;

(2) Short-term measurable objectives of the program;

(3) Activities to be undertaken to accomplish the goals and objectives;

(4) An assessment and identification process for all students deemed eligible to receive instruction and services;

(5) A description of criteria used to establish Individual Educational Plans and measurable progress;

(6) Staff/student ratios for instruction and services;

(7) A description of the methods used for program evaluation;

(8) A description of the process for increasing representation of persons with disabilities from the community, including outreach to disabled persons who are ethnic minorities and women.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56048. Enrollment Reports and Budget.

The district shall submit enrollment and budget reports to the Chancellor. These reports will be used by the Chancellor to forecast students served, to allocate funds, and to provide the basis for validation and audits.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56050. Review of DSP&S Program Plan, Enrollment Reports and Budget.

All plans, enrollment reports, and budgets shall be reviewed and evaluated by the Chancellor within ninety (90) days of receipt. The Chancellor shall approve plans in whole or in part for funding.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56052. Evaluation.

The Chancellor shall conduct evaluations of DSP&S programs to determine their effectiveness. Evaluations shall utilize an external peer review process following the accreditation model. The evaluation shall, at a minimum, provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), and data on the implementation of the program as outlined in Education Code Sections 84850 and 78600.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code; and 29 U.S.C. 794.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56054. Program Audits.

The Chancellor shall provide for on-site validations and audits of DSP&S programs to determine the accuracy of the reported number of students served and expenditure of funds pursuant to the requirements of this chapter. The Chancellor may adjust allocations to reflect validation and audit findings.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Article 4. Personnel

56056. Authorized Professional Staff.

Persons providing services in the DSP&S program as coordinators, counselors or instructors shall possess valid Community College credentials authorizing the service provided, and shall meet the minimum academic and/or experiential requirements set forth in Sections 56058–56064 of this article.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56058. Coordinator of Disabled Student Programs and Services.

Each participating community college shall designate one certificated employee as the Coordinator of DSP&S. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day to day operation of DSP&S. The designated Coordinator must hold a credential issued by the Board of Governors which authorizes the holder to perform the types of duties the coordinator performs for the college district.

In addition, the Coordinator must meet the following minimum standards:

(a) Hold an appropriate DSP&S credential; and/or

(b) Have two (2) years full time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) Instruction or counseling or both in a higher education program for students with disabilities; or

(2) Administration of a program for students with disabilities in an institution of higher education; or

(3) Teaching, counseling or administration in secondary education, working predominantly or exclusively in programs for students with dsiabilities; or

(4) Administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominantly or exclusively related to persons with disabilities, or

(c) Meet the requirements of Education Code Section 84850.5(b).

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56060. Counselor, Disabled Student Programs and Services.

For the purpose of this section, a counselor of DSP&S shall be defined as a certificated counselor providing academic, personal and vocational guidance and counseling in accordance with the standards for the Community College Counselor Credential pursuant to Section 52140. The DSP&S counselor shall be further authorized to instruct courses in guidance/counseling or college orientation and to provide intake counseling assessments and/or screenings for students enrolled in DSP&S. In addition, the DSP&S Counselor must meet the following minimum standards:

(a) Hold a masters degree in Rehabilitation Counseling; or

(b) Hold a masters degree in a field of special education with completion of 24 semester units of upper division or graduate level coursework with emphasis in counseling, guidance, student personnel, psychology or social welfare; or

(c) Hold a masters degree in counseling, guidance, student personnel, psychology, or social welfare, with 12 or more semester units in upper division or graduate level coursework specifically in the counseling or rehabilitation of individuals with disabilities and have two (2) years full-time experience or equivalent within the last four (4) years in one or more of the following areas:

(1) Counseling and/or guidance for students with disabilities in an institution of higher education; or

(2) Counseling and/or guidance for secondary school students with disabilities; or

(3) Counseling and/or guidance in industry, government, public agencies, military or private social welfare organizations in which the responsibilities of the position were predominantly or exclusively for persons with disabilities; or

(d) Meet the requirements of Education Section 84850.5 (b).

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56062. Waiver of Minimum Requirements for DSP&S Counselors and Coordinators.

A waiver of the minimum requirements for DSP&S counselors and Coordinators may be granted upon request to the Chancellor. The waiver request must be submitted to the Chancellor by the college president or superintendent and must contain a detailed explanation as to why no individual meeting the minimum requirements was available to fill the position. The request must further document that the level of services to disabled students will not be reduced as a result of personnel not meeting minimum requirements. The request shall also include a description of the actions the college and/or district expects to undertake, and estimated timelines, in order to employ personnel who will meet the minimum requirements.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56064. Disabled Student Programs and Services Instructor and Services Credential.

Personnel responsible for the provision of instruction and service to students with disabilities must possess the DSP&S Instructor/Services Credential defined in Sections 52085–52087 and 56058–56062 of this part.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56066. Authorized Support Staff.

Each community college district may employ non-certificated support staff. Support staff shall function under the direction of certificated persons credentialed in the area for which services and instruction are provided.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Article 5. Funding

56068. Allocation.

The Chancellor shall allocate funds to each Community College District for expenditure in each college in accordance with the approved DSP&S plan. The Chancellor may authorize redistribution of funds between colleges within a District on application of the District.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56070. Criteria for Funding Served Students.

When counting Students served for the purpose of funding, each student must meet one or more of the following criteria:

(a) Be enrolled in a general college class and receive three or more contact hours of special services per term; or

(b) Be enrolled in a special class; or

(c) Be enrolled in three or more units of approved independent study, supervised or approved by credentialed DSP&S staff.

DSP&S funds shall be allocated only for students who have completed the registration process and have paid or received a waiver of fees.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56072. Direct Excess Costs.

Direct excess costs are expenditures which do not duplicate existing college or community resources and are incurred to meet the exceptional needs of students with disabilities through the provision of special classes and/or services. Only expenditures in the following areas may be claimed as Direct Excess Costs:

(a) Special facilities costs which are expenditures for space, equipment or furniture acquired or modified by the district and used by the students.

(b) Educational material costs which are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) DSP&S personnel:

(1) Expenditures for certificated persons employed to provide student support and/or instructional services;

(2) Classified instructional or service aides and other classified assistants utilized for the provision of instruction and/or services;

(3) Benefits.

(d) Transportation costs which are expenditures for persons, equipment, modifications or related costs for transporting students for educational purposes not otherwise provided by the college.

(e) Other instructional or service related expenditures in DSP&S.

(f) Program Accountability and Development Services Funds (PADS) costs expended for college, regional and statewide activities for staff and program development which are approved by the Chancellor.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56074. Non-Instructional Cost Rate.

The State approved non-instructional cost rate is determined by dividing the preceding fiscal year's total non-instructional costs by the sum of its non-instructional and direct instructional costs. Non-instructional costs are those fixed administrative and ancillary costs which a college shall compute from the income generated by ADA in special classes.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56076. Determination of Net Apportionment.

The net apportionment for the fiscal year shall be determined by utilizing the apportionment in Section 56078 of this chapter and the non-instructional costs determined by Section 56074 of this chapter.

If program income exceeds expenditures, the non-instructional costs plus the percentage of apportionment in excess of the non-instructional costs returned to the college general fund shall not exceed 50% for on-campus special classes and 20% for off-campus special classes.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56078. Average Daily Attendance Apportionment (ADA) for Classes Offered Through DSP&S.

ADA Apportionment for special classes is determined by the following method: The aggregate average cost per unit of ADA is the sum of the total apportionment available to the district. This result is then reduced by the total amount of the State approved non-instructional cost rate as defined in Section 56074.

The apportionment funds generated by this process must be expended for special class instruction in accordance with Section 56028 of this chapter.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

56080. Determination of Direct Excess Costs.

Direct excess costs, as defined in Section 56072 of this chapter, shall be approved only after special class average daily attendance apportionment and all other funding has been completely utilized. These income sources shall include but not be limited to:

(a) Vocational Education Act (VEA);
(b) Local or college contribution/support;
(c) Federal/state or local assistance grants;
(d) Value of volunteers.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56082. Adjustments to Allocation.

The Chancellor may adjust the allocation of any college during a given fiscal year for one or more of the following reasons:

(a) To adjust for over or under allocated amounts in any of three prior fiscal years;
(b) To adjust for over or under utilization of current allocations;
(c) To adjust for over or under allocation resulting from audits or validations.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56084. District Fiscal Responsibility and Contribution.

The district fiscal responsibility shall be to fund the cost of providing services at rates which are at least equal to the average cost expended for services offered by the college if the student receives these services exclusively through DSP&S.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

56086. Expenses Not Funded.

Funds shall not be provided for the following expenses:

(a) College administrative support costs, such as: staff of the college business office, bookstore, reproduction, etc.;
(b) Administrative salaries and benefits, with the exception of the DSP&S Coordinator;
(c) Indirect costs, such as heat, light, power and janitorial;
(d) Costs of construction, except for removal or modification of minor architectural barriers, with approval of the Chancellor;

(e) Travel costs for other than DSP&S related activities or functions;
(f) Costs for campus space and plant maintenance.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

59088. Other Support Funds.

Colleges applying for direct funds will certify to the Chancellor that reasonable efforts have been made to secure federal or local funds other than short-term grants for DSP&S.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY:

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Register 91-23

§ 55602.5

Subchapter 7. Occupational Education

Article 1. Vocational Education Contracts

55600. Definitions.

For the purposes of this article the following definitions apply:

(a) Vocational education contract means a written agreement between ny community college district and a contractor which meets standards rescribed herein to provide vocational instruction to students enrolled community colleges. Such agreements shall also be required to comply ith the provisions of article 5 (commencing with section 8090) of chapr 1, part 6 of the Education Code.

(b) The California State Plan for Vocational Education means an offial agreement between the United States Commissioner of Education d the California State Board of Education which provides standards, olicies, and procedures that shall apply to the operation of various nses of vocational education to qualify for financial support from the ducation Amendments of 1976 (Public Law 94–482 and 95–40), part , Vocational Education, or any subsequent federal legislation.

(c) Contractor as used in Education Code section 8092 means any prite postsecondary school authorized or approved pursuant to the provions of Chapter 3 (commencing with section 94300), and which has been operation not less than two (2) full calendar years prior to the effective te of the contract, to provide vocational skill training authorized by this ode.

(d) Eligible costs means all direct and indirect related instructional sts but does not include expenditures for capital outlay (600 category the California Community Colleges Budget and Accounting Manual).

ote: Authority cited: Sections 8092, 66700 and 70901, Education Code. Referce: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Educaon Code.

History

New chapter 7 (sections 55600 through 55631, not consecutive) filed 4–26–74; effective thirtieth day thereafter (Register 74, No. 17).

Amendment of section and NOTE filed 11–4–77; effective thirtieth day thereafter (Register 77, No. 45).

Repealer of subchapter 1 heading, amendment of article 1 heading, and repealer and new section 55600 filed 4–27–83; effective thirtieth day thereafter (Register 83, No. 18).

Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

55601. Definitions.

OTE: Authority cited: Sections 71020, 8092, Education Code. Reference: Chapr 1, Article 5 (commencing with Section 8090) of Division 1 of the Education ode.

History

Amendment filed 11–4–77; effective thirtieth day thereafter (Register 77, No. 45).

Amendment of subsection (g) filed 1–16–81; effective thirtieth day thereafter (Register 81, No. 3).

Repealer filed 4–27–83; effective thirtieth day thereafter (Register 83, No. 18).

55602. Authority to Contract.

Any community college district or districts may contract with a private ost secondary school authorized or approved pursuant to the provisions f chapter 3 (commencing with section 94300) of part 59 of the Education Code and which has been in operation not less than two full calendar ears prior to the effective date of such contract to provide vocational kill training authorized by the Education Code. Any community college istrict may contract with an activity center, work activity center, or sheltered work shop to provide vocational skill training authorized by the Education Code in any adult education program for substantially handicapped persons operated pursuant to subdivision (c) of section 41976 of he Education Code.

All contracts between a community college district and a private postsecondary school entered into pursuant to this section, or an activity center, work center, or sheltered workshop shall do all of the following:

(1) Be approved by the Chancellor.

(2) Provide that the amount contracted for per student shall not exceed the total direct and indirect costs to provide the same training in the community colleges or the tuition the private postsecondary school charges its private students, whichever is lower.

(3) Provide that the community college students receiving training in a private postsecondary school, or an activity center, work activity center, or sheltered workshop pursuant to that contract may not be charged additional tuition for any training included in the contract. The attendance of those students pursuant to a contract authorized by this section shall be credited to the community college district for the purposes of apportionments from the State School Fund.

(4) Provide that all programs, courses, and classes of instruction shall meet the standards set forth in the California State Plan for Vocational Education, or is a course of study for adult schools approved by the Department of Education under section 51056 of the Education Code.

The students who attend a private postsecondary school or an activity center, work activity center or sheltered workshop pursuant to a contract under this section shall be enrollees of the community college and the vocational instruction provided pursuant to that contract shall be under the exclusive control and management of the governing body of the contracting community college district. The Chancellor may audit the accounts of both the district and the private party involved in these contracts to the extent necessary to assure the integrity of the public funds involved.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55602.5. Contracts for Vocational Education for Students with Impaired Physical Capacity.

Notwithstanding any provision in the Education Code to the contrary, the governing board of a community college district and a proprietary or nonprofit organization, a public entity, or a proprietary or nonprofit private corporation may enter into a contract for the education of community college students whose capacity to function is impaired by physical deficiency or injury, in vocational education classes to be conducted for such students by the proprietary or nonprofit organization, the public entity, or the proprietary or nonprofit private corporation maintaining the vocational education classes. All instruction pursuant to this section shall be approved of and supervised by the governing board of the community college district and shall be conducted by academic employees. The average daily attendance of such community college students attending classes, under the provisions of this section, shall be credited to the community college district and college credit may be granted students who satisfactorily complete the course of instructions in such classes.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55603. Instructional Purpose.

Contractors shall provide vocational, technical, and occupational instruction related to attainment of skills, knowledge, and attitudes so that students may be prepared for:

(a) Gainful employment in the occupational area for which training was provided, or

(b) Occupational upgrading so students will have higher level skills required by new and changing technology and employment practices, or

(c) Enrollment in more advanced training programs.

Note: Authority cited: Sections 8092, 66700 and 70901, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Education Code.

Register 91-31

§ 56062
§ 56064

§ 56050. Review of DSP&S Program Plan, Enrollment Reports and Budget.

All plans, enrollment reports, and budget shall be reviewed and evaluated by the Chancellor within ninety (90) days of receipt. The Chancellor shall approve plans in whole or in part for funding.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850 Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 56052. Evaluation.

The Chancellor shall conduct evaluations of DSP&S programs to determine their effectiveness. Evaluations shall utilize an external peer review process following the accreditation model. The evaluation shall at a minimum, provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), and data on the implementation of the program as outlined in Education Code Sections 84850 and 78600.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code, 29 U.S.C. Sec. 794.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

§ 56054. Program Audits.

The Chancellor shall provide for on-site validations and audits of DSP&S programs to determine the accuracy of the reported number of students served and expenditure of funds pursuant to the requirements of this chapter. The Chancellor may adjust allocations to reflect validation and audit findings.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Article 4. Personnel

§ 56056. Authorized Professional Staff.

Persons providing services in the DSP&S program as coordinators, counselors or instructors shall possess valid Community College credentials authorizing the service provided, and shall meet the minimum academic and/or experiential requirements set forth in Sections 56058–56064 of this article.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-888 (Register 88, No. 16). For prior history, see Register 83, No.18.

§ 56058. Coordinator of Disabled Student Programs and Services.

Each participating community college shall designate one certificated employee as the Coordinator of DSP&S. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day to day operation of DSP&S. The designated Coordinator must hold a credential issued by the Board of Governors which authorizes the holder to perform the types of duties the coordinator performs for the college district.

In addition, the Coordinator must meet the following minimum standards:

(a) Hold an appropriate DSP&S credential; and/or

(b) Have two (2) years full time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) Instruction or counseling or both in a higher education program for students with disabilities; or

(2) Administration of a program for students with disabilities in an institution of higher education; or

(3) Teaching, counseling or administration in secondary education, working predominantly or exclusively in programs for students with disabilities; or

(4) Administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominantly or exclusively related to persons with disabilities, or

(c) Meet the requirements of Education Code Section 84850.5(b).

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

§ 56060. Counselor, Disabled Student Programs and Services.

For the purpose of this section, a counselor of DSP&S shall be defined as a certificated counselor providing academic, personal and vocational guidance and counseling in accordance with the standards for the Community College Counselor Credential pursuant to Section 52140. The DSP&S counselor shall be further authorized to instruct courses in guidance/counseling or college orientation and to provide intake counseling assessments and/or screenings for students enrolled in DSP&S. In addition, the DSP&S Counselor must meet the following minimum standards:

(a) Hold a masters degree in Rehabilitation Counseling; or

(b) Hold a masters degree in a field of special education with completion of 24 semester units of upper division or graduate level coursework with emphasis in counseling, guidance, student personnel. psychology or social welfare; or

(c) Hold a masters degree in counseling, guidance, student personnel. psychology, or social welfare, with 12 or more semester units in upper division or graduate level coursework specifically in the counseling or rehabilitation of individuals with disabilities and have two (2) years full-time experience or equivalent within the last four (4) years in one or more of the following areas.

(1) Counseling and/or guidance for students with disabilities in an institution of higher education; or

(2) Counseling and/or guidance for secondary school students with disabilities; or

(3) Counseling and/or guidance in industry, government, public agencies, military or private social welfare organizations in which the responsibilities of the position were predominantly or exclusively for persons with disabilities; or

(d) Meet the requirements of Education Section 84850.5 (b).

NOTE: Authority cited: Sections 71020, 78600 and 84600 and 84850, Education Code. Reference: Section 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 83, No. 16). For prior history, see Register 83, No.18.

§ 56062. Waiver of Minimum Requirements for DSP&S Counselors and Coordinators.

A waiver of the minimum requirements for DSP&S counselors and Coordinators may be granted upon request to the Chancellor. The waiver request must be submitted to the Chancellor by the college president or superintendent and must contain a detailed explanation as to why no individual meeting the minimum requirements was available to fill the position. The request must further document that the level of services to disabled students will not be reduced as a result of personnel not meeting minimum requirements. The request shall also include a description of actions the college and/or district expects to undertake, and estimated timetables, in order to employ personnel who will meet the minimum requirements.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error in first paragraph (Register 91, No 31).

Disabled Student Programs and Services Instructor and Services Credential.

Personnel responsible for the provision of instruction and service to students with disabilities must possess the DSP&S Instructor/Services Credential defined in sections 52085–52087 of this part.

Note: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error (Register 91, No. 31).

§ 56066. Authorized Support Staff.

Each community college district may employ non-certificated support staff. Support staff shall function under the direction of certificated persons credentialed in the area for which services and instruction are provided.

Note: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

Article 5. Funding

§ 56068. Allocation.

The Chancellor shall allocate funds to each Community College District for expenditure in each college in accordance with the approved DSP&S plan. The chancellor may authorize redistribution of funds between colleges within a District on application of the District.

Note: Authority cited: Sections 71020, 78600, and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

History

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 56070. Criteria for Funding Served Students.

When counting Students served for the purpose of funding, each student must meet one or more of the following criteria:

(a) Be enrolled in a general college class and receive three or more contact hours of special services per term; or

(b) Be enrolled in a special class; or

(c) Be enrolled in three or more units of approved independent study, supervised or approved by credentialed DSP&S staff.

DSP&S funds shall be allocated only for students who have completed the registration process and have paid or received a waiver of fees.

Note: Authority cited: Sections 71020, 78600, and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

History

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 56072. Direct Excess Costs.

Direct excess costs are expenditures which do not duplicate existing college or community resources and are incurred to meet the exceptional needs of students with disabilities through the provisions of special classes and/or services. Only expenditures in the following areas may be claimed as Direct Excess Costs:

(a) Special facilities costs which are expenditures for space, equipment or furniture acquired or modified by the district and used by the students.

(b) Educational material costs which are expenditures for material specifically developed or purchased to assist the student in the learning process.

(c) DSP&S personnel:

(1) Expenditures for certificated persons employed to provide student support and/or instructional services;

[The next page is 359.]

Register 91-43

§ 55602.5

in community colleges. Such agreements shall also be required to comply with the provisions of article 5 (commencing with section 8090) of chapter 1, part 6 of the Education Code.

(b) The California State Plan for Vocational Education means an official agreement between the United States Commissioner of Education and the California State Board of Education which provides standards, policies, and procedures that shall apply to the operation of various phases of vocational education to qualify for financial support from the Education Amendments of 1976 (Public Law 94-482 and 95-40), part A, Vocational Education, or any subsequent federal legislation.

(c) Contractor as used in Education Code section 8092 means any private postsecondary school authorized or approved pursuant to the provisions of Chapter 3 (commencing with section 94300), and which has been in operation not less than two (2) full calendar years prior to the effective date of the contract, to provide vocational skill training authorized by this Code.

(d) Eligible costs means all direct and indirect related instructional costs but does not include expenditures for capital outlay (600 category in the California Community Colleges Budget and Accounting Manual).

Note: Authority cited: Sections 8092, 66700 and 70901, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Education Code.

History

. New chapter 7 (sections 55600 through 55631, not consecutive) filed 4-26-74; effective thirtieth day thereafter (Register 74, No. 17).
. Amendment of section and NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
. Repealer of subchapter 1 heading, amendment of article 1 heading, and repealer and new section 55600 filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55601. Definitions.

Note: Authority cited: Sections 71020, 8092, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090) of Division 1 of the Education Code.

History

. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
. Amendment of subsection (g) filed 1-16-81; effective thirtieth day thereafter (Register 81, No. 3).
. Repealer filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

§ 55602. Authority to Contract.

Any community college district or districts may contract with a private post secondary school authorized or approved pursuant to the provisions of chapter 3 (commencing with section 94300) of part 59 of the Education Code and which has been in operation not less than two full calendar years prior to the effective date of such contract to provide vocational skill training authorized by the Education Code. Any community college district may contract with an activity center, work activity center, or sheltered work shop to provide vocational skill training authorized by the Education Code in any adult education program for substantially handicapped persons operated pursuant to subdivision (e) of section 41976 of the Education Code.

All contracts between a community college district and a private postsecondary school entered into pursuant to this section, or an activity center, work center, or sheltered workshop shall do all of the following:

(1) Be approved by the Chancellor.

(2) Provide that the amount contracted for per student shall not exceed the total direct and indirect costs to provide the same training in the community colleges or the tuition the private postsecondary school charges to private students, whichever is lower.

(3) Provide that the community college students receiving training in a private postsecondary school, or an activity center, work activity center, or sheltered workshop pursuant to that contract may not be charged additional tuition for any training included in the contract. The attendance of those students pursuant to a contract authorized by this section shall be credited to the community college district for the purposes of apportionments from the State School Fund.

(4) Provide that all programs, courses, and classes of instruction shall meet the standards set forth in the California State Plan for Vocational Education, or is a course of study for adult schools approved by the Department of Education under section 51056 of the Education Code.

The students who attend a private postsecondary school or an activity center, work activity center or sheltered workshop pursuant to a contract under this section shall be enrollees of the community college and the vocational instruction provided pursuant to that contract shall be under the exclusive control and management of the governing body of the contracting community college district. The Chancellor may audit the accounts of both the district and the private party involved in these contracts to the extent necessary to assure the integrity of the public funds involved.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55602.5. Contracts for Vocational Education for Students with Impaired Physical Capacity.

Notwithstanding any provision in the Education Code to the contrary, the governing board of a community college district and a proprietary or nonprofit organization, a public entity, or a proprietary or nonprofit private corporation may enter into a contract for the education of community college students whose capacity to function is impaired by physical deficiency or injury, in vocational education classes to be conducted for such students by the proprietary or nonprofit organization, the public entity, or the proprietary or nonprofit private corporation maintaining the vocational education classes. All instruction pursuant to this section shall be approved of and supervised by the governing board of the community college district and shall be conducted by academic employees. The average daily attendance of such community college students attending classes, under the provisions of this section, shall be credited to the community college district and college credit may be granted students who satisfactorily complete the course of instruction in such classes.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. Adoption of sections submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).
2. Editorial correction of printing error (Register 91, No. 43).

§ 55603. Instructional Purpose.

Contractors shall provide vocational, technical, and occupational instruction related to attainment of skills, knowledge, and attitudes so that students may be prepared for:

(a) Gainful employment in the occupational area for which training was provided, or

(b) Occupational upgrading so students will have higher level skills required by new and changing technology and employment practices, or

(c) Enrollment in more advanced training programs.

Note: Authority cited: Sections 8092, 66700 and 70901, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Education Code.

History

1. New NOTE filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
2. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55604. Application for Approval.

Note: Authority cited: Sections 8092, 71020, 71024, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090) of Division 1 of the Education Code.

History

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
2. Amendment filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46).
3. Repealer filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).

History

1. Amendment of sections submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).
2. Editorial correction of printing error (Register 91, No. 43).

§ 54048. Agricultural Employment.

A student claiming residence shall provide either (a) or (b):

(a) Evidence that the student's parent with whom the student is living earns a livelihood primarily by performing agricultural labor for hire in California and other states and has performed such labor in California for at least two months in each of the preceding two years, and that the parent lives within the district. If the parent of such student had sufficient income to incur personal income tax liability for federal and/or state purposes, proof that the student was claimed as a dependent on federal or state personal income tax returns shall also be required.

(b) Evidence showing the student himself or herself earns a livelihood primarily by performing agricultural labor for hire in California and other states and that such labor has been performed in California for at least two months in each of the preceding two years.

As used in this section agricultural labor for hire means seasonal employment in connection with actual production of agricultural crops, including seeding, thinning and harvesting.

Note: Authority cited: Sections 66700, 68044, 68040 and 68100, Education Code. Reference: Sections 68044, 68100 and 78034, Education Code.

History

1. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 54050. Exceptions from the One-Year Waiting Period.

Those exceptions from payment of nonresident tuition provided by Education Code sections 68074 (military dependents) and 68075 (military members) apply only during the first year of the student's current physical presence in California.

Note: Authority cited: Sections 66700 and 68044, Education Code. Reference: Sections 68044, 68074 and 68075, Education Code.

History

1. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 54060. Appeal Procedure.

(a) A community college district shall notify each student of the student's residence classification not later than fourteen (14) calendar days after the beginning of the session for which the student has applied, or fourteen (14) calendar days after the student's application for admission, whichever is later.

(b) Any student, following a decision on residence classification by the college, may make written appeal of that decision. Each community college district shall establish procedures for appeals of residence classifications.

(c) The Chancellor will advise community college districts on issues in residence classification. However, the student shall have no right of appeal to the Chancellor or Board of Governors.

Note: Authority cited: Sections 66700 and 68044, Education Code. Reference: Sections 68040, 68044 and 78034, Education Code.

History

1. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 54070. Refunds.

The governing board of each community college district shall adopt rules providing for refund of the following nonresident tuition fees:

(a) Those collected in error.

(b) Those refundable as a result of a reduction of the educational program at the community college for which the fees have been paid.

(c) Those refundable as a result of the student's reduction of units or the student's withdrawal from an education program at the community college for which fees have been paid, where reduction or withdrawal is for reasons deemed sufficient by the governing board.

Note: Authority cited: Sections 66700, 68044 and 68051, Education Code. Reference: Sections 68044 and 68051, Education Code.

History

1. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 54072. Waiver.

The community college district may waive nonresident tuition fees which were not collected in a previous session where:

(a) The fees were not collected as a result of the district's error and not through the fault of the student, and

(b) To collect the fees would cause the student undue hardship. No state funds may be collected for the attendance of a student for whom fees were waived pursuant to this section.

Note: Authority cited: Sections 66700, 68044 and 68051, Education Code. Reference: Section 68044, Education Code.

History

1. New section filed 6-8-83; effective thirtieth day thereafter (Register 83, No. 24).
2. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

Subchapter 2. Parking for Students with Disabilities

§ 54100. Parking for Students with Disabilities.

(a) Each community college district which provides parking shall, consistent with the requirements of this section and Education Code Sections 66260 and 67311.5, provide parking at each of its colleges or centers to students with disabilities and those providing transportation for such students.

(b) For purposes of this section, "students with disabilities" are those who have enrolled at the college and:

(1) qualify as disabled persons or disabled veterans pursuant to Section 22511.5 of the Vehicle Code; or

(2) are entitled to special parking provided through Disabled Student Programs and Services pursuant to Subchapter 1 (commencing with Section 56000) of Chapter 7 of this Division.

(c) Students with disabilities using parking provided under this section may be required to display a distinguishing license plate or placard issued by the Department of Motor Vehicles pursuant to Section 22511.5 of the Vehicle Code or a special sticker issued by the college authorizing parking in spaces designated for persons with disabilities.

(d) Students with disabilities may be required to pay parking permit fees imposed pursuant to Education Code Section 72247. Students with disabilities shall not be required to pay any other charge, or be subjected to any time limitation or other restriction not specified herein, when parking in any of the following areas:

(1) any restricted zone described in subdivision (e) of Section 21458 of the Vehicle Code;

(2) any street upon which preferential parking privileges and height limits have been given pursuant to Section 22507 of the Vehicle Code;

(3) any parking zone that is restricted as to the length of time parking is permitted as indicated by a sign erected pursuant to a local ordinance;

(4) any metered zone; or

(5) any space in any lot or area otherwise designated for use by faculty, staff, administrators, or visitors.

(e) Parking specifically designated for persons with disabilities pursuant to Section 7102 of Title 24 of the California Code of Regulations shall be available to students with disabilities, and those providing transportation to such persons, in those parking areas which are most accessible to facilities which the district finds are most used by students.

(f) Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for such students.

(g) When parking provided pursuant to this section is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by

attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district.

(h) Revenue form parking fees collected pursuant to Education Code 7 may be used to offset the costs of implementing this sec-

TE: Authority cited: Sections 66260, 67311.5, 66700 and 70901, Education de. Reference: Sections 66260, 67311.5 and 72247, Education Code; and Secns 21458, 22507 and 22511.5, Vehicle Code.

History

Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

Repealer of Chapter 2 (Section 54150) filed 7-29-82; effective thirtieth day hereafter (Register 82, No. 31).

New section filed 1-16-92; operative 2-18-92 (Register 92, No. 12).

Subchapter 2.5. Medical Insurance for Hazardous Activities

TE: Authority cited: Sections 71020, 72246.5, Education Code. Reference: tion 72246.5, Education Code.

History

New Chapter 2.5 (Articles 1-3, Sections 54161-54184, not consecutive) filed 2-13-78 as an emergency; effective upon filing. Certificate of Compliance included (Register 78, No. 50).

Repealer of Chapter 2.5 (Sections 54160-54184) filed 11-15-79; effective hirtieth day thereafter (Register 79, No. 46).

Subchapter 3. Attendance

TE: Authority cited: Sections 66700, 71020, 76300, 78405, 84500.1, and 30, Education Code. Reference: Sections 8512, 76300, 78203, 78412, 84500, 00.1, 84500.5, and 84530, Education Code.

History

Repealer of Chapter 3 (Subchapters 1 and 2, Sections 54200-54222, not consecutive) and new Chapter 3 (Articles 1 and 2, Sections 54180-54228, not consecutive) filed 8-12-80; effective thirtieth day thereafter (Register 80, No. 33). For prior history, see Registers 79, No. 46; 77, No. 45; and 74, No. 10.

4. Chapter 3 (Articles 1 and 2, Sections 54180-54228, not consecutive) filed 7-29-82; effective thirtieth day thereafter (Register 82, No. 31). For prior history, see Register 81, No. 3.

54200. Certain Students' Residences More than 60 Miles from Nearest Attendance Center.

Any student under 21 years of age, and any student under 25 years of who has been honorably discharged or is otherwise returning from ive or inactive military service within the armed forces of the United tes, who resides in this state and more than 60 miles from the nearest mmunity college measured by the usual vehicular route between the dent's home and the college, may request to attend credit courses at community college in the state, whether or not the student's residence a district maintaining a community college. The governing board of district maintaining the community college designated by the student ll admit the student provided all requirements for admission are met. The provisions of this section shall not apply to any student residing district maintaining a community college if that district maintains adate dormitories or housing facilities or provides adequate transporta for the student between the student's home and community college ndance center.

f the student resides within territory not included within any district resides more than 60 miles from the nearest community college, meed by the usual vehicular route between the students home and the atdance center, there shall be paid to the parents or other persons having rge or control of the student and directly to adult students and married ors, by the district in which the student attends, a maintenance allowe not to exceed four dollars ($4) per calendar day, including weekends school holidays, for the portion of a semester, quarter, or other sesn or term in which the student is enrolled full time in credit classes in or college under this section. Districts shall receive reim- the Chancellor's Office for allowances paid to students from nondistrict territory for the prior fiscal year not to exceed the maximum amount as provided by law.

No later than 60 days after the close of each fiscal year the Chancellor shall determine the daily allowance rate for the prior fiscal year. If claims made by community colleges exceed total funds raised by nondistrict territories for that purpose prior to July 1, 1978, the Chancellor shall prorate the allowances made under this section. No later than 90 days after the close of each fiscal year the community college districts shall pay eligible students at the rate prescribed by the Chancellor and verification of the claims by the appropriate county superintendent of schools.

The Chancellor shall prescribe procedures for the submission of claims by districts.

For the purpose of this section, a person shall be deemed to be honorably discharged from the armed forces (a) if he or she was honorable discharged from the armed forces of the United States or (b) if he or she was inducted into the armed forces of the United States under the "Universal Military Training and Service Act," and

(1) satisfactorily completes his or her period of training and service under that act and is issued a certificate to that effect pursuant to that act, or

(2) having served honorably on active duty was transferred to a reserve component of the armed forces of the United States pursuant to that act, or

(3) was otherwise released pursuant to that act under honorable conditions.

For the purposes of this section, the term "armed forces of the United States" shall include all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretaries of the Army, Navy and Air Force, and all components of the Coast Guard.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).
2. Amendment of third and fifth paragraphs filed 10-25-91; operative 11-24-91 (Register 92, No. 9).

Subchapter 4. Interstate Attendance

NOTE: Authority cited for Chapter 4: Section 66804, Education Code. Reference: Chapter 11, Part 40, Division 5, Education Code.

History

1. New Chapter 4 (Sections 54300-54340, not consecutive) filed 9-27-73; effective thirtieth day thereafter (Register 73, No. 39).
2. Amendment of NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
3. Repealer of Chapter 4 (Sections 54300-54340, not consecutive) filed 7-29-82; effective thirtieth day thereafter (Register 82, No. 31).

Subchapter 5. Enrollment Accounting

NOTE: Authority cited: Section 71020 and 84522, Education Code.

History

1. New Chapter 5 (Sections 54500-54510, not consecutive) filed 12-13-74; effective thirtieth day thereafter (Register 74, No. 50).
2. Amendment of NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
3. Repealer of Chapter 5 (Sections 54500-54512, not consecutive) filed 7-29-82; effective thirtieth day thereafter (Register 82, No. 31). For prior history, see Registers 76, No. 41 and 75, No. 26.

Subchapter 6. Student Records

§ 54600. Purpose.

This chapter is adopted pursuant to and for implementation of Chapter 1.5 (commencing with Section 76200), Part 47 of Division 7 of the Education Code regarding Student Records. The provisions of this Chapter should be read and interpreted in conjunction with the provisions of Chapter 1.5.

Alternative delivery systems considered must be adequately described, generally mutually exclusive, and limited to a manageable number to facilitate analysis and review.

(d) Proposed sources of funding for needed resources must be identified for both short and long-term operations.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Sections 66700 and 81810, Education Code.

HISTORY

1. Amendment of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55840. Appointment and Qualification of District Librarian.

The governing board of a community college district maintaining its own library or libraries may appoint a librarian who shall meet minimum qualifications established pursuant to chapter 4 (commencing with section 53400) of division 4 of this part.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

§ 55841. Annual Report by Governing Board to Department of Education.

The governing board of a district shall, on or before August 31st, in each year, report to the Chancellor on the condition of district libraries, for the year ending June 30th preceding. The report shall, in addition to other matters deemed expedient by the governing board or the librarians, contain such statistical and other information as is deemed desirable by the Chancellor. For this purpose the Chancellor may send to the districts instructions or question blanks so as to obtain the material for a comparative study of library conditions in the state.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Adoption of section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 23).

Chapter 7. Special Programs

Subchapter 1. Disabled Student Programs and Services

Article 1. General Provisions and Definitions

§ 56000. Scope of Chapter.

This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code Sections 67310–12 and 84850.

Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter. Any support services or instruction funded, in whole or in part, under the authority of this subchapter must:

(a) not duplicate services or instruction which are otherwise available to all students;

(b) be directly related to the educational limitations of the verified disabilities of the students to be served;

(c) be directly related to the students' participation in the educational process;

(d) promote the maximum independence and integration of students with disabilities; and

(e) support participation of students with disabilities in educational activities consistent with the mission of the community colleges as set forth in Education Code Section 66701.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 66701, 67310–12 and 84850, Education Code.

HISTORY

1. Repealer of chapter 1 (sections 56000–56062) and new chapter 1 (sections 56000–56088, not consecutive) filed 12-17-76 as an emergency; effective upon filing. Designated inoperative 90 days after filing (Register 76, No. 51). For prior history, see Register 73, No. 44.
2. Repealer of chapter 1 (sections 56000–56088, not consecutive) and new chapter 1 (sections 56000–56088) filed 3-15-77; effective thirtieth day thereafter (Register 77, No. 12).
3. Amendment of section and NOTE filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).
4. Amendment filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
5. Repealer of chapter 1 (sections 56000–56088, not consecutive) and new chapter 1 (sections 56000–56088, not consecutive) filed 3-29-88; operative 4-28-99 (Register 88, No. 16).
6. Amendment of first and second paragraphs, repealer of subsections (a) and (f), amendment of newly designated subsections (a)–(d), new subsection (e), and amendment of NOTE filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56002. Student with a Disability.

A "student with a disability" or "disabled student" is a person enrolled at a community college who has a verified impairment which limits one or more major life activities, as defined in 28 C.F.R. 35.104, and which imposes an educational limitation as defined in Section 56004. For purposes of reporting to the Chancellor under Section 56030, students with disabilities shall be reported in the categories described in Sections 56032–44.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56004. Educational Limitation.

As used in this subchapter, "educational limitation" means disability related functional limitation in the educational setting. This occurs when the limitation prevents the student from fully benefiting from classes, activities, or services offered by the college to nondisabled students, without specific additional support services or instruction as defined in Section 56005.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56005. Support Services or Instruction.

As used in this subchapter, "support services or instruction" means any one or more of the services listed in Section 56026, special class instruction authorized under Section 56028, or both.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. New section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56006. Determination of Eligibility.

(a) In order to be eligible for support services or instruction authorized under this chapter, a student with a disability must have an impairment which is verified pursuant to subdivision (b) which results in an educational limitation identified pursuant to subdivision (c) of this section.

(b) The existence of an impairment may be verified, using procedures prescribed by the Chancellor, by one of the following means:

(1) observation by DSPS professional staff with review by the DSPS coordinator;

(2) assessment by appropriate DSPS professional staff; or
(3) review of documentation provided by appropriate agencies or certified or licensed professionals outside of DSPS.

[illegible]dent's educational limitations must be identified by appropriate DSPS professional staff and described in the Student Education Contract (SEC) required pursuant to Section 56022. Eligibility for each service provided must be directly related to an educational limitation consistent with Section 56000(b) and Section 56004.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

56008. Student Rights.

(a) Participation by students with disabilities in Disabled Student Programs and Services shall be entirely voluntary.

(b) Receiving support services or instruction authorized under this subchapter shall not preclude a student from also participating in any other course, program or activity offered by the college.

(c) All records maintained by DSPS personnel pertaining to students with disabilities shall be protected from disclosure and shall be subject to all other requirements for handling of student records as provided in Subchapter 2 (commencing with Section 54600) of Chapter 5 of this Division.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

56010. Student Responsibilities.

(a) Students receiving support services or instruction under this subchapter [illegible] with the student code of conduct adopted by the college and other applicable statutes and regulations to student conduct;

(2) be responsible in their use of DSPS services and adhere to written service provision policies adopted by DSPS; and

(3) make measurable progress toward the goals established in the student's Student Educational Contract or, when the student is enrolled in a regular college course, meet academic standards established by the college pursuant to Subchapter 8 (commencing with Section 55750) of Chapter 6 of this Division.

(b) A district may adopt a written policy providing for the suspension or termination of DSPS services where a student fails to comply with subdivisions (a)(2) or (a)(3) of this section. Such policies shall provide for written notice to the student prior to the suspension or termination and shall afford the student an opportunity to appeal the decision. Each student shall be given a copy of this policy upon first applying for services from DSPS.

NOTE: Authority cited: Section 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

56012. Communication Disability.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

56014. Learning Disability.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, NO. 16).
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56016. Acquired Brain Injury.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56018. Developmentally Delayed Learner.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Article 2. DSPS Services

§ 56020. Availability of Services.

Each community college district receiving funds pursuant to this subchapter shall employ reasonable means to inform all students and staff about the support services or instruction available through the DSPS program.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment and repositioning of article 2. heading and repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56022. Student Educational Contract.

A Student Educational Contract (SEC) is a plan to address specific needs of the student. An SEC must be established upon initiation of DSPS services and shall be reviewed and updated annually for every student with a disability participating in DSPS. The SEC specifies those regular and/or special classes and support services identified and agreed upon by both the student and DSPS professional staff as necessary to meet the student's specific educational needs. The SEC shall be reviewed annually by a DSPS professional staff person to determine whether the student has made progress toward his/her stated goals(s).

Whenever possible the SEC shall serve as the Student Educational Plan (SEP) and shall meet the requirements set forth in Section 55525 of this division. In addition, for students in noncredit special classes, each SEC shall include, but need not be limited to a description of the criteria used to evaluate the student's progress.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 63710–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56024. Measurable Progress.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56026. Support Services.

Support services are those specialized services available to students with disabilities as defined in Section 56002, which are in addition to the regular services provided to all students. Such services enable students to participate in regular activities, programs and classes offered by the college. They may include, but need not be limited to:

(a) Basic fixed cost administrative services associated with the ongo-
g administration and operation of the DSPS program. These services
clude:

(1) Access to and arrangements for adaptive educational equipment,
aterials and supplies required by students with disabilities;

(2) Job placement and development services related to transition to
pployment;

(3) Liaison with campus and/or community agencies, including refer-
l to campus or community agencies and follow-up services;

(4) Registration assistance relating to on or off-campus college regis-
tion, including priority enrollment assistance, application for financial
l and related college services;

(5) Special parking, including on-campus parking registration or,
ile an application for the State handicapped placard or license plate is
nding, provision of a temporary parking permit.

(6) Supplemental specialized orientation to acquaint students with en-
onmental aspects of the college and community.

(b) Continuing variable cost services which fluctuate with changes in
number of students or the unit load of the students. These services in-
de, but are not limited to:

(1) Test-taking facilitation, including arrangement, proctoring and
dification of test and test administration for students with disabilities;

(2) Assessment, including both individual and group assessment not
erwise provided by the college to determine functional educational
d vocational levels or to verify specific disabilities;

(3) Counseling, including specialized academic, vocational, personal,
d peer counseling services specifically for students with disabilities,
t duplicated by ongoing general counseling services available to all
dents;

(4) Interpreter services, including manual and oral interpreting for
ring-impaired students;

(5) mobility ability assistance (on-campus), including manual or mo-
ized transportation to and from college courses and related educational
ivities;

(6) notetaker services, to provide assistance to students with disabili-
s in the classroom;

(7) reader services, including the coordination and provision of ser-
es for students with disabilities in the instructional setting;

(8) speech services provided by a licensed speech/language patholo-
t for students with verified speech disabilities;

(9) transcription services, including, but not limited to, the provision
braille and print materials;

(10) transportation assistance (off-campus), only if not otherwise pro-
ded by the college to all students, where public accessible transporta-
n is unavailable, and is deemed inadequate by the Chancellor's Office;

(11) specialized tutoring services not otherwise provided by the col-
ge;

(12) outreach activities designed to recruit potential students with dis-
ilities to the college;

(13) accommodations for participation in co-curricular activities di-
ctly related to the student's enrollment in state-funded educational
urses or programs; and

(14) repair of adaptive equipment donated to the DSPS program or
rchased with funds provided under this subchapter.

(c) One-time variable costs for purchase of DSPS equipment, such as
iapted educational equipment, materials, supplies and transportation
ehicles.

ote: Authority cited: Sections 67312, 70901 and 84850, Education Code. Ref-
rence: Sections 67310-12 and 84850, Education Code.

History

. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.

. Amendment of section heading, section and Note filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56027. Academic Accommodations.

Each community college district receiving funding pursuant to this subchapter shall establish a policy and procedure for responding to, in a timely manner consistent with Section 53203 of this division, accommodation requests involving academic adjustments. This procedure shall provide for an individualized review of each request. The procedure shall also permit the Section 504 Coordinator, or other designated district official with knowledge of accommodation requirements, to make an interim decision pending a final resolution.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

History

1. New section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56028. Special Classes Instruction.

Special classes are instructional activities designed to address the educational limitations of students with disabilities who would be unable to substantially benefit from regular college classes even with appropriate support services or accommodations. Such classes generate revenue based on the number of full-time equivalent students (FTES) enrolled in the classes.

Such classes shall be open to enrollment of students who do not have disabilities, however, to qualify as a special class, a majority of those enrolled in the class must be students with disabilities.

Special classes offered for credit or noncredit shall meet the applicable requirements for degree credit, non-degree credit, or noncredit set forth in Sections 55002 and 55705.5 of this part. In addition, special classes shall:

(a) Be designed to enable students with disabilities to compensate for educational limitations and/or acquire the skills necessary to complete their educational objectives;

(b) Employ instructors who meet minimum qualifications set forth in Section 53414 of this Division.

(c) Utilize curriculum, instructional methods, or materials specifically designed to address the educational limitations of students with disabilities. Curriculum committees responsible for reviewing and/or recommending special class offerings shall have or obtain the expertise appropriate for determining whether the requirements of this section are satisfied; and

(d) Utilize student/instructor ratios determined to be appropriate by the District given the educational limitations of the students with disabilities enrolled in each class. Class size should not be so large as to impede measurable progress or to endanger the well-being and safety of students or staff.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

History

1. New section filed 3-29-88 operative 4-29-88 (Register 88, No. 16).
2. Amendment of section heading, section and Note filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56029. Special Class Course Repeatability.

Repetition of special classes is subject to the provisions of Sections 55761-63 and 58161 of this division. However, districts are authorized to permit additional repetitions of special classes to provide an accommodation to a student's educational limitations pursuant to state and federal nondiscrimination laws. Districts shall develop policies and procedures providing for repetition under the follow circumstances:

(a) When continuing success of the student in other general and/or special classes is dependent on additional repetitions of a specific class;

(b) When additional repetitions of a specific special class are essential to completing a student's preparation for enrollment into other regular or special classes; or

(c) When the student has a student educational contract which involves a goal other than completion of the special class in question and repetition of the course will further achievement of that goal.

: Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310–12 and 84850, Education Code; and 29 U.S.C. Sec. 794.

History

ed 2-4-93; operative 3-6-93 (Register 93, No. 6).

Article 3. Reports, Plans and Program Requirements

030. Reporting Requirements.

ch community college district receiving funding pursuant to this apter shall submit such reports (including budget and fiscal reports ibed in Article 4) as the Chancellor may require. When submitting reports, districts shall use the disability categories set forth in Sec- 56032–44 and shall conform to the reporting format, procedures, eadlines the Chancellor may additionally prescribe.

: Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310–12 and 84850, Education Code.

History

pealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. . For prior history, see Register 83, No. 18.

endment and repositioning of article 3. heading and repealer and new sec- filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

032. Physical Disability.

ysical disability means a visual, mobility or orthopedic impairment.

) Visual impairment means total or partial loss of sight.

) Mobility or orthopedic impairment means a serious limitation in notion or motor function.

: Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310–12 and 84850, Education Code.

History

pealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. . For prior history, see Register 83, No. 18.

: w section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

034. Communication Disability.

mmunication disability is defined as an impairment in the processes ech, language or hearing.

) Hearing impairment means a total or partial loss of hearing function h impedes the communication process essential to language, educa- l, social and/or cultural interactions.

) Speech and language impairments mean one or more speech/lan- e disorders of voice, articulation, rhythm and/or the receptive and ssive processes of language.

: Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310–12 and 84850, Education Code.

History

pealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

036. Learning Disability.

arning disability is defined as a persistent condition of presumed ological dysfunction which may exist with other disabling condi- . This dysfunction continues despite instruction in standard room situations. To be categorized as learning disabled, a student exhibit:

) Average to above-average intellectual ability;

) Severe processing deficit(s);

) Severe aptitude-achievement discrepancy(ies); and

) Measured achievement in an instructional or employment setting.

: Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310–12 and 84850, Education Code.

History

pealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No.). istory, see Register 83, No. 18.

p. w section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56038. Acquired Brain Impairment.

Acquired brain impairment means a verified deficit in brain functioning which results in a total or partial loss of cognitive, communicative, motor, psycho-social, and/or sensory-perceptual abilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56040. Developmentally Delayed Learner.

The developmentally delayed learner is a student who exhibits the following:

(a) below average intellectual functioning; and

(b) potential for measurable achievement in instructional and employment settings.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56042. Psychological Disability.

(a) Psychological disability means a persistent psychological or psychiatric disorder, or emotional or mental illness.

(b) For purposes of this subchapter, the following conditions are not psychological disabilities:

(1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; and

(3) psychoactive substance abuse disorders resulting from current illegal use of drugs.

(c) In developing the allocation formula required under Section 56072, the Chancellor shall assign a zero weight to students with psychological disabilities until such time as the state budget provides additional funds to serve this population.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56044. Other Disabilities.

This category includes all students with disabilities, as defined in Section 56002, who do not fall into any of the categories described in Sections 56032–42, but who indicate a need for support services or instruction provided pursuant to Sections 56026 and 56028.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Editorial correction of printing error in subsection (a) (Register 91, No. 31).
3. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56046. DSPS Program Plan.

(a) Each district receiving funding pursuant to this subchapter shall submit to the Chancellor, at such times as the Chancellor shall designate, a DSPS program plan for each college within the district. Upon approval by the Chancellor, the plan shall be a contract between the District and the Chancellor. Expenditures of funds appropriated pursuant to this subchapter must conform to the approved plan.

(b) Each district shall submit updates to its program plan to the Chancellor upon request.

(c) The program plan shall be in the form prescribed by the Chancellor and shall contain at least all of the following:

(1) long-term goals of the DSPS program;

(2) the short-term measurable objectives of the program;

(3) the activities to be undertaken to accomplish the goals and objectives; and

(4) a description of the methods used for program evaluation.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Amendment of section heading, section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56048. Staffing.

(a) Persons employed pursuant to this subchapter as counselors or instructors of students with disabilities shall meet minimum qualifications set forth in Section 53414 of Subchapter 4 of Chapter 4 of this Division.

(b) Each district receiving funds pursuant to this subchapter shall designate a DSPS Coordinator for each college in the district. For the purpose of this section, the Coordinator is defined as that individual who has responsibility for the day-to-day operation of DSPS. The designated Coordinator must meet the minimum qualifications for a DSPS counselor or instructor set forth in Section 53414(a) through (d) or meet the minimum qualifications for an educational administrator set forth in Section 53420 and, in addition, have two (2) years full-time experience or the equivalent within the last four (4) years in one or more of the following fields:

(1) instruction or counseling or both in a higher education program for students with disabilities;

(2) administration of a program for students with disabilities in an institution of higher education;

(3) teaching, counseling or administration in secondary education, working predominantly or exclusively in programs for students with disabilities; or

(4) administrative or supervisory experience in industry, government, public agencies, the military, or private social welfare organizations, in which the responsibilities of the position were predominantly or exclusively related to persons with disabilities.

(c) Districts receiving funding pursuant to this subchapter may also employ classified and/or paraprofessional support staff. Support staff shall function under the direction of a DSPS counselor, instructor, or Coordinator as appropriate for the support services or instruction being provided.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56050. Advisory Committee.

Each district receiving funds pursuant to this subchapter shall establish, at each college in the district, an advisory committee which shall meet not less than once per year.

The advisory committee shall, at a minimum, include student with disabilities and representatives of the disability community and agencies or organizations serving persons with disabilities.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. New section filed 3–29–88; operative 4–28–88 (Register 88, No. 16).
2. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56052. Evaluation.

The Chancellor shall conduct evaluations of DSPS programs to determine their effectiveness. Each college shall be evaluated at least once every five years. The evaluation shall at a minimum, provide for the gathering of outcome data, staff and student perceptions of program effectiveness, access requirements of the Americans with Disabilities Act (42 USC 12101 et seq.), Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), compliance with Education Code Section 67311.5 with respect to parking for persons with disabilities, and data on the implementation of the program as outlined in Education Code Section 84850.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code; and 29 U.S.C. Sec. 794.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment of section and NOTE filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56054. Special Projects.

(a) Community college districts receiving funding pursuant to this subchapter shall cooperate to the maximum extent possible with the Chancellor in carrying out special projects. Such projects may include, but are not limited to, task force meetings, research studies, model programs, conferences, training seminars, and other activities designed to foster program development and accountability. Such special projects shall be funded from the three percent set aside authorized pursuant to Education Code Section 84850(e).

(b) Where such special projects fund services to students, such students need not meet the eligibility criteria otherwise required under this subchapter, but such students shall meet any eligibility requirements which the Chancellor may prescribe.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56056. Authorized Professional Staff.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–888 (Register 88, No. 16). For prior history, see Register 83, No.18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56058. Coordinator of Disabled Student Programs and Services.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

Article 4. Funding And Accountability

§ 56060. Basis of Funding.

Any community college district shall be entitled to receive funding pursuant to Education Code Section 84850 to offset the direct excess cost, as defined in Section 56064, of providing support services or instruction, or both, to students with disabilities enrolled in state-supported educational courses or programs.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3–29–88; operative 4–28–88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Amendment and repositioning of article heading and repealer and new section filed 2–4–93; operative 3–6–93 (Register 93, No. 6).

§ 56062. Provision of Support Services or Instruction.

A community college district will be deemed to have "provided support services or instruction" to a student with a disability, as required by Section 56060, if the student is enrolled in a special class or is enrolled in a regular class and received four or more service contracts per year with the DSPS program.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310–12 and 84850, Education Code.

History

ealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. For prior history, see Register 83, No. 18.

rection of printing error in first paragraph (Register 91, No. 31).

w section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

84. Direct Excess Costs.

ect excess costs are those actual fixed, variable, and one-time costs cluding indirect administrative costs, as defined in Section 56068) oviding support services or instruction, as defined in Sections 5 and 56028, which exceed the combined total of the following:

the average cost to the district of providing comparable services (as d in Section 56066) to nondisabled students times the number of nts receiving such services from DSPS;

the revenue derived from special classes as provided in Section); and

any other funds for serving students with disabilities which the dis- ceives from federal, state, or local sources other than discretionary t funds.

Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310-12 and 84850, Education Code.

History

ealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. For prior history, see Register 83, No. 18.

torial correction of printing error in first paragraph (Register 91, No. 31).

ealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

86. Comparable Services.

As used in Section 56064, "comparable services" are those services are comparable to services available from a college to its nondis- students. These services include, but are not limited to:

job placement and development as described in Section 5(a)(2);

registration assistance as described in Section 56026(a)(4);

special parking as described in Section 56026(a)(8);

t as described in Section 56026(b)(2);

as described in Section 56026(b)(3);

tutoring as described in Section 56062(b)(11); and

outreach as described in Section 56026(b)(12).

Districts which claim reimbursement for direct excess costs for erable services as defined in subdivision (a) must, for each college district:

certify that the service in question is not offered to nondisabled stu- ; or

collect and report to the Chancellor, on forms prescribed by the cellor, data showing the number of new and the number of continu- udents with disabilities enrolled in credit courses who received one re such services, in whole or in part, from DSPS.

The Chancellor shall adjust the allocation of each district by the er, if any, of students reported pursuant to subdivision (b)(2), times plicable credit student services funding rates for new and continu- udents calculated pursuant to Article 4 (commencing with Section 0) of Subchapter 4 of Chapter 9 of this Division.

Authority cited: Sections 67312, 70901 and 84850, Education Code. Refer- Sections 67310-12 and 84850, Education Code.

History

ealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. For prior history, see Register 83, No. 18.

ealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

88. Indirect Administrative Costs.

used in Section 56064, the term "indirect administrative costs" any administrative overhead or operational cost, including but not d to, the following:

college administrative support costs, such as staff in the college ess office, bookstore, reproduction center, etc.;

) trative salaries and benefits, with the exception of the S or;

(c) indirect costs, such as heat, light, power, telephone, FAX, gasoline and janitorial;

(d) costs of construction, except for removal or modification of minor architectural barriers;

(e) staff travel costs for other than DSPS-related activities or functions;

(f) costs for on- and off-campus space and plant maintenance;

(g) the cost of office furniture (e.g., desks, bookcases, filing cabinets, etc.);

(h) costs of dues or memberships for DSPS staff;

(i) rent of off-campus space;

(j) costs for legal matters, election campaigns or audit expenses;

(k) building costs, even if the new building were for exclusive use of DSPS;

(l) books or other resource material purchases for the general or main library; or

(m) equipment which is not, in whole or part, adapted for use by students with disabilities.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

History

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56070. Revenue from Special Classes.

(a) For purposes of Section 56064 (b), the revenue derived from special classes, for fiscal year 1995-96 and all subsequent years, shall be calculated by adding together the following:

(1) the FTES instructional non-credit rate times the number of units of FTES in noncredit special classes; and

(2) the FTES instructional credit rate, not including indirect administrative costs, times the number of units of FTES in credit special classes for each college in the District.

(b) In implementing this section, the Chancellor shall insure that increases or decreases in the amount of special class revenue attributed to a district solely as a result of the adoption of the "disaggregate" method of calculation described in subdivision (A) shall be spread evenly over a three (3) year phase-in period ending with full implementation for fiscal year 1995-96.

(c) Revenue from special classes shall be used for provision of support services or instruction pursuant to Section 56026 and 56028 and shall not be used for indirect administrative costs as defined in Section 56068.

Note: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

History

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56072. Allocations; Reports; Audits; Adjustments.

(a) The Chancellor shall adopt an allocation formula which is consistent with the requirements of this subchapter. The Chancellor shall use this formula to make advance allocations of funding provided pursuant to Section 56060 to each community college district consistent with the district's approved DSPS program plan and the requirements of this Article.

(b) A portion, not to exceed 10 percent, of the allocation may be based on the amount of federal, state, local, or district discretionary funds which the district has devoted to serving students with disabilities. Provided, however, that in no event shall any district be entitled to receive funding which exceeds the direct excess cost, as defined in Section 56064, of providing support services or instruction to student with disabilities.

(c) Each district shall submit such enrollment and budget reports as the Chancellor may require.

(d) The Chancellor shall provide for audits of DSPS programs to determine the accuracy of the reports required pursuant to subdivision (c).

(e) The Chancellor may, based on audit findings or enrollment/budget reports, adjust the allocation of any district to compensate for over or un-

der-allocated amounts in the current fiscal year or any of the three immediately preceding fiscal years.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56074. Accounting for Funds.

Each community college district shall establish a unique budget identifier code to separately account for all funds provided pursuant to this subchapter. The district shall certify through fiscal and accounting reports prescribed by the Chancellor that all funds were expended in accordance with the requirements of this subchapter.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56076. Other Resources.

As a condition of receiving funds pursuant to this subchapter, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities.

NOTE: Authority cited: Sections 67312, 70901 and 84850, Education Code. Reference: Sections 67310-12 and 84850, Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer and new section filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56078. Average Daily Attendance Apportionment (ADA) for Classes Offered Through DSP&S.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56080. Determination of Direct Excess Costs.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600, and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No.16). For prior history, see Register 83, No. 18.
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56082. Adjustments to Allocation.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56084. District Fiscal Responsibility and Contribution.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56086. Expenses Not Funded.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. New section filed 3-29-88; operative 4-28-88 (Register 88, No. 16).
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

§ 56088. Other Support Funds.

NOTE: Authority cited: Sections 71020, 78600 and 84850, Education Code. Reference: Sections 78600 and 84850, Education Code.

HISTORY

1. Repealer and new section filed 3-29-88; operative 4-28-88 (Register 88, No. 16). For prior history, see Register 83, No. 18.
2. Repealer filed 2-4-93; operative 3-6-93 (Register 93, No. 6).

Subchapter 2. Extended Opportunity Programs and Services*

NOTE: Authority cited: Sections 66948, 66952, 71020, Education Code. Reference: Chapter 2, Article 8 (commencing with Section 69640) of Part 42 of the Education Code.

HISTORY

1. Repealer of Chapter 2 (Sections 56100-56198) filed 11-15-79; effective thirtieth day thereafter (Register 79, No. 46). For prior history, see Registers 78, No. 3; 74, No. 26; 73, No. 26; 72, No. 29; 71, No. 8; and 70, No. 50.

*Chapter 2 (Sections 56100-56198) superseded by provisions of Chapter 2.5 (Sections 56200-56296) as of 7-1-77.

Subchapter 2.5. Extended Opportunity Programs and Services

Article 1. General Provisions and Definitions

§ 56200. Implementation.

This chapter implements, and should be read in conjunction with, Chapter 2, Article 8 (commencing with Section 69640), Part 42, Division 5, of the Education Code. The definitions in this article apply to the requirements of this chapter.

NOTE: Authority cited: Sections 69648, 69652 and 71020, Education Code. Reference: Sections 69640-69655, Education Code.

HISTORY

1. New Chapter 2.5 (Sections 56200-56296, not consecutive) filed 10-8-76; designated effective 7-1-77 (Register 76, No. 41).
2. Amendment filed 8-16-77; effective thirtieth day thereafter (Register 77, No. 34).
3. Repealer of Chapter 2.5 (Sections 56200-56296, not consecutive) and new Chapter 2.5 (Sections 56200-56293, not consecutive) filed 8-10-79; effective thirtieth day thereafter (Register 79, No. 32). For prior history, see Registers 77, No. 34; 77, No. 45; 78, No. 26 and 78, No. 39.
4. Repealer filed 1-16-81; effective thirtieth day thereafter (Register 81, No. 3).
5. Repealer of Subchapter 1 heading, amendment of Article 1 heading, and new section filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
6. Repealer and new section filed 9-24-87; operative 10-24-87 (Register 87, No. 40).

§ 56201. Waiver.

The Chancellor is authorized to waive any part or all of Articles 3 and 5. Waiver requests must be submitted to the Chancellor in writing by the district superintendent/chancellor setting forth in detail the reasons for the request and the resulting problems caused if the request were denied.

NOTE: Authority cited: Sections 69648, 69648.7 and 71020, Education Code. Reference: Sections 69640-69655, Education Code.

HISTORY

1. New section filed 9-24-87; operative 10-24-87 (Register 87, No. 40). For prior history, see Register 83, No. 18.

§ 56202. Full-Time Student.

"Full-Time Student" means a student, who during a regular semester or quarter, is enrolled in a minimum of 12 credit units or the equivalent in community college courses. Full-time student for a summer or inter session shall be defined by the college district.

NOTE: Authority cited: Sections 69648, 69648.7 and 71020, Education Code. Reference: Sections 69640-69655, Education Code.

HISTORY

1. New section filed 9-24-87; operative 10-24-87 (Register 87, No. 40).

Register 95-22

§ 55602.5

ss than two (2) full calendar years prior to the effective date of the act, to provide vocational skill training authorized by this Code.

) "Eligible costs" means all direct and indirect related instructional but does not include expenditures for capital outlay (6000 category California Community Colleges Budget and Accounting Manual).

Authority cited: Sections 8092, 66700 and 70901, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Education Code.

History

r chapter 7 (sections 55600 through 55631, not consecutive) filed 4-26-74; ctive thirtieth day thereafter (Register 74, No. 17).

endment of section and Note filed 11-4-77; effective thirtieth day thereaf- Register 77, No. 45).

ealer of subchapter 1 heading, amendment of article 1 heading, and repealer new section 55600 filed 4-27-83; effective thirtieth day thereafter (Regis- 3, No. 18).

endment filed 3-4-91 by Board of Governors of California Community eges with the Secretary of State; operative 4-5-91 (Register 91, No. 23). mitted to OAL for printing only pursuant to Education Code Section 01.5(b).

endment filed 5-15-93; operative 6-4-93 (Register 93, No. 25).

orial correction of History 4 (Register 95, No. 22).

01. Appointment of Vocational Education Advisory Committee by School District Participating in Vocational Education Program.

governing board of each community college district participating ocational education program shall appoint a vocational education ry committee to develop recommendations on the program and to le liaison between the district and potential employers.

committee shall consist of one or more representative of the gener- lic knowledgeable about the disadvantaged, students, teachers, ss, industry, school administration, and the field office of the De- ent of Employment Development.

Authority cited: Sections 66700 and 70901, Education Code. Reference: 70901, Education Code.

History

section filed 5-15-93; operative 6-4-93 (Register 93, No. 25). For prior ry, see Register 83, No. 18.

02. Authority to Contract.

y community college district or districts may contract with a private econdary school authorized or approved pursuant to the provisions pter 3 (commencing with section 94300) of part 59 of the Education and which has been in operation not less than two full calendar prior to the effective date of such contract to provide vocational raining authorized by the Education Code. Any community college ct may contract with an activity center, work activity center, or shel- work shop to provide vocational skill training authorized by the ation Code in any adult education program for substantially handi- d persons operated pursuant to subdivision (e) of section 41976 of ducation Code.

l contracts between a community college district and a private post- dary school entered into pursuant to this section, or an activity cen- ork center, or sheltered workshop shall do all of the following:

) Be approved by the Chancellor.

) Provide that the amount contracted for per student shall not exceed otal direct and indirect costs to provide the same training in the com- ity colleges or the tuition the private postsecondary school charges rivate students, whichever is lower.

) Provide that the community college students receiving training in vate postsecondary school, or an activity center, work activity center, eltered workshop pursuant to that contract may not be charged addi- al tuition for any training included in the contract. The attendance of e students pursuant to a contract authorized by this section shall be lited to the community college district for the purposes of apportion- ts from the State School Fund.

4) Provide that all programs, courses, and classes of instruction shall et the standards set forth in the California State Plan for Vocational cation, or is a course of study for adult schools approved by the De- ment of Education under section 51056 of the Education Code.

The students who attend a private postsecondary school or an activity center, work activity center or sheltered workshop pursuant to a contract under this section shall be enrollees of the community college and the vocational instruction provided pursuant to that contract shall be under the exclusive control and management of the governing body of the contracting community college district. The Chancellor may audit the accounts of both the district and the private party involved in these contracts to the extent necessary to assure the integrity of the public funds involved.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. New section filed 3-4-91 by Board of Governors of California Community Colleges with the Secretary of State; operative 4-5-91 (Register 91, No. 23). Submitted to OAL for printing only pursuant to Education Code Section 70901.5(b).
2. Editorial correction of History 1 (Register 95, No. 22).

§ 55602.5. Contracts for Vocational Education for Students with Impaired Physical Capacity.

Notwithstanding any provision in the Education Code to the contrary, the governing board of a community college district and a proprietary or nonprofit organization, a public entity, or a proprietary or nonprofit private corporation may enter into a contract for the education of community college students whose capacity to function is impaired by physical deficiency or injury in vocational education classes to be conducted for such students by the proprietary or nonprofit organization, the public entity, or the proprietary or nonprofit private corporation maintaining the vocational education classes. All instruction pursuant to this Section shall be approved of and supervised by the governing board of the community college district and shall be conducted by academic employees. The full-time equivalent student of such community college students attending classes under the provisions of this Section shall be credited to the community college district, and college credit may be granted to students who satisfactorily complete the course of instruction in such classes.

Note: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

History

1. New section filed 3-4-91 by Board of Governors of California Community Colleges with the Secretary of State; operative 4-5-91 (Register 91, No. 23). Submitted to OAL for printing only pursuant to Education Code Section 70901.5(b).
2. Editorial correction of printing error (Register 91, No. 43).
3. Amendment filed 9-6-94; operative 10-6-94. Submitted to OAL for printing only pursuant to Education Code section 70901.5 (Register 94, No. 38).
4. Editorial correction of History 1 (Register 95, No. 22).

§ 55603. Instructional Purpose.

Contractors shall provide vocational, technical, and occupational instruction related to attainment of skills, knowledge, and attitudes so that students may be prepared for:

(a) Gainful employment in the occupational area for which training was provided, or

(b) Occupational upgrading so students will have higher level skills required by new and changing technology and employment practices, or

(c) Enrollment in more advanced training programs.

Note: Authority cited: Sections 8092, 66700 and 70901, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090), Division 1, Education Code.

History

1. New Note filed 4-27-83; effective thirtieth day thereafter (Register 83, No. 18).
2. Amendment filed 3-4-91 by Board of Governors of California Community Colleges with the Secretary of State; operative 4-5-91 (Register 91, No. 23). Submitted to OAL for printing only pursuant to Education Code Section 70901.5(b).
3. Editorial correction of History 2 (Register 95, No. 22).

§ 55604. Application for Approval.

Note: Authority cited: Sections 8092, 71020, 71024, Education Code. Reference: Chapter 1, Article 5 (commencing with Section 8090) of Division 1 of the Education Code.

History

1. Amendment filed 11-4-77; effective thirtieth day thereafter (Register 77, No. 45).

Exhibit E

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

December 5, 2007

RECEIVED
DEC 07 2007
COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

The Department of Finance has completed its review of Test Claim No. 02-TC-22, Disabled Student Programs and Services (DSPS), submitted by the West Kern Community College District. Based on our review of the claim, as well as relevant statutes and regulations, we do not believe that the procedures, definitions, and general instructions provided in the DSPS program constitute a reimbursable state mandated activity on local community college districts.

The claimant asserts that seven Education Code Sections (ECS) and thirty-eight regulations in the California Code of Regulations (CCR) impose a new program or higher level of service on local community college districts. These provisions of the Education Code and the California Code of Regulations outline the following activities for the community college districts to undertake and the various definitions that apply:

- ECS 67300 requires the community colleges to conform to the level and quality provided by the Department of Rehabilitation prior to July 1, 1981.
- ECS 67301 requires the creation and maintaining of disabled student parking.
- ECS 67302 requires an entity that prints instructional materials for students to provide alternate versions of that material for disabled students.
- ECS 67310 sets forth principles for public postsecondary institutions and budgetary control agencies to observe in providing postsecondary programs and services for students with disabilities.
- ECS 67311 establishes three categories of costs that are appropriate for funding DSPS.
- ECS 67312 requires the BOG (Board of Governors) to maintain, develop, and implement a system for evaluating DSPS programs.
- ECS 84850 requires the BOG to adopt rules and regulations for the administration and funding for educational programs and support services to be provided to disabled students. As a condition of receiving funds pursuant to this section, each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require.
- CCR 54100 requires districts to provide special parking for disabled students.
- CCR 55522 requires accommodations to matriculation services for disabled students.

- CCR 55602.5 allows districts to enter into a contract with various entities to provide vocational education to students with disabilities.
- CCR 56000 defines the scope of the chapter for DSPS regulations.
- CCR 56002 defines "student with a disability."
- CCR 56004 defines "educational limitation."
- CCR 56005 defines "support services for instruction."
- CCR 56006 outlines the guidelines for a student to be eligible for DSPS programs.
- CCR 56008 describes the rights of students who participate in DSPS.
- CCR 56010 describes the responsibilities of students who participate in DSPS.
- CCR 56020 requires notification to students of services available through DSPS.
- CCR 56022 requires that a Student Educational Contract be created upon the initiation of DSPS services, which shall be reviewed and updated annually for every student with a disability participating in DSPS.
- CCR 56026 defines "special services."
- CCR 56027 requires a district receiving funding from DSPS to establish a policy and procedure for accommodation requests involving academic adjustments.
- CCR 56028 defines "special classes."
- CCR 56029 describes how DSPS requirements apply to course repetition.
- CCR 56030 requires each district to submit reports that the Chancellor may require.
- CCR 56032 defines "physical disability."
- CCR 56034 defines "communication disability."
- CCR 56036 defines "learning disability."
- CCR 56038 defines "acquired brain impairment."
- CCR 56040 defines "developmentally delayed learner."
- CCR 56042 defines "psychological disability."
- CCR 56044 creates a category for students with disabilities that do not fall into other categories.
- CCR 56046 requires each district to submit a DSPS program plan for each college within the district upon request from the Chancellor's Office.
- CCR 56048 establishes minimum guidelines for counselors and instructors for students with disabilities.
- CCR 56050 requires districts to establish a DSPS advisory committee, which must include a student with disabilities representative.
- CCR 56052 requires the Chancellor to conduct evaluations of DSPS programs.
- CCR 56054 requires districts to cooperate to the maximum extent possible with the Chancellor in carrying out special projects.
- CCR 56060 states that districts will receive funding to offset the direct excess costs of instruction to students with disabilities.
- CCR 56062 defines when a disabled student has been "provided support services or instruction."
- CCR 56064 defines "direct excess costs."
- CCR 56066 defines "comparable services."
- CCR 56068 defines "indirect administrative costs."
- CCR 56070 provides the calculations for determining revenue derived from special classes.
- CCR 56072 requires the Chancellor's Office to adopt an allocation formula.
- CCR 56074 requires the districts to create a budget identifier code to account for funds.

- CCR 56076 requires districts to certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving students with disabilities.

We would note that ECS 67312 and the first portions of ECS 84850 set forth requirements on the BOG and not the individual community college districts. CCR 56046 and CCR 56072 set forth requirements for the Chancellor's Office and do not place any requirements on individual districts. CCR 56000, CCR 56002, CCR 56004, CCR 56005, CCR 56006, CCR 56008, CCR 56010, CCR 56026, CCR 56028, CCR 56032, CCR 56034, CCR 56036, CCR 56038, CCR 56040, CCR 56042, CCR 56044, CCR 56062, CCR 56064, CCR 56066, and CCR 56068 are definitional in nature, and do not impose a new activity or higher level of service on the districts.

Beyond the statutes and regulations noted above, we concur with the analysis performed by the Chancellor's Office of the California Community Colleges submitted on March 11, 2004 that ultimately concluded that there is no reimbursable state mandated activity on local community college districts. We base our conclusion on the fact that DSPS activities are already fully funded in the budget and that DSPS is a voluntary program. We also note that there are measures that can be taken by community college districts to offset costs.

The first basis for denial of this test claim is that there is currently sufficient funding for this program in the community college budget. Funding for DSPS and related services have been provided in the community college budget for the past 26 years. In 1981, the Department of Rehabilitation transferred its responsibility for providing services to community college disabled students to the community colleges. $17,585,130 was transferred that year to the State School Fund to provide funding for:

> "...excess direct instructional cost of providing special facilities, special education materials, educational assistance, mobility assistance, transportation, program accountability, and program developmental services for handicapped students enrolled at community colleges." Ch. 99, Statutes of 1981, SB 110 (Alquist)

Funding for this program is now part of the annual appropriation for DSPS in Schedule (5) of Item 6870-101-0001 of the Budget Act. Since 2003, the year in which this test claim was filed, budgeted support for this program has been provided as follows: $115,001,000 in the Budget Act of 2007, $107,870,000 in the Budget Act of 2006, $91,191,000 in the Budget Act of 2005, $85,977,000 in the Budget Act of 2004, and $82,583,000 in the Budget Act of 2003. This represents a significant and ongoing commitment by the state of California to fund specific activities and costs associated with participation in the DSPS program. Thus, the exemption from a finding of a reimbursable mandate pursuant to Government Code Section 17556 (e) applies. It states that:

> "The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate."

The second basis for denial of this test claim is the fact that participation in DSPS is a voluntary activity that is not legally compelled by the state.

There is nothing preventing a community college district from refusing to accept state funding for this program, which would preclude them from the corresponding ECS and CCR provisions. Participation in the DSPS provides additional funding for many services that were already required to be delivered by federal law. While there may be some additional activities required for participation with DSPS, current funding levels for DSPS satisfies this need.

In *Department of Finance v. Commission on State Mandates (Kern High School)*, 30 Cal.4th 727 (2003), the California Supreme Court found that no mandate exists when a school district chooses to participate in a program because that program has benefits "too good to refuse" (*Id.* at 731). Federal law already requires districts to provide accommodations for students with disabilities through the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.

The Rehabilitation Act of 1973 states that:

> "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall; solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

The Americans with Disabilities Act of 1990 (Act) prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments. The Act also prohibits discrimination on the basis of disability in "places of public accommodation."

Participation in DSPS provides districts with the benefit of funding to offset costs of many programs and activities they would already be required to support pursuant to those federal laws. Section 84850(c) of the Education Code states that:

> "The regulations adopted by the board of governors shall provide for the apportionment of funds to each community college district to offset the district excess cost of providing specialized support services or instruction, or both, to disabled students enrolled in state-supported educational programs or courses."

A district may claim that for all intents and purposes, they are essentially compelled to participate in DSPS. This contention is based on the premise that choosing not to comply with guidelines set forth by DSPS is not a viable option. The Court's ruling in *Kern* dispels this notion, however. That Court held that a state can use program funding to encourage participation by local entities in a given program without creating a state mandate. (*Id.*) This is true even in situations where those local entities incur costs as a result of participation in those programs. (*Id.*) Thus, even though DSPS potentially does require community colleges to engage in activities it would not normally have to participate in, any resultant additional costs from those additional services are not reimbursable state mandates.

It should also be noted that community college districts have fee authority to offset particular costs stemming from participation in the DSPS program. The levying of parking fees for providing disabled parking is one such measure. Section 54100 (a) of Title 5 requires that each community college district which provides parking, shall provide parking to students with disabilities and those who provide transportation for students with disabilities.

In addition, Section 54100 of Title 5 states:

> "Students with disabilities may be required to pay parking permit fees imposed pursuant to Education Code Section 76360."
>
> "Revenue from parking fees collected pursuant to Education Code Section 76360 may be used to offset the costs of implementing this section. "

Thus, community college districts have the authority to levy parking fees to offset the additional costs of implementing the parking regulations called for by DSPS. This precludes this portion of DSPS from being considered a reimbursable state mandate.

In light of the fact that DSPS has received almost $500 million since 2003-04, that DSPS is a voluntary activity undertaken by community colleges, and that there are methods to offset costs that stem from DSPS activities, we believe that this claim should be denied in its entirety.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your February 20, 2004 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Thomas Todd, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,

Jeannie Oropeza

Program Budget Manager
Jeannie Oropeza

Attachment

Attachment A

DECLARATION OF THOMAS TODD
DEPARTMENT OF FINANCE
CLAIM NO.

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

12-5-07
at Sacramento, CA

Thomas Todd

PROOF OF SERVICE

Test Claim Name: Disabled Student Programs and Services (DSPS)
Test Claim Number: 02-TC-22

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On 12/04/2007, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

Ms. Kelly Hargreaves
Department of Rehabilitation
721 Capitol Mall
Sacramento, CA 95814

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd., #307
Sacramento, CA 95842

Mr. Steve Smith
Steve Smith Enterprises, Inc.
3323 Watt Avenue #291
Sacramento, CA 95821

Mr. Arthur Palkowitz
San Diego Unified School District
Office of Resource Development
4100 Normal Street, Room 3209
San Diego, CA 92103-8363

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. Joe Rombold
School Innovations & Advocacy
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Ms. Donna Ferebee
Department of Finance (A-15)
915 L Street, 11th Floor
Sacramento, CA 95814

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 894059
Temecula, CA 92589

Mr. Robert Miyashiro
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730

Mr. Keith B. Petersen
SixTen & Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA

Mr. Erik Skinner
California Community Colleges
Chancellor's Office (G-01)
1102 Q Street, Suite 300
Sacramento, CA 95814-6549

Mr. David E. Scribner
Scribner Consulting Group, Inc.
3840 Rosin Court, Suite 190
Sacramento, CA 95834

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Jeannie Oropeza
Department of Finance (A-15)
Education Systems Unit
915 L Street, 7th Floor
Sacramento, CA 95814

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Mr. J. Bradley Burgess
Public Resource Management Group
895 La Sierra Drive
Sacramento, CA 95864

Mr. William Duncan
West Kern Community College District
29 Emmons Park Drive
Taft, CA 93268

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 4, 2007 at Sacramento, California.

Annette Waite

Annette Waite

SixTen and Associates
Mandate Reimbursement Services

Exhibit F

KEITH B. PETERSEN, MPA, JD, President
E-Mail: Kbpsixten@aol.com

San Diego
5252 Balboa Avenue, Suite 900
San Diego, CA 92117
Telephone: (858) 514-8605
Fax: (858) 514-8645

Sacramento
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834
Telephone: (916) 565-6104
Fax: (916) 564-6103

May 2, 2008

RECEIVED
MAY 0 6 2008
COMMISSION ON STATE MANDATES

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: CSM 02-TC -22
Disabled Student Programs & Services

Dear Ms. Higashi:

On November 1, 2007, I submitted to the Commission, on behalf of the test claimant, a supplement to the test claim filing, specifically, the history of the Title 5, CCR, sections included in the test claim, at the request of the Commission staff.

Your letter dated April 29, 2008, requests an updated test claim form CSM 2 to include the California Code of Regulations registers which contain the history of the changes to the CCR sections listed in the original test claim filing.

This letter transmits, on behalf of the test claimants, the list of registers and relevant section numbers, in the form of an amended attachment page to the CSM 2 form.

Sincerely,

Keith B. Petersen

C: Douglas Brinkley, Vice-Chancellor
Finance and Administration
State Center Community College District
1525 East Weldon
Fresno, CA 93704-6398

May 02, 2008
02-TC-22 Disabled Student Programs and Services
Amended Attachment to Form CSM 2(2/91) Test Claim Form

Statutes:

Chapter 745, Statutes of 2001	Chapter 379, Statutes of 1999	Chapter 758, Statutes of 1995
Chapter 1243, Statutes of 1992	Chapter 626, Statutes of 1991	Chapter 1206, Statutes of 1990
Chapter 1066, Statutes of 1990	Chapter 998, Statutes of 1987	Chapter 829, Statutes of 1987
Chapter 248, Statutes of 1986	Chapter 903, Statutes of 1985	Chapter 323, Statutes of 1983
Chapter 251, Statutes of 1982	Chapter 796, Statutes of 1981	Chapter 1035, Statutes of 1979
Chapter 282, Statutes of 1979	Chapter 1403, Statutes of 1978	Chapter 36, Statutes of 1977

Code Sections:

Education Code Section 67300	Education Code Section 67301	Education Code Section 67302
Education Code Section 67310	Education Code Section 67311	Education Code Section 67312
Education Code Section 84850		

California Code of Regulations Registers:

Register 76-51

Title 5, Sections: 56000 56002 56004 56006 56008 56010 56016 56018 56020 56022 56024 56026 56028 56030 56032 56034 56036 56038 56040 56042 56044 56046 56048 56052 56054 56056 56058 56060 56062 56064 56066 56080 56082 56084 56086 56088

Register 77-12

Title 5, Sections: 56000 56002 56004 56006 56008 56010 56016 56018 56019 56020 56022 56024 56026 56028 56030 56032 56034 56036 56038 56040 56042 56044 56046 56048 56052 56054 56056 56058 56060 56062 56064 56066 56080 56082 56084 56088

Register 77-45

Title 5, Sections: 56000 56040 56042 56058 56080

Register 79-46

Title 5, Sections: 56040 56042 56044 56082

Register 83-18

Title 5, Sections: 56000 56002 56004 56006 56008 56010 56016 56018 56019 56020 56022 56024 56026 56030 56032 56034 56036 56038 56040 56042 56044 56046 56048 56052 56054 56056 56058 56060 56062 56064 56066 56080 56082 56084 56088

Register 88-16

Title 5, Sections: 56000 56002 56004 56006 56008 56010 56012 56014 56016 56018 56019 56020 56022 56024 56026 56028 56030 56032 56034 56036

	56038	56040	56042	56044	56046	56048	56050	56052	56054	56056
	56058	56060	56062	56064	56066	56068	56070	56072	56074	56076
	56078	56080	56082	56084	56086	56088				

Register 91-23

Title 5, Sections: 55602.5

Register 91-31

Title 5, Sections: 56062 56064

Register 91-43

Title 5, Sections: 55602.5

Register 92-12

Title 5, Sections: 54100

Register 93-06

Title 5, Sections:	56000	56002	56004	56005	56006	56008	56010	56012	56014	56016
	56018	56020	56022	56024	56026	56027	56028	56029	56030	56032
	56034	56036	56038	56040	56042	56044	56046	56048	56050	56052
	56054	56056	56058	56060	56062	56064	56066	56068	56070	56072
	56074	56076	56078	56080	56082	56084	56086	56088		

Register 95-22

Title 5, Sections: 55602.5 55603

California Code of Regulations Originally Listed:

Title 5, Section 54100	Title 5, Section 55522	Title 5, Section 55602.5
Title 5, Section 56000	Title 5, Section 56002	Title 5, Section 56004
Title 5, Section 56005	Title 5, Section 56006	Title 5, Section 56008
Title 5, Section 56010	Title 5, Section 56020	Title 5, Section 56022
Title 5, Section 56026	Title 5, Section 56027	Title 5, Section 56028
Title 5, Section 56029	Title 5, Section 56030	Title 5, Section 56032
Title 5, Section 56034	Title 5, Section 56036	Title 5, Section 56038
Title 5, Section 56040	Title 5, Section 56042	Title 5, Section 56044
Title 5, Section 56046	Title 5, Section 56048	Title 5, Section 56050
Title 5, Section 56052	Title 5, Section 56054	Title 5, Section 56060
Title 5, Section 56062	Title 5, Section 56064	Title 5, Section 56066
Title 5, Section 56068	Title 5, Section 56070	Title 5, Section 56072
Title 5, Section 56074	Title 5, Section 56076	-

Implementing Guidelines For Title 5 Regulations Disabled Student Program and Services

DECLARATION OF SERVICE

Re: Test Claim 02-TC-22
West Kern Community College District
Disabled Student Programs & Services

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimants. I am 18 years of age or older and not a party to the entitled matter. My business address is 3841 North Freeway Blvd, Suite 170, Sacramento, CA 95834.

On the date indicated below, I served the attached letter dated May 2, 2008, to Paula Higashi, Executive Director, Commission on State Mandates, to the Commission mailing list dated 04/29/08 for this test claim, and to:

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 5, 2008, at Sacramento, California.

Barbara A. Rinkle

Commission on State Mandates

Original List Date: 6/18/2003
Last Updated: 4/26/2007
List Print Date: 04/29/2008
Claim Number: 02-TC-22
Issue: Disabled Student Programs and Services

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Keith B. Petersen SixTen & Associates 3841 North Freeway Blvd., Suite 170 Sacramento, CA 95834	**Claimant Representative** Tel: Fax:	 (916) 565-6104 (916) 564-6103

COMMISSION ON STATE MANDATES
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EXHIBIT G

May 6, 2008

Mr. Keith Petersen
SixTen and Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Disabled Student Programs and Services, 02-TC-22
Education Code Sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850, as added and amended by Statutes 1977, Chapter 36 et al.; and
California Code of Regulations, Title 5, Sections 54100, and 56000 et seq.
West Kern Community College District, Claimant

Dear Mr. Petersen:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Tuesday, **May 27, 2008**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, June 26, 2008**, at 9:30 a.m. in Room 126, State Capitol, Sacramento, CA. The final staff analysis will be issued on or about June 13, 2008. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Katherine Tokarski at (916) 445-9429 with any questions regarding the above.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enclosures

ITEM ___

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850

Statutes 1977, Chapter 36 (SB 112)
Statutes 1978, Chapter 1403 (AB 2670)
Statutes 1979, Chapters 282 (AB 8) and 1035 (SB 186)
Statutes 1981, Chapter 796 (SB 1053)
Statutes 1982, Chapter 251 (AB 1729)
Statutes 1983, Chapter 323 (AB 223)
Statutes 1985, Chapter 903 (SB 1160)
Statutes 1986, Chapter 248 (SB 2451)
Statutes 1987, Chapters 829 (AB 746) and 998 (SB 252)
Statutes 1990, Chapters 1066 (AB 2625) and 1206 (AB 3929)
Statutes 1991, Chapter 626 (AB 1021)
Statutes 1992, Chapter 1243 (AB 3090)
Statutes 1995, Chapter 758 (AB 446)
Statutes 1999, Chapter 379 (AB 422)
Statutes 2001, Chapter 745 (SB 1191)

California Code of Regulations, Title 5, Sections 54100, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, 56076
(As Added or Amended by Register 76, No. 51, Register 77, Nos. 12 & 45, Register 79, No. 46, Register 83, No. 18, Register 88, No. 16, Register 91, No. 31, Register 92, No. 12, and Register 93, No. 6)

Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*, Issued by the Chancellor's Office, California Community Colleges, January 2, 1997

Disabled Student Programs and Services
(02-TC-22)

West Kern Community College District, Claimant

EXECUTIVE SUMMARY

Background

The May 23, 2003 test claim filed by West Kern Community College District concerns the provision of services to disabled students within the California community college system. The test claim alleges that community college districts have incurred costs mandated by the state for the provision of disabled student services, including verifying a student's eligibility for support services, establishing a Student Educational Contract, and completing related accounting, budget and fiscal reports. There are also activities alleged for requesting instructional materials from publishers in an electronic format, and disabled student parking services.

The Department of Finance and the California Community Colleges Chancellor's Office dispute the test claim, asserting that the state requirements for Disabled Student Programs and Services (DSPS) are voluntary unless the claimant accepts significant program funds, which are then available to cover the claimed costs. Where the state acknowledges certain activities may be mandatory, the state asserts that they are otherwise required under federal law.

Staff finds that equal protection and related supportive services requirements for disabled students did not originate with state law, but rather with the United States Constitution, federal case law, and subsequent federal statutes and regulations. Current federal law requiring the provision of disabled student services by the California community colleges includes both the 1973 Rehabilitation Act, commonly referred to as Section 504, and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.).

Staff finds for the statutory and regulatory DSPS program there is an underlying federal mandate imposed directly on the community colleges, and the state has set up an optional program for the community colleges to receive additional funding to meet those requirements. The state's offer of financial assistance to community college districts to meet such requirements does not impose a state-mandated program.

Similarly, regarding claimed administrative activities for requesting instructional materials in an electronic format from publishers, staff finds that community colleges have a duty under federal law to timely provide instructional materials to disabled students in an accessible format. The 1999 test claim statute provides one method for the community colleges to fulfill this duty, but has not imposed a state-mandated program.

Regarding the statute and regulation on disabled student parking, accessible disabled parking is required by federal mandate. To the extent the claimant seeks mandate reimbursement for not being able to charge disabled students parking fines and meter fees, the *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, disallows claims for lost revenue.

Conclusion

Staff concludes that Education Code sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850; California Code of Regulations, title 5, sections 54100, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, and 56076; and the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," do not impose a state-mandated program on community college districts subject to article XIII B, section 6.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to deny this test claim.

STAFF ANALYSIS

Claimant

West Kern Community College District

Chronology

05/23/03	Claimant files the test claim with the Commission on State Mandates (Commission)
06/20/03	Commission staff issues the completeness review letter and requests comments from state agencies
07/15/03	Department of Finance (DOF) requests an extension of time for filing comments for 120 days, to consult with the Office of the Attorney General
07/17/03	Commission staff grants an extension to September 3, 2003
08/07/03	DOF requests an extension of time to October 17, 2003
08/11/03	Commission staff grants the extension of time as requested
10/31/02	DOF requests an extension of time to file comments until February 7, 2004
11/07/03	Commission staff grants the extension of time as requested
02/18/04	DOF requests an extension of time to file initial comments to August 9, 2004
02/18/04	Commission staff grants the extension of time as requested
03/16/04	California Community Colleges Chancellor's Office (Chancellor's Office) files comments
04/05/04	Claimant files rebuttal to comments by Chancellor's Office
06/10/04	DOF requests an extension of time to file initial comments to August 9, 2005
06/14/04	Commission staff grants the extension of time as requested
09/09/04	DOF requests an extension of time to file initial comments to December 9, 2004
09/14/04	Commission staff grants the extension of time as requested
09/24/04	Department of Justice requests removal from test claim mailing list
12/24/04	DOF requests an extension of time to file initial comments to March 9, 2005
12/28/04	Commission staff grants the extension of time as requested
03/15/05	DOF requests an extension of time to file initial comments to June 9, 2005
03/17/05	Commission staff grants the extension of time as requested
09/21/05	DOF requests an extension of time to file initial comments to December 1, 2005
10/03/05	Commission staff grants the extension of time as requested
02/03/06	DOF requests an extension of time to file initial comments to March 1, 2006
02/07/06	Commission staff grants the extension of time as requested

10/30/07	Commission staff issues a request for comments on the test claim from the Department of Rehabilitation and DOF, due by November 20, 2007
11/05/07	Claimant submits a supplement to the test claim filing, with a history of the claimed regulations
12/06/07	DOF submits initial comments on the test claim filing
04/02/08	Commission severs two regulations (Cal. Code Regs., tit. 5, §§ 55522 and 55602.5) from the *DSPS* test claim, that are also pled in *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31)
04/28/08	Commission staff issues letter to claimant requesting an updated face sheet identifying which regulatory register numbers are pled in the test claim
05/02/08	Claimant submits amended facesheet
05/05/08	Commission staff issues the draft staff analysis on the test claim

Background

This test claim concerns the provision of services to disabled students within the California community colleges system. The test claim alleges that community college districts have incurred costs mandated by the state, due to the enactment or amendment of Education Code sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850, and thirty-six related title 5 regulations,[1, 2] as well as the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," issued by the California Community Colleges Chancellor's Office on January 2, 1997. The claimant alleges that the laws and claimed executive orders require community college districts to provide disabled student services activities, including verifying a student's eligibility for support services, establishing a Student Educational Contract, and completing related accounting, budget and fiscal reports. There are also activities alleged for requesting instructional materials from publishers in an electronic format, and providing disabled student parking services.

Prior Law

Disabled student services were part of the Education Code and regulations for community colleges prior to the enactment of the test claim legislation.[3] An uncodified statute was added by Statutes 1971, chapter 1619, establishing that the state shall annually apportion money to community college districts "for the purpose of funding the excess cost of providing special

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[1] References to "title 5" are to the California Code of Regulations.

[2] The original test claim filing included mandate allegations for California Code of Regulations, title 5, sections 55522 and 55602.5 (Register 91, Nos. 23 & 43; Register 95, No. 22), regarding matriculation accommodations and contracting for disabled student vocational education, respectively. These regulations are also included in another pending test claim; therefore they were severed from *DSPS* and will be included in the Commission's decision on *Minimum Conditions for State Aid* (02-TC-25 and 02-TC-31).

[3] Former Education Code section 18151, and California Code of Regulations, title 5, section 56000 et seq. (Reg. 73, no. 44.)

facilities, special educational material, educational assistance, mobility assistance, and transportation for handicapped students." This funding was limited to $400 annually for each disabled student, age 21 or older, with demonstrated financial need. Statutes 1972, chapter 1123 repealed the earlier section, and substantially reenacted it as Education Code section 18151, with the added provision that before applying for an apportionment under this section, each community college district must certify "that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds." Education Code section 18151 has since been amended, renumbered, and reenacted as Education Code section 84850, which is a statute pled in this test claim.

Test Claim Statutes, Regulations, and Guidelines

The requirement for the California Community Colleges Board of Governors to "provide for the apportionment of funds to each community college district to offset the direct excess cost of providing specialized support services or instruction, or both, to disabled students" is now found at Education Code section 84850, and is no longer limited in dollar amount, nor is it restricted by financial need or age of the student. Instead, it is part of a larger statutory and regulatory scheme which provides additional funding to community college districts who agree to provide disabled student services pursuant to state guidelines, including demonstrating accountability for the funding. Chapter 14, "Disabled Student Services," was added to the Education Code by Statutes 1981, chapter 796, beginning with Education Code section 67300[4] which states, in pertinent part:

> Services for disabled students provided by the California Community Colleges ... shall ... at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges ... to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation.[5]

An interagency agreement between the Chancellor's Office and the California Department of Rehabilitation (DOR)[6] is described in the legislative history of Statutes 1981, chapter 796, which first added section 67300 to the Education Code. The "Cooperative Agreement" was signed in June 1981, stating:[7]

> [T]he Chancellor acknowledges and agrees that the community colleges are required by Section 504 of the Rehabilitation Act of 1973, and the regulations implementing that Section and Article 9.5 (11135 to 11135.5)[8] of the California

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[4] Amended by Statutes 1985, chapter 903, Statutes 1986, chapter 248, Statutes 1987, chapter 998, Statutes 1991, chapter 626. Repealed and reenacted by Statutes 1995, chapter 758.

[5] The omitted portions refer to California's university systems.

[6] The DOR's primary function is to provide and refer individuals with disabilities to a variety of vocational rehabilitation and independent living services. (Welf. & Inst. Code, § 19000 et seq.)

[7] See Attachment 1 to the Draft Staff Analysis.

[8] Government Code section 11135 et seq., enacted by Statutes 1977, chapter 972, provides individuals with protection from discrimination on the basis of disability (as well as for other basis, including age, color, and sex), in any program or activity receiving state funding.

Government Code to provide auxiliary aids necessary to make the benefits of the community college programs fully accessible to all their disabled students;

The agreement continues:

> Beginning July 1, 1981, the following auxiliary aids related to educational programs will no longer be provided by the Department of Rehabilitation:
>
> 1. Reader services for the blind and visually impaired.
> 2. Notetaker services for the blind and visually impaired.
> 3. Interpreter services for the deaf and hearing impaired.
> 4. On-campus mobility assistance.
> 5. On-campus transportation.
> 6. Special adaptive equipment.

Education Code section 67300, in contrast to the interagency agreement, now requires the DOR to provide all reader services to its blind students, even when solely for educational purposes.

Education Code section 67310 is a lengthy statement of legislative intent and principles to provide state funding to state colleges and universities, "to cover the actual cost of providing services and instruction" to disabled postsecondary students. Education Code section 67312 requires the California Community Colleges Board of Governors to adopt regulations "necessary to the operation of programs funded pursuant to this chapter."[9] Those regulations are found at California Code of Regulations, title 5, section 56000 et seq.

Title 5, section 56000 expresses that compliance with the DSPS regulations is a condition of state DSPS funding: "Programs receiving funds allocated pursuant to Education Code section 84850 shall meet the requirements of this subchapter."[10] The regulations require community college districts receiving DSPS funding to establish a DSPS advisory committee, to "meet not less than once per year," designate a DSPS Coordinator with "responsibility for the day-to-day operation of DSPS," and "employ reasonable means to inform all students and staff" about the availability of DSPS services.[11] Then, for students who qualify for DSPS services, the community college must identify a student's educational limitations and describe them in a Student Educational Contract (SEC), which is to be updated annually.[12] Such records are required to be protected from disclosure.[13]

Community college districts must give students a copy of any district policy on the termination or suspension of DSPS services for a student's failure to make measurable progress toward

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[9] Chapter 14 includes Education Code sections 67300 through 67313.

[10] The Chancellor's Office issued the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," on January 2, 1997, which provides the text of each DSPS regulation, followed by a restatement and a description of what type of documentation may demonstrate compliance with the regulation.

[11] California Code of Regulations, title 5, sections 56020, 56048, and 56050.

[12] California Code of Regulations, title 5, sections 56006 and 56022.

[13] California Code of Regulations, title 5, section 56008.

educational goals, or other non-compliance with DSPS policies.[14] In addition, districts are required to establish policies and procedures for responding to student requests for academic accommodations and repetition of special classes.[15]

Community college districts must establish a program plan that "shall be a contract between the District and the Chancellor," and comply with certifications, evaluations, and regular fiscal reporting to the Chancellor's Office, pursuant to deadlines and format requirements.[16] Community college districts shall also "cooperate to the maximum extent possible with the Chancellor in carrying out special projects," such as research and training, using funding "from the three percent set aside authorized pursuant to Education Code Section 84850(e)."[17]

The types of expenses that can be covered by annual DSPS funding, on a fixed-cost basis, include: adaptive educational equipment, materials, and supplies required by disabled students; job placement and development services; priority enrollment and registration assistance; specialized campus orientation; special parking arrangements; activities necessary to coordinate and administer specialized services and instruction; and DSPS assessment activities.[18]

Community colleges can seek actual cost reimbursement for variable-cost items including: diagnostic assessment; on-campus mobility assistance and off-campus transportation assistance; disability-related counseling and advising; interpreter services for deaf and hard-of-hearing students; reader and notetaker services; specialized class instruction and tutoring; speech services; test taking facilitation; and transcription services.[19] Community colleges can also receive funds for "one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles."[20] These are expenses that will vary according to the nature of an individual student's disabilities.

Finally, Education Code section 67301 (including former section 67311.5), and the implementing regulation at title 5, section 54100, describe the duty of community colleges to make special parking available for disabled students. Education Code section 67302 provides a method for public postsecondary institutions to acquire instructional materials from publishers in an electronic format, in order to ease the process of transcribing materials for disabled students into an accessible format, such as braille, audio, or digital text.

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[14] California Code of Regulations, title 5, section 56010.

[15] California Code of Regulations, title 5, sections 56027 and 56029.

[16] California Code of Regulations, title 5, section 56030, 56046, 56052, 56066, 56072, 56074 and 56076.

[17] California Code of Regulations, title 5, section 56054.

[18] Education Code section 67311 and California Code of Regulations, title 5, section 56026.

[19] *Ibid.*

[20] *Ibid.*

Relevant Federal Law:

The California laws regarding supportive services and aids for disabled community college students are intertwined with federal law. The Rehabilitation Act of 1973 (29 U.S.C. § 794), often referred to as "Section 504," is the original federal law found to require the provision of support services for disabled post-secondary students:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, 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.

"Program or activity," as it pertains to the community colleges, is defined as "*all* of the operations of" ... "(2)(A) a college, university, or other postsecondary institution, or a public system of higher education."[21]

According to the Congressional history discussed by the court in *Lloyd v. Regional Transp. Authority* (1977) 548 F.2d 1277, 1285, the federal Rehabilitation Act of 1973 was designed to extend the protections of the Civil Rights Act of 1964 to the handicapped:

> "Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." 4 U.S.Code Cong. & Admin.News, p. 6390 (1974).
>
> The Committee continues by stating that Section 504's similarity to Section 601 of the Civil Rights Act of 1964 was not accidental:
>
> "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended." (4 U.S.Code Cong. & Admin.News, p. 6390 (1974)).

After some delay, the Rehabilitation Act regulations were adopted in 1980.[22] The regulations specify that program accessibility is inclusive of facility accessibility: "No qualified handicapped

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[21] 34 Code of Federal Regulations part 104.3.

[22] *Cherry v. Mathews* (1976) 419 F.Supp. 922, 924: "Both draft and proposed regulations have already been issued by the Secretary. See 41 Fed.Reg. 20296 (May 17, 1976); id. at 29548 (July 16, 1976). FN2 The introduction and preambles to the regulations detail the complex, difficult problems involved in fashioning guidelines to prevent discrimination against handicapped individuals. Rather than establish a date by which final regulations must issue, the Court retains jurisdiction over this matter to assure that no further unreasonable delays affect the promulgation of regulations under § 504."

person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies." (34 C.F.R. § 104.21.)

The federal regulations also include specific requirements for post-secondary education. First, "[q]ualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies." (34 C.F.R. § 104.21.) Further, academic requirements are to be modified "as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." (34 C.F.R. § 104.44(a).) In addition, auxiliary aids are required to assist students, as necessary:

> (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature. (34 C.F.R. § 104.44(d).)

With the enactment of the Americans with Disabilities Act of 1990 (hereafter, "the ADA;" 42 U.S.C. § 12101 et seq.), Congress expanded the required accessibility and protections for disabled individuals in public service and private business, without regard to the receipt of federal funding.[23]

Claimant's Position

West Kern Community College District's May 23, 2003[24] test claim filing, at pages 74 through 97, sets out a list of new activities, "A" through "Z," alleged to be required by the test claim statutes and executive orders. Claimant alleges that the state has required community college districts to adopt and implement procedures, and periodically update those procedures, pursuant to the test claim statutes and executives orders to offer support services and instruction to disabled students. Some examples of the claimant's specific allegations include: verifying that a student has a disability "which results in an educational limitation;" categorize a student's disability using the definitions in title 5, sections 56032, 56034, 56036, 56038, 56040, 56042,

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[23] In *Zukle v. Regents of University of California* (1999) 166 F.3d 1041, 1045, at footnote 11, the 9th circuit found "There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. *See* 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims].")"

[24] The potential reimbursement period begins no earlier than July 1, 2001, based upon the filing date for this test claim. (Gov. Code, § 17557.)

and 56044; identify and describe any educational limitations, along with a plan to meet the student's educational needs, in a "Student Education Contract," and review and update each contract annually.[25]

The claimant also alleges that title 5, section 56020 requires districts to "employ reasonable means to inform all students about the support services or instruction available through the DSPS program." Claimant states that the required support services includes providing adaptive educational equipment, material and supplies; employment development; priority registration; special parking; supplemental orientation; test taking facilitation; special assessments and counseling; interpreter, reader, note-taker, transcription, tutor, and mobility assistance.[26]

Further, the test claim alleges that community college districts are required to "provide special classes designed to address the educational limitations of students with disabilities who would not be able to substantially benefit from regular college classes, even with appropriate support services and accommodations."[27]

The claim contends that the test claim statutes and executive orders require the development of policies for suspension and termination from the DSPS program; recordkeeping requirements for DSPS student files; the designation of a qualified DSPS Coordinator for each college; formation of a DSPS advisory committee; developing and updating "specialized accounting procedures" for calculating the direct and indirect costs of DSPS services; and "to determine and certify that reasonable efforts have been made to utilize all funds from federal, state and local sources available for serving students with disabilities."[28]

The test claim also alleges new activities for disabled student parking services and requesting instructional materials from publishers in an electronic format.

The claimant acknowledges that some apportionment funding (Ed. Code, § 84850, subd. (c)), funds for special classes (Cal. Code Regs., tit. 5, § 56028), and parking fees (Ed. Code, § 67301) may be available to "reduce the costs incurred by these mandated duties."[29]

The claimant rebutted the Chancellor's Office comments on the test claim filing in a letter dated April 1, 2004. The claimant's substantive arguments will be addressed in the analysis below.[30]

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[25] Test Claim Filing, pages 74-81.

[26] *Id.* at pages 81-85.

[27] Test Claim Filing, page 86.

[28] *Id.* at pages 87-96.

[29] *Id.* at page 98.

[30] In the April 1, 2004 rebuttal, the claimant argues that the Chancellor's Office comments are "incompetent" and should be stricken from the record since they do not comply with the Commission's regulations (Cal. Code Regs., tit. 2, § 1183.02.) That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief, and that any assertions of fact are to be supported by documentary evidence. The claimant contends that "the comments of [the Chancellor's Office] do not comply with these essential requirements."

California Community Colleges Chancellor's Office Position

The comments on the test claim filing, received March 16, 2004, from the Chancellor's Office dispute much of the test claim allegations. Regarding DSPS, the Chancellor's Office argues that Education Code sections 67310, 67311, 67312, and 84850, and the California Code of Regulations, title 5, sections 56000 through 56076, either do not expressly require activities of the community college districts, or are optional unless the districts seek state funds:

> for the direct excess costs of providing certain services or instruction to students with disabilities. Under federal law, districts are required to provide accommodations for students with disabilities by section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, but nothing compels a district to apply for DSPS funds or claim reimbursement from the state for services it does provide.[31]

On Education Code section 67302, regarding the requirement for publishers to provide electronic versions of instructional materials for use by disabled students, the Chancellor's Office asserts that the statute does not impose mandatory duties on the colleges to request the materials from the publishers. However, "to the extent that colleges do call upon publishers to provide the electronic texts, the statute creates a potential savings to districts since federal law requires districts to provide students with visual impairments access to print and computer-based information."

Regarding disabled student parking accessibility pursuant to Education Code section 67301, and title 5, section 54100, the Chancellor's Office asserts that Government Code section 17556, subdivisions (d) and (e) may preclude the Commission from finding of costs mandated by the state because the districts are authorized to use their other parking fees to offset the costs.

Department of Finance's Position

On December 6, 2007, DOF submitted substantive comments on the test claim filing. DOF states: "Based on our review of the claim, as well as relevant statutes and regulations, we do not believe that the procedures, definitions, and general instruction provided in the DSPS program constitute a reimbursable state mandated activity on local community college districts." Further, DOF states agreement with the analysis in the Chancellor's Office letter of March 11, 2004, and bases this "on the fact that DSPS activities are already fully funded in the budget and that DSPS is a voluntary program."

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied upon by staff at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The state agency responses contain comments on whether the Commission should approve this test claim and are, therefore, not stricken from the administrative record.

[31] Chancellor's Office Comments on the Test Claim, dated March 11, 2004, page 5.

DOF states:

> Funding for this program is now part of the annual appropriation for DSPS in Schedule (5) of Item 6870-101-0001 of the Budget Act. Since 2003, the year in which this test claim was filed, budgeted support for this program has been provided as follows: $115,001,000 in the Budget Act of 2007, $107,870,000 in the Budget Act of 2006, $91,191,000 in the Budget Act of 2005, $85,977,000 in the Budget Act of 2004, and $82,583,000 in the Budget Act of 2003. This represents a significant and ongoing commitment by the state of California to fund specific activities and costs associated with participation in the DSPS program.

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[32] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[33] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[34] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[35] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[36]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[37] To determine if the

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[32] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[33] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[34] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[35] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[36] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (*Lucia Mar*).

[37] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,*

program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[38] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[39] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[40]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[41] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[42]

Issue 1: Do the test claim statutes or alleged executive orders impose a state-mandated program on community college districts subject to article XIII B, section 6 of the California Constitution?

A test claim statute or executive order imposes a state-mandated program when it compels a local agency or school district to perform activities not previously required, or when legislation requires that costs previously borne by the state are now to be paid by school districts.[43] Thus, in order for a test claim statute or executive order to be subject to article XIII B, section 6 of the California Constitution, the statutory language must order or command that school districts perform an activity or task.

The test claim allegations will be analyzed by areas of activities, as follows: A) providing "Disabled Student Programs and Services;" B) requesting instructional materials in an electronic format; and C) parking services for students with disabilities.

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44 Cal.3d 830, 835.)

[38] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[39] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[40] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[41] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[42] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[43] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 836.

A. Providing "Disabled Student Programs and Services (DSPS)"

The claimant alleges that Education Code sections 67300,[44] 67310,[45] 67311,[46] 67312,[47] and 84850,[48] impose a reimbursable state-mandated program. The claimant further alleges that California Code of Regulations, title 5, sections 56000 et seq., and the Chancellor's Office DSPS "Implementing Guidelines for Title 5 Regulations" are executive orders which impose a reimbursable state mandated program on community college districts. The new activities alleged relate to the provision of disabled student services, such as: verifying a student's eligibility for support services; establishing a Student Educational Contract to identify and provide for needed auxiliary aids and educational facilitation; as well as for DSPS-related accounting, budget and fiscal reporting activities.

As described below, staff finds that an underlying federal mandate is imposed directly on community college districts to provide support services to disabled students pursuant to the Rehabilitation Act of 1973 and the ADA. The state has set up an optional program for community colleges to receive excess funding to meet those requirements. Although some activities are required of community colleges who receive DSPS funding, staff finds that the California Supreme Court's decision in *Kern High School Dist., supra,* supports the conclusion that the state DSPS activities alleged are voluntary unless a community college district accepts state program funds, and therefore do not impose a state mandated program. These issues are discussed below.

Federal law mandates community college districts to provide support services to disabled students:

Education Code section 67300, states that services for disabled community college students shall "at a minimum, conform to the level and quality of those services provided by the Department of Rehabilitation to its clients prior to July 1, 1981. However, nothing in this chapter requires the California Community Colleges ... to provide the services for disabled students in the same manner as those services were provided by the Department of Rehabilitation." The section also provides that "blind students who are attending California Community Colleges under the sponsorship of the Department of Rehabilitation shall have all reader services provided directly by the" DOR.

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[44] Added by Statutes 1981, chapter 796, amended by Statutes 1985, chapter 903, Statutes 1986, chapter 248, Statutes 1987, chapter 998, Statutes 1991, chapter 626. Repealed and reenacted by Statutes 1995, chapter 758.

[45] Repealed and reenacted by Statutes 1995, chapter 758; derived from Statutes 1987, chapter 829.

[46] *Ibid.*

[47] *Ibid.* A minor amendment by Statutes 2004, chapter 303 was not pled and does not impact the test claim analysis.

[48] Statutes 1990, chapter 1206 repealed and replaced this section; earlier versions also concerned special funding for services and assistance to disabled students. Derived from former Education Code section 18151, as added by Statutes 1972, chapter 1123.

Education Code section 67300 was adopted subsequent to a June 1981 "Cooperative Agreement" signed by the Chancellor's Office and the DOR.[49] The DOR was established in the 1960s to administer vocational rehabilitation programs to disabled persons with financial need, and to access related federal funding.[50] Some clients of the DOR receive vocational education through the public postsecondary education system,[51] while community colleges have long had a mission to serve both postsecondary academic and vocational education purposes.[52] Because of the overlap and historical cooperation of the systems, following the adoption of the federal Rehabilitation Act regulations the DOR and the Chancellor's Office signed an interagency "Cooperative Agreement" in June 1981, stating:[53]

> [T]he Chancellor acknowledges and agrees that the community colleges are required by Section 504 of the Rehabilitation Act of 1973, and the regulations implementing that Section and Article 9.5 (11135 to 11135.5)[54] of the California Government Code to provide auxiliary aids necessary to make the benefits of the community college programs fully accessible to all their disabled students;

The agreement continues:

> Beginning July 1, 1981, the following auxiliary aids related to educational programs will no longer be provided by the Department of Rehabilitation:
>
> 1. Reader services for the blind and visually impaired.
> 2. Notetaker services for the blind and visually impaired.
> 3. Interpreter services for the deaf and hearing impaired.
> 4. On-campus mobility assistance.
> 5. On-campus transportation.
> 6. Special adaptive equipment.

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[49] According to the legislative history for section 67300: "An interagency agreement between the [DOR] and postsecondary education institutions ... provides for a transfer of funding and management of auxiliary services, including readers for the blind, from the [DOR] to these postsecondary education systems. The [DOR] cites federal law and state law to justify the responsibility of public postsecondary institutions to provide auxiliary educational services to handicapped students. However, organizations representing the blind ... prefer to have the reader services remain with [DOR]." (Sen. Republican Caucus, analysis of Sen. Bill No. 1053 (1981-1982 Reg. Sess.), as amended Jul. 7, 1981, p. 2.) See Attachment 2.

[50] Welfare and Institutions Code section 19000 et seq. as enacted by Statutes 1969, chapter 1107, includes references to earlier federal funding for vocational rehabilitation for workers disabled on the job.

[51] Welfare and Institutions Code section 19013.

[52] Former Education Code section 66701 and current Education Code section 66010.4.

[53] See Attachment 1 to the Draft Staff Analysis.

[54] Government Code section 11135 et seq., enacted by Statutes 1977, chapter 972, provides individuals with protection from discrimination on the basis of disability (as well as for other basis, including age, color, and sex), in any program or activity receiving state funding.

The agreement also provides a list of "traditional services" that will continue to be provided by the DOR to its "student/clients including but not limited to" disability evaluation, therapy, individual diagnostic testing, off-campus transportation, reader or interpreter services for the blind or hearing impaired "other than for educational programs," job placement services, special adaptive equipment when not "useable solely for educational purposes," and individual tutoring when college services are insufficient. This interagency agreement is described in the legislative history of Statutes 1981, chapter 796, which first added section 67300 to the Education Code. Education Code section 67300, in contrast to the interagency agreement, now requires the DOR to provide reader services to blind students, even when solely for educational purposes.

Education Code section 67310 is a lengthy statement of legislative intent and principles to provide state funding to state colleges and universities, "to cover the actual cost of providing services and instruction" to disabled postsecondary students. Education Code section 67311 lists the DSPS cost categories and expenses the Legislature intends to fund, including such items as diagnostic assessment; on-campus mobility assistance and off-campus transportation assistance; disability-related counseling and advising; interpreter services for deaf and hard-of-hearing students; reader and notetaker services; specialized class instruction and tutoring; speech services; test taking facilitation; and transcription services. Community colleges can also receive funds for "one-time expenditures for the purchase of supplies or the repair of equipment, such as adapted educational materials and vehicles."

Education Code section 67312 requires the California Community Colleges Board of Governors to adopt regulations "necessary to the operation of programs funded pursuant to this chapter."[55] Education Code section 84850 also requires the Board of Governors to adopt regulations regarding the "administration and funding of educational programs and support services" for disabled students. Those regulations are found at California Code of Regulations, title 5, section 56000 et seq.

The claimant argues that *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830 supports a finding that a program has been shifted from the state to local community colleges districts, resulting in a reimbursable state-mandated program.[56] In *Lucia Mar, supra,* K-12 school districts sought mandate reimbursement after the state required contributions for the education of severely handicapped students at state schools. The Court concluded, *supra*, at page 836, "that because section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts – an obligation the school districts did not have at the time article XIIIB was adopted – it calls for plaintiffs to support a "new program" within the meaning of section 6."

There are important factual distinctions between the present test claim and *Lucia Mar*. First, the state is not newly charging community college districts for services provided by the state. Here, the DOR withdrew the provision of most educational auxiliary aids to postsecondary-student

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[55] Chapter 14 includes Education Code sections 67300 through 67313.

[56] Claimant's April 5, 2004 Rebuttal to Comments, page 13, states that "The [DOR] is a state agency. Therefore, because Education Code Section 67300 shifts financial responsibility for the education of disabled students from this state agency to community college districts, it calls for those districts to support a "new program" within the meaning of section 6."

clients. However, community college districts had an existing obligation pursuant to federal law to provide the auxiliary aids necessary to accommodate all enrolled disabled students, regardless of whether the student was also a client of the DOR.[57] Community colleges have long had postsecondary and vocational education as their primary mission. Former Education Code section 66701[58] defined the scope of instruction for California community colleges as "standard collegiate courses for transfer to other institutions; vocational and technical fields leading to employment; general or liberal arts courses; and community services." Education Code section 66010.4 now restates that the "primary mission" of community colleges is "academic and vocational instruction at the lower division level."[59] Because community college districts have a preexisting and continuing duty under the Rehabilitation Act of 1973 and the ADA to provide needed auxiliary aids and services to all disabled students, as detailed below, the state did not shift a program to community college districts, and *Lucia Mar* does not apply.

Under federal law, any services offered by a community college, including postsecondary and vocational education, must be made accessible to qualified disabled individuals.[60] The Rehabilitation Act of 1973 requires that recipients of federal funds provide "program accessibility" by making the recipient's facilities physically accessible to disabled persons. "A recipient may comply with the requirements ... through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries ... alterations of existing facilities and construction of new facilities [which meet accessibility standards], or any other methods that result in making its program or activity accessible to handicapped persons."[61]

Subpart E of the Rehabilitation Act regulations apply specifically to postsecondary education. Part 104.42 requires nondiscrimination on the basis of disability in admission or recruitment. Part 104.43 requires nondiscrimination on the basis of disability for all "academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services."

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[57] See 34 Code of Federal Regulations part 104.44. In *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1584, the court found: "Since federal assistance to education is pervasive (see, e.g. Ed. Code, §§ 12000-12405, 49540 et seq., 92140 et seq.), section 504 [Rehabilitation Act] was applicable to virtually all public educational programs in this and other states." In 1990, the ADA imposed the same requirements on all public entities, regardless of funding. (42 U.S.C. § 12131 et seq.; 28 C.F.R. § 35.101 et seq.)

[58] Last substantive amendment by Statutes 1974, chapter 921; renumbered by Statutes 1976, chapter 1010.

[59] Statutes 1990, chapter 1597 repealed section 66701, and reenacted its substantive provisions in Education Code section 66010.4.

[60] 29 United States Code section 794 requires non-discrimination by reason of disability in all postsecondary and vocational education programs receiving any federal funds. Also, 34 Federal Code of Regulations part 104.44 requires the provision of auxiliary aids for disabled postsecondary students.

[61] 34 Code of Federal Regulations part 104.22(b).

Part 104.44 requires that community colleges complying with the federal Rehabilitation Act "shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student," including modification of the length of time allowed to complete degree requirements, and the substitution of course requirements.[62]

In addition, a postsecondary institution "shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills."[63] Under the Rehabilitation Act regulations, such "[a]uxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."[64] 34 Code of Federal Regulations part 104.4(b) specifies that federal funding recipients may not "provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others."

With the 1990 adoption of the ADA (which applies to all public entities, regardless of the receipt of federal funding), regulations were developed which repeat many of the non-discrimination and accessibility requirements of the 1973 Rehabilitation Act, but often go further. For example, 28 Code of Federal Regulations part 35.160(b) requires that "a public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity ... giving primary consideration to the requests of the individual with disabilities."[65]

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[62] 34 Code of Federal Regulations part 104.44(a).

[63] 34 Code of Federal Regulations part 104.44(d).

[64] *Ibid.*

[65] Auxiliary aids and services is defined in the ADA to include:

> (1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
> (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
> (3) Acquisition or modification of equipment or devices; and
> (4) Other similar services and actions. (28 C.F.R. part 35.104.)

An opinion document from the United States Department of Education, Office of Civil Rights, or OCR, on auxiliary aids and services for disabled students, while not controlling, is informative.[66] The requirements of the Rehabilitation Act and the ADA are enforced at public colleges and universities through the OCR.[67] The OCR published a letter, revised September 1998, regarding the duties of postsecondary institutions to provide auxiliary aids, stating "[a]n institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid."[68]

Thus, in the absence of the test claim legislation, community colleges still have to meet all of the federal law equal access requirements of the ADA required directly of all public agencies, and for those districts receiving any form of federal funding, the Rehabilitation Act of 1973. In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, the claimant argued that a reimbursable state-mandated program was imposed by a Penal Code provision requiring criminal indigent defense services and other procedural protections in capital murder cases. However, the court clearly found "no state mandate exists if the requirement or provisions of a state statute are, nevertheless, required by federal law."[69]

Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564 further supports the conclusion that the state has not imposed a state-mandated program for the provision of support services to disabled students by community colleges. The *Hayes* case concerned a mandate claim for special education costs for K-12 schools, ultimately focusing on the federal Education of the Handicapped Act. The proper holding from *Hayes* is that:

> When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate. (See *City of*

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[66] In *Cohen v. Brown University* (C.A.1 (R.I.) 1996) 101 F.3d 155, 173, regarding the degree of judicial deference given to the OCR's Policy Interpretation of federal Title IX law, the court found: "It is also well established 'that an agency's construction of its own regulations is entitled to substantial deference.'"

[67] In interpreting regulations under the ADA and Rehabilitation Act, the court recognizes that the OCR is "the federal agency responsible for investigating complaints of disability discrimination." *Guckenberger v. Boston University* (D.Mass. 1997) 974 F.Supp. 106, 145.

[68] See <http://www.ed.gov/print/about/offices/list/ocr/docs/auxaids.html>, as of March 5, 2008. Attachment 3 to the Draft Staff Analysis.

[69] *County of Los Angeles, supra,* 32 Cal.App.4th 805, 816.

Sacramento v. State of California, supra, 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522.)[70]

Thus, community colleges are responsible for providing necessary auxiliary aids and services for all of their disabled students, in order to achieve program accessibility required by federal law; therefore the costs are imposed on local districts by federal mandate, consistent with the court's opinion in *Hayes, supra,* 11 Cal.App.4th 1564, 1595.

The state has enacted an optional program for the community colleges to receive excess funding:

Because some test claim activities, not otherwise required by federal law, are required of recipients of state DSPS funding, the analysis must continue. As described in the background above, DSPS funding is available to community college districts "to offset the direct excess cost of providing specialized support services or instruction" to disabled students.[71] The test claim statutes and regulations require community college districts receiving DSPS funding to engage in activities such as establishing a DSPS advisory committee, maintaining a designated DSPS Coordinator, and informing students and staff about the availability of DSPS services.[72] Then, for students who qualify for DSPS services, the community college must identify a student's educational limitations and describe them in a Student Educational Contract, which is to be updated annually.[73] Community college districts must also establish and/or distribute certain policies and procedures regarding DSPS participation and rules.[74]

In addition, a contractual DSPS program plan must be established between the district and the Chancellor, and districts must comply with funding accountability requirements including certifications, evaluations, and regular fiscal reporting to the Chancellor's Office, pursuant to deadlines and format requirements.[75] Community college districts are also to "cooperate to the maximum extent possible with the Chancellor in carrying out special projects," such as research and training, using funding "from the three percent set aside authorized pursuant to Education Code Section 84850(e)."[76]

The Chancellor's Office also issued the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," on January 2, 1997, which is pled in the test claim as an executive order. The document provides each DSPS regulation, followed by a restatement and a description of what type of documentation may demonstrate compliance with the

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[70] *Hayes, supra,* 11 Cal.App.4th 1564, 1593.

[71] Government Code section 84850, subdivision (c). Direct excess costs are defined as costs which exceed: the average cost of providing services to nondisabled students; the indirect cost of administration and facilities for DSPS; "the revenue derived from average daily attendance in special classes;" and any other federal, state or local funds received for serving disabled students.

[72] California Code of Regulations, title 5, sections 56020, 56048, and 56050.

[73] California Code of Regulations, title 5, sections 56006 and 56022.

[74] California Code of Regulations, title 5, sections 56010, 56027 and 56029.

[75] Education Code section 67310, subdivision (e) and (f); California Code of Regulations, title 5, section 56030, 56046, 56052, 56066, 56072, 56074 and 56076.

[76] California Code of Regulations, title 5, section 56054.

regulation. The first page of the Guidelines states: "It is important to note that the Guidelines are not regulations which have gone through the full regulatory approval process. *College staff are encouraged, but not required, to use the Guidelines in administering the DSPS programs.* It is the responsibility of the colleges to establish programs, policies, and procedures which meet the requirements of these and other relevant statutes and regulations." [Emphasis added.] Government Code section 17516 defines an "executive order" as "any order, plan, requirement, rule, or regulation issued by . . . any agency, department, board, or commission of state government." Staff finds that the "Implementing Guidelines" are not an executive order because they impose no requirements based on the definition in Government Code section 17516.

Staff finds that the California Supreme Court's decision in *Kern High School Dist., supra,* supports the conclusion that the state DSPS activities alleged are voluntary unless a community college district accepts state program funds, and therefore do not impose a state-mandated program. The school district claimants in *Kern* participated in various funded programs each of which required the use of school site councils and other advisory committees. The claimants sought reimbursement for the costs from subsequent statutes which required that such councils and committees provide public notice of meetings, and post agendas for those meetings. The Court rejected the "claimants' assertion that merely because they participate in one or more of the various education-related funded programs here at issue, the costs they incurred in complying with program conditions have been legally compelled and hence constitute reimbursable state mandates. We instead agree with the Department of Finance, and with *City of Merced, supra,* 153 Cal.App.3d 777, that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves."[77] The court held that if a school district elects to participate in or continue to participate in any underlying voluntary funded program, the district's obligation to comply with the downstream notice and agenda requirements does not constitute a reimbursable state-mandated program.[78]

The plain language of Education Code section 84850 and California Code of Regulations, title 5, section 56000 express that compliance with the DSPS rules and regulations is as a condition of receiving state DSPS funding. Education Code section 84850, subdivision (d) states: "*As a condition of receiving funds pursuant to this section,* each community college district shall certify that reasonable efforts have been made to utilize all funds from federal, state, or local sources which are available for serving disabled students. Districts shall also provide the programmatic and fiscal information concerning programs and services for disabled students that the regulations of the board of governors require." Similarly, title 5, section 56000 provides: "This subchapter applies to community college districts offering support services, or instruction through Disabled Student Programs and Services (DSPS), on and/or off campus, to students with disabilities pursuant to Education Code sections 67310-12 and 84850. *Programs receiving funds allocated pursuant to Education Code Section 84850 shall meet the requirements of this subchapter.*"

To further demonstrate the voluntary nature of community college district participation in the DSPS program, the Chancellor's Office issued a short document titled "*Commonly Asked*

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[77] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

[78] *Id.* at page 747.

Questions About "Mandated" vs "Non-Mandated" DSP&S Services (Revised July, 2003)"[79] discussing the DSPS regulatory scheme. The California Supreme Court acknowledged that although the interpretation of regulations is a question of law, it "will give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates."[80] Therefore, this document is valuable as an interpretation of the regulations issued by the Chancellor's Office.

> **Q. What DSP&S services are colleges mandated to provide?**
>
> A. Because of the nature of serving students with disabilities there is no specific list of mandated versus non-mandated services.
>
> *Technically, no "DSP&S" services are required, because participation in DSP&S is voluntary on the part of each college. Colleges are governed by the Title 5 regulations regarding DSP&S only because they accept the DSP&S funds allocated to them every year. A college could refuse the DSP&S funds and not be subject to the requirements of Title 5 regarding DSP&S.* [Emphasis added.]
>
> However, colleges are still subject to state and federal law regarding the civil rights of people with disabilities to be served in a non-discriminatory manner. State Government Code sections 11135-11139.5, Section 504 of the federal Rehabilitation Act and the federal [ADA] all guarantee equal access to people with disabilities, and community colleges are subject to all of those laws.
>
> Given all of that, the answer of what is "mandated" always depends on the disability-related educational limitation(s) of each individual student. You can never say that any specific type of service or accommodation is always "mandated", because there are some students with disabilities who won't need those services in order to receive equal access to the instruction, information, or programs offered by the college.

The claimant argues that even if the requirements of the DSPS program are optional, "[a] finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate."[81] The claimant describes *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 as the controlling case law, and states that the California Supreme Court's 2003 decision in *Kern High School Dist., supra,* 30 Cal.4th 727 did not change the standard for finding practical compulsion.

In *Kern*, the claimants similarly argued that the California Supreme Court should apply its analysis in *City of Sacramento* regarding federal mandates in a way to find practical compulsion for otherwise optional state programs requiring school site councils. However, the Court in *Kern* examined its earlier decision in *City of Sacramento*, and rejected the claimants' argument, as follows:

> Claimants contend that even if they have not been legally compelled to participate in most of the programs listed in Education Code section 35147, subdivision (b),

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[79] See Attachment 4 to the Draft Staff Analysis.

[80] *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235.

[81] Claimant's Rebuttal to Comments, received April 5, 2004, page 8.

> and hence have not been legally required to incur the related notice and agenda costs, they nevertheless have been compelled as a practical matter to participate in those programs and hence to incur such costs. Claimants assert that school districts have "had no true option or choice but to participate in these [underlying education-related] programs. *This absence of a reasonable alternative to participation is a de facto mandate.*" As explained below, on the facts of this case, we disagree.
>
> Claimants and amici curiae supporting them, relying upon this court's broad interpretation of the federal mandate provision of article XIII B, section 9, [footnote omitted] in *City of Sacramento, supra,* 50 Cal.3d 51, 70-76, assert that we should recognize and endorse such a broader construction of section 6 of that article-a construction that does not limit the definition of a reimbursable state mandate to circumstances of *legal* compulsion.[82]

The *Kern* Court explains that the parties disagree as to whether "federal mandate" and "state mandate" should be subject to the same interpretation, but concludes, *supra*, at page 751:

> We find it unnecessary to resolve whether our reasoning in *City of Sacramento, supra*, 50 Cal.3d 51, applies with regard to the proper interpretation of the term "state mandate" in section 6 of article XIII B. Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento, supra*, 50 Cal.3d 51, applies equally in the context of article XIII [B], section 6, for reasons set out below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation" and other "draconian" consequences (*City of Sacramento, supra,* 50 Cal.3d at p. 74), and hence have not been "mandated," under article XIII [B], section 6, to incur increased costs.

Staff disagrees with claimant's contention that in the present test claim "community college districts' participation is not truly voluntary, the carrot is too large and the stick is too short."[83] Instead, staff finds that the factors for finding practical compulsion are not present here. The state provides annual funding for community college districts, in excess of any other available student funding, for use in meeting federal law requirements of providing disabled students equal access to education.[84] The state has imposed some regulatory requirements upon districts receiving DSPS funds. The incentive, or "carrot," for community colleges to comply with the regulatory requirements of the DSPS program is the availability of significant funding to cover the costs of providing educational services to disabled students; the only consequence is the removal of the funds. There are no other penalties imposed by the state, such as double taxation, or the removal of other, unrelated funding sources. Like the Court in *Kern*, staff finds that a

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[82] *Kern High School Dist., supra,* 30 Cal.4th 727, at pages 748-749.

[83] Rebuttal to Comments, received April 5, 2004, page 12.

[84] DOF, in its December 5, 2007 letter, describes an annual appropriation for DSPS in the budget at Item 6870-1010-0001, Schedule 5, as follows (rounded): $82.6 million (Budget Act of 2003); $86 million (2004); $91.2 million (2005); $107.9 million (2006); $115 million (2007).

"district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits."[85]

Staff finds that there is an underlying federal mandate imposed directly on the community college district itself to provide support services to disabled students, and the state has set up an optional program for the community colleges to receive excess funding to meet those requirements. The state's offer of financial assistance to community college districts to meet such requirements does not impose a state-mandated program. Therefore, staff finds that Education Code section 67300, 67310, 67311, 67312 and 84850; California Code of Regulations, title 5, section 56000 et seq.; and the Chancellor's Office "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," issued January 2, 1997, do not impose a state-mandated program on community college districts.

B) Requesting Instructional Materials in an Electronic Format

Education Code Section 67302:

The claimant alleges that Education Code section 67302 imposes a reimbursable state-mandated program by requiring community colleges "When seeking printed instructional materials in an electronic format, to provide to the publisher or manufacturer a written request" meeting the statutory certification requirements; to copy protect disks or electronic files when being used directly by a student; and to submit requests for materials through a statewide processing center, if one is established by the Chancellor's Office.[86]

Education Code section 67302, as added by Statutes 1999, chapter 379 (AB 422) provides a statutory method for California public colleges and universities to acquire instructional materials from a publisher in an electronic format in order to meet federal accessibility requirements for students with disabilities, such as easier transcription to braille, audio, or digital text. Subdivision (a) requires publishers of printed instructional materials to provide such materials in an electronic format "at no additional cost and in a timely manner" upon receipt of a written request from a community college that certifies the following:

1. the college or student has purchased the printed instructional material for use by a student;
2. the student has a disability that prevents him or her from using standard instructional materials;
3. the materials are for use by the student in connection with a course he or she is registered or enrolled in; and
4. is signed by the community college DSPS coordinator, or another campus official responsible for monitoring ADA compliance.

Pursuant to Education Code section 67302, subdivision (b), a publisher may also require that the request include a signed statement by the student agreeing that the electronic materials will be used for "his or her own educational purposes" and that the student "will not copy or duplicate the printed instructional material for use by others." Subdivision (c) provides that if a college

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[85] *Kern High School Dist., supra,* 30 Cal.4th 727, 753.

[86] Test Claim Filing, pages 84-85.

allows a student to use an electronic version of instructional materials directly, the college is required to take reasonable precautions, such as copy-protecting the file, to prevent students from violating the federal Copyright Revision Act, by further distributing the material.

Education Code section 67302, subdivision (d) requires publishers to provide "nonprinted instructional materials," such as software programs and videos, under the same conditions as printed materials, "when technology is available to convert these materials" from another format compatible with braille or speech synthesis software. Subdivision (e) provides definitions of terms, such as "instructional material" and "specialized format." Subdivision (f) explicitly provides the right for colleges and universities to use the electronic instructional materials to transcribe the materials into braille, and to share the braille copy with other disabled students.

Education Code section 67302, subdivision (g) provides that if the Chancellor's Office establishes a statewide or regional center for processing such requests "(1) The colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material ... to the center, which shall transmit the request to the publisher or manufacturer." Subdivision (h) provides that the statute does not authorize the use of any materials in violation of the federal Copyright Revision Act.

Education Code section 67302, subdivision (i) requires the governing board of the California Community Colleges to adopt guidelines for the implementation of the statute. Finally, subdivision (j) provides that "Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code." Civil Code section 54.1 is the California version of the ADA, requiring that disabled persons be granted full and equal access to transportation, facilities open to the general public, and housing.

The Chancellor's Office published "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities" in April 2000 [hereafter "Alternate Media Guidelines"]. According to the preface, although the document was originally developed in response to the federal Office of Civil Rights (OCR) review, Part II of the Alternate Media Guidelines "addresses the procedures to be used by colleges in taking advantage of the option provided by AB 422 to obtain electronic text from publishers."[87] The appendix to the Alternate Media Guidelines provides sample forms for the student to use to request electronic format materials from the college, as well as a form for colleges to use when requesting materials from publishers, including the text of the required certification. The Alternate Media Guidelines states, "AB 422 does not require publishers to provide electronic versions of materials which are published for a general audience, even though they might be useful to students."[88] Further, "AB 422 may also be of only limited value in terms of obtaining electronic versions of mathematics and science materials or 'nonprinted instructional materials.'"[89] "Finally, it is important to keep in mind that, even when it applies, AB 422 only obliges a publisher to provide electronic text to the college. It remains the college's responsibility to provide instructional materials in an alternate media appropriate to the needs of the student."[90]

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[87] Alternate Media Guidelines, page ii. See Attachment 5 to the Draft Staff Analysis.

[88] *Id.* at page 25.

[89] *Id.* at page 26.

[90] *Ibid.*

This responsibility to provide instructional materials in an appropriate alternate media comes from federal law. The equal educational opportunity requirements of the Rehabilitation Act and the ADA are enforced at public colleges and universities through the federal OCR.[91] In 1996, the OCR opened a compliance review of the California Community Colleges focused on access to print and technology by students with visual disabilities, which was positively resolved in 2001.[92] One of the accomplishments mentioned in the final review is that California law now requires "that publishers cooperate in providing printed textbooks in an electronic format to colleges in the California state postsecondary system (thus eliminating the onerous task of scanning hard copy paper)."[93] The OCR review, at page 4, continues:

> Title II of the Americans with Disabilities Act (Title II) requires a public college to take appropriate steps to ensure that communications with persons with disabilities "are as effective as communications with others" [28 C.F.R. § 35.160(a)]. OCR has repeatedly held that the term "communication" in this context means the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources of the Internet. Title II further states that, in determining what type of auxiliary aid and service is necessary, a public college shall give primary consideration to the requests of the individual with a disability [28 C.F.R. § 35.160(b)(2)].
>
> In construing the conditions under which communication is "as effective as" that provided to nondisabled persons, on several occasions OCR has held that the three basic components of effectiveness are timeliness of delivery, accuracy of the translations, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.

Thus, community colleges have an existing duty under federal law to provide timely, accurate and appropriate accessible instructional materials to disabled students. In *Hayes, supra,* 11 Cal.App.4th 1564, 1593, the court found: "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention." The court determined: "the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed on local districts by federal mandate or by the state's voluntary choice in its implementation of the federal program."[94]

Here, the Chancellor's Office April 2000 Alternate Media Guidelines identifies the statutory procedure as an "*option* provided by AB 422 to obtain electronic text from publishers."[95] Again, in the comments filed on the test claim, the Chancellor's Office argues "the statute is not

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[91] OCR letter to Chancellor's Office re: Docket Number 09-97-6001, August 21, 2001, page 3. See Attachment 6 to the Draft Staff Analysis.

[92] *Id.* at page 1.

[93] *Id.* at page 3.

[94] *Hayes, supra,* 11 Cal.App.4th 1564, 1595. See also, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816: "no state mandate exists if the requirement or provisions of a state statute are, nevertheless, required by federal law."

[95] Alternate Media Guidelines, page ii. See Attachment 5 to Draft Staff Analysis.

mandatory since colleges are not required to use the mechanism established by section 67302 or to ask publishers to provide texts in electronic form."[96]

Staff finds that there is an underlying federal mandate imposed directly on community college districts, and the state has set up the means for the community colleges to efficiently meet those requirements. Community colleges are free to directly scan or transcribe materials from hard copy publications to create accessible versions for their disabled students, just as they could prior to the operation of AB 422; however they may be in violation of federal law for failing to timely provide accessible materials.[97] Filling out a one-page form and sending it to a publisher, as in the sample provided in the Chancellor's Office Alternate Media Guidelines, is a lower level of service than the alternative of scanning, or otherwise transcribing, an entire textbook into electronic format in order to meet the standards of equal access for disabled student required by federal law. Thus, staff finds that Education Code section 67302 does not impose a state-mandated program on community college districts.

C) Parking Services for Students with Disabilities

Education Code Section 67301 and California Code of Regulations, Title 5, Section 54100:

The test claim alleges that Education Code section 67301 (including former section 67311.5), and title 5, section 54100 requires community colleges to provide special parking for students with disabilities, as well as for those providing transportation for them. The claim alleges that this includes "waiv[ing] any restrictions, fines or meter fees."[98]

Education Code section 67301,[99] first added in 1990 as former section 67311.5, requires the California Community Colleges Board of Governors to adopt rules and regulations, which, pursuant to subdivision (a), include authorization for students with disabilities to park for unlimited periods in public time-restricted or metered spaces, without fee. Subdivision (b) requires that the adopted regulations require visitor parking be provided at no charge for a disabled person, or someone providing their transportation, and to "provide accommodations to any person whose disability prevents him or her from operating the gate controls" in a parking facility controlled by a mechanical gate. Subdivision (c) requires the California Community Colleges Board of Governors to institute audit procedures to monitor individual campus compliance with disabled parking laws, including the requirements of the ADA. Staff finds that Education Code section 67301, including former section 67311.5 as it was initially numbered, require duties of the Board of Governors to adopt regulations, but does not directly require

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[96] Chancellor's Office Comments, received March 16, 2004, page 3.

[97] The March 2004 comments on the test claim from the Chancellor's Office, at page 3, assert: "to the extent that colleges do call upon publishers to provide the electronic texts, the statute creates a potential savings to districts since federal law requires districts to provide students with visual impairments access to print and computer-based information."

[98] Test Claim Filing, pages 90-91.

[99] Added by Statutes 1995, chapter 758 (AB 446), amended by Statutes 2001, chapter 745 (SB 1191) (urgency oper. Oct. 12, 2001). The section was derived from former section 67311.5, which was added by Statutes 1990, chapter 1066, and repealed by Statutes 1995, chapter 758.

activities of community college districts, and therefore does not impose a state-mandated activity on community college districts.

California Code of Regulations, title 5, section 54100[100] is the implementing regulation for the disabled parking statute. Students with disabilities are defined in subdivision (b) as enrolled students who either qualify as disabled under the Vehicle Code, or are entitled to special parking through DSPS. Subdivision (c) allows community college districts to require the display of handicapped license plates or placards issued by the Department of Motor Vehicles, or by a sticker issued by the college.

Lost Revenue from Meter Fees and Parking Tickets

Subdivision (d) of title 5, section 54100 permits community colleges to charge the same parking permit fees imposed on students, but does not allow any other charge or surcharge, such as meter fees, or ticketing for parking for extended times in time-limited zones.

As background on the parking fees available for disabled student parking, staff notes that title 5, section 54100, subdivision (h) provides that: "Revenue from parking fees collected pursuant to Education Code section 76360 may be used to offset the costs of implementing this section." Education Code section 76360 permits community colleges to charge up to $40 per semester and $20 per intersession, to students, employees and others, for campus parking services. The fee may be increased for funding on-campus parking construction if both the number of students per available parking space, and the local cost per square foot of land, exceed statewide averages. Even if such higher charges are allowed, the fee may not exceed the actual cost of constructing a parking structure. Students receiving financial aid may not be charged more than $20 per semester for parking. Fees collected must be deposited in a designated fund, and may only be expended for public transportation subsidies and parking services. Parking services is defined as "the purchase, construction, and operation and maintenance of parking facilities."

The claimant alleges that community college districts are required to "adopt and implement rules and regulations to provide parking at each campus or center for students with disabilities and those providing transportation for those students," and pursuant to title 5, section 54100, subdivision (d): "[o]ther than permit fees imposed pursuant to Education Code 72247,[101] to waive any restrictions, fines or meter fees."[102] The claimant acknowledges that DSPS apportionment funding and parking fees may be available to "reduce the costs incurred by these mandated duties."[103]

Staff finds that mandate reimbursement for the lost revenue from waiving disabled students parking fines and meter fees is encompassed by the court's holding in *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284-1285:

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[100] As added by Register 92, number 12, operative February 18, 1992.

[101] Repealed, renumbered and reenacted as Education Code section 76360, by Statutes 1993, chapter 8.

[102] Test Claim Filing, page 90.

[103] *Id.* at page 98. Special disabled student parking is a cost category listed in the DSPS program, both in Education Code section 67311 and California Code of Regulations, title 5, section 56026.

> In light of the constraints imposed by the rules regarding strict construction of constitutional limitations on the power of the Legislature, and the rule that requires respect for the Legislature's adoption of a particular meaning of a constitutional phrase, we cannot extend the provisions of section 6 to include concepts such as lost revenue, that are not fairly implicated by the history, voter materials, language and legislative interpretation of section 6. We can only conclude that when the Constitution uses "costs" in the context of subvention of funds to reimburse for "the costs of such program," that some actual cost must be demonstrated, and not merely decreases in revenue.

In this case, title 5, section 54100, subdivision (d) permits community college districts to charge disabled students the same parking permit fees as other students, but disallows any additional revenue from charging meter fees and parking fines to disabled students, if they park in time-limited or other restricted areas. Such a potential decrease in revenue is not a cost subject to subvention pursuant to *County of Sonoma, supra*. Therefore, staff finds that title 5, section 54100, subdivision (d) does not impose a state-mandated program.

Providing Accessible Parking

The claimant further alleges that a reimbursable state-mandated program is imposed by the accessible parking requirements of title 5, section 54100, subdivisions (a), (e) and (g).[104] Subdivision (a) states that: "Each community college district which provides parking shall, consistent with the requirements of this section and Education Code section 67301, provide parking at each of its colleges or centers to students with disabilities and those providing transportation for such students." Title 5, section 54100, subdivision (e) requires:

> Parking specifically designated for persons with disabilities pursuant to Section 7102 of Title 24[105] of the California Code of Regulations shall be available to students with disabilities, and those providing transportation to such persons, in those parking areas which are most accessible to facilities which the district finds are most used by students.

Title 5, section 54100, subdivision (g) requires:

> When parking provided pursuant to this section is located in an area where access is controlled by a mechanical gate, the district shall ensure that accommodations are made for students with disabilities who are unable to operate the gate controls. Accommodations may be provided by an attendant assigned to assist in operation of the gate or by any other effective means deemed appropriate by the district.

When test claim activities are also required by federal law, no state-mandated program can be found. In *Hayes, supra,* regarding a mandate claim for special education costs for K-12 schools, the Court found:

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[104] *Id.* at pages 90-91.

[105] California Code of Regulations, title 24, section 7102 formerly provided the California Building Standards Code site development requirements for accessible disabled parking, however the section was deleted from the Code on April 24, 1995.

> When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate.[106]

In the present case, the applicable Rehabilitation Act regulations require that a community college "shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons." (34 C.F.R. § 104.22(a).) The same requirement is found in the ADA, which applies to all public entities, even if they do not receive federal funds (28 C.F.R. § 35.150(a).)

All new construction and facilities altered after the effective dates of the ADA and Rehabilitation Act regulations are required to "be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by" disabled individuals.[107] Parking is explicitly included in the applicable definition of "facility" under both the Rehabilitation Act and the ADA.[108] Although both the ADA and the Rehabilitation Act provide that the law does not "necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities,"[109] this is not a broad exception to the rule requiring readily accessible facilities. The Appendix to the ADA regulations regarding the accessibility requirements of title II (for all public entities), specify:

> Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is "readily achievable," or to provide goods and services through alternative methods, where those methods are "readily achievable," title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases. (28 C.F.R. Pt. 35, App. A, "Section 35.150 Existing Facilities".)

Under the Rehabilitation Act, recipients of public funds were required to make a transition plan to achieve accessibility within sixty days of May 9, 1980 (the effective date of the regulations),

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[106] *Hayes, supra,* 11 Cal.App.4th 1564, 1593.

[107] 34 Code of Federal Regulations part 104.23, effective May 9, 1980; 28 Code of Federal Regulations part 35.151, effective January 26, 1992.

[108] 34 Code of Federal Regulations part 104. 3, effective May 9, 1980; 28 Code of Federal Regulations part 35.104, effective January 26, 1992.

[109] 34 Code of Federal Regulations part 104.22(a), effective May 9, 1980; and 28 Code of Federal Regulations part 35.150(a), effective January 26, 1992.

and "where structural changes in facilities are necessary," within three years.[110] Under the ADA, any necessary structural changes that were not already accomplished under the Rehabilitation Act were required "within three years of January 26, 1992, but in any event as expeditiously as possible."[111] The appendix to the ADA, regarding the transition plan time periods, also specifies "a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction."[112]

Staff finds the state requirements of title 5, section 54100, subdivisions (a) and (e), to provide designated disabled parking "in those parking areas which are most accessible to facilities which the district finds are most used by students," implements the federal law requirements to operate community colleges programs and facilities so that they are "readily accessible" to disabled individuals. Title 5, section 54100, subdivision (g), requires that accommodations be made for students with disabilities who are unable to operate gate controls in areas where the designated disabled parking is required to be available pursuant to section 54100, subdivision (e). Staff finds that making disabled student parking accessible through any "effective means deemed appropriate by the district," is also required by the Rehabilitation Act and the ADA.[113] Therefore, staff finds that title 5, section 54100, subdivisions (a), (e) and (g) do not impose a state-mandated program.

Notice of Availability of Accessible Parking

Finally, the claimant alleges that a reimbursable state-mandated program is imposed by the requirements of title 5, section 54100, subdivision (f):[114]

> Each community college district shall post in conspicuous places notice that parking is available to students with disabilities and those providing transportation for such students.

The ADA requires that all public entities provide signage directing users to accessible entrances to facilities. As stated above, the definition of "facility" includes parking (28 C.F.R. § 35.104). 28 Code of Federal Regulations part 35.163, provides:

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[110] 34 Code of Federal Regulations part 104.22(d).

[111] 28 Code of Federal Regulations part 35.150(c).

[112] 28 Code of Federal Regulations part 35, Appendix A ("Time Periods").

[113] The ADA regulations state: "A public entity may comply with the requirements of this section 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 accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or *any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.* A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." (28 C.F.R. § 35.150(b)(1).) Similar language is found in the Rehabilitation Act regulations for recipients of federal funds (34 C.F.R. § 104.22(b).)

[114] Test Claim Filing at pages 90-91.

(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility[115] shall be used at each accessible entrance of a facility.

As stated above, *Hayes* specifies that when federal law "imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention."[116] Staff finds that by posting the accessibility signage necessary to comply with the federal law, a community college district will meet the state requirement to post conspicuous notice on the availability of accessible parking; therefore, section 54100, subdivision (f) has not imposed a state-mandated program.

Based upon all of the above, staff finds that Education Code section 67301, and California Code of Regulations, title 5, section 54100, do not impose a state-mandated program on community college districts.

CONCLUSION

Staff concludes that Education Code sections 67300, 67301, 67302, 67310, 67311, 67312, and 84850; California Code of Regulations, title 5, sections 54100, 56000, 56002, 56004, 56005, 56006, 56008, 56010, 56020, 56022, 56026, 56027, 56028, 56029, 56030, 56032, 56034, 56036, 56038, 56040, 56042, 56044, 56046, 56048, 56050, 56052, 56054, 56060, 56062, 56064, 56066, 56068, 56070, 56072, 56074, and 56076; and the "Implementing Guidelines for Title 5 Regulations, *Disabled Student Programs and Services*," do not impose a state-mandated program on community college districts subject to article XIII B, section 6.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to deny this test claim.

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[115] I.e., the blue-and-white wheelchair symbol.

[116] *Hayes, supra,* 11 Cal.App.4th 1564, 1593.

ATTACHMENT 1

COOPERATIVE AGREEMENT
BETWEEN
CALIFORNIA STATE DEPARTMENT OF REHABILITATION
AND
CHANCELLOR'S OFFICE
THE CALIFORNIA COMMUNITY COLLEGES

WHEREAS, the Chancellor of the California Community Colleges (hereinafter referred to as Chancellor) and the Director of the Department of Rehabilitation (hereinafter referred to as Director) recognize that no otherwise qualified disabled person should be denied the benefits of California Community Colleges solely by reason of his/her disability; and

WHEREAS, the Department of Rehabilitation (hereinafter referred to as Department) recognizes that it shares responsibility with educational systems as a provider of needed services to persons with disabilities and that the concerns and goals of Education and those of Vocational Rehabilitation are clearly compatible and every effort will be made to effectively and efficiently coordinate available services; and

WHEREAS, the Chancellor and the Director agree to make every effort with the Governor of the State of California, the Department of Finance and before the Legislature of the State of California and Congress of the United States to promote and support the appropriation of adequate State and Federal funds to enable the community colleges to provide appropriate educational opportunities to all their disabled students; and

WHEREAS, the Chancellor acknowledges and agrees that the community colleges are required by Section 504 of the Rehabilitation Act of 1973, and the regulations implementing that Section and Article 9.5 (11135 to 11135.5) of the California Government Code to provid auxiliary aids necessary to make the benefits of the community college programs fully accessible to all their disabled students; and

WHEREAS, the Chancellor and the Director wish to ensure that no disabled person be denied educational auxiliary aids or services and programs as a result of ineffective coordination; and

WHEREAS, the Chancellor, on behalf of Community Colleges and the Director, on behalf of the Department, agree to the following:

1. The Community Colleges will refer appropriate students to the Department for eligibility evaluation and services.

2. Beginning July 1, 1981, the Department will discontinue the provision of auxiliary aid services to its clients attending community colleges. To the extent possible, the community college system will continue to provide auxiliary aids and other educational services to all needy disabled community college students.

3. Disabled community college students who are or will be clients of the Department, will continue to receive non-auxiliary aid services provided by the Department, if in the judgment of the rehabilitation counselor such servic are necessary to facilitate the agreed upon individualized written rehabilitation program (IWRP).

4. Pertaining to and for the benefit of disabled students, a free exchange of information to the extent permitted by the respective rules and regulations of both community colleges and the Department, each taking appropriate steps to protect confidential information so exchanged.

5. In order to facilitate closer working relationships at the local level, Department District Administrators and College Presidents should develop written working agreements.

For the purposes of this agreement, auxiliary aids are defined as those devices and services necessary to ensure that a disabled student will enjoy the benefits of and participation in all the education programs operated by the community colleges on an equal basis with other students.

Beginning July 1, 1981, the following auxiliary aids related to educational programs will no longer be provided by the Department of Rehabilitation:

1. Reader services for the blind and visually impaired.
2. Notetaker services for the blind and visually impaired.
3. Interpreter services for the deaf and hearing impaired.
4. On-campus mobility assistance.
5. On-campus transportation.
6. Special adaptive equipment.

The Department will continue providing its traditional services to student/clients including but not limited to the following:

1. Medical/psychiatric evaluation of disability.
2. Physical, psychiatric or speech therapy.
3. Individual diagnostic testing.
4. Vocational rehabilitation counseling.
5. Off-campus transportation, including mileage allowance, bus or taxi fare, other than for education programs and when service does not already exist for non-disabled students.
6. Maintenance - supplement funds for basic living expenses when unavailable from other resources.
7. Off-campus mobility instruction.
8. Prosthetic/orthotic maintenance and repair.
9. Reader and notetaker services for the blind and visually impaired and interpreter services for the deaf and hearing impaired other than for educational programs.
10. Job placement services.
11. Payment of college fees (registration, books, supplies, etc.).
12. Special adaptive equipment, unless clearly useable solely for educational purposes.
13. Tutoring for individual students when college services are non-existent or insufficient.

NOW, THEREFORE, BE IT RESOLVED that this interagency agreement shall serve as a vehicle for both agencies to cooperate in providing services to eligible disabled students beginning on the date that this agreement is signed by both parties and continuing through Fiscal Year 1984/85. This document may be revised, if appropriate, by representatives of both signatories and terminated prior to July 1, 1985, only by mutual consent between the agencies or by a written three-months prior notification by either party.

BY: _____ Date: 6/23/81
Gerald Hayward, Chancellor
California Community Colleges

BY: Edward V. Roberts Date: 6/23/81
Edward V. Roberts, Director
California Department of Rehabilitation

SENATE REPUBLICAN CAUCUS
SENATOR KENNETH L. MADDY, Chairman

ATTACHMENT 2

POSITIONS:

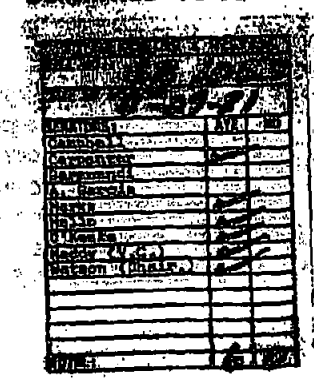
SUPPORT: National Federation of the Blind of California
American Council of the Blind of California

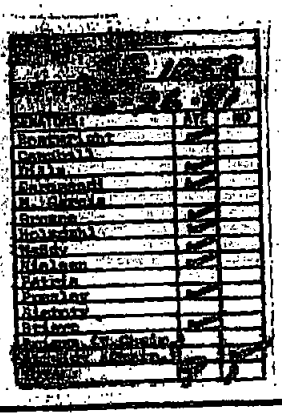
APPROPRIATION BILL
BILL NUMBER: SB 1053

AUTHOR: Davis

AMENDED COPY: 7/7/81
TWO-THIRDS VOTE
URGENCY

Committee Votes:





Senate Floor Vote:

Assembly Floor Vote:

DIGEST

This bill requires the Department of Rehabilitation to provide reader services to: 1) any blind student who is a California resident attending college in this state; and, 2) any blind student who is a client of the department attending college outside of the state.

FISCAL EFFECT:

Appropriation: Yes Fiscal Committee: Yes Local: No

$983,185 would be appropriated from the General Fund to the Department of Rehabilitation to carry out provisions of this measure. The money is being transferred from various budget items. The Legislative Analyst found that based on the department's estimate of case service expenditures, full-year costs to the Department of Rehabilitation as a result of SB 1053 would be $720,000 ($612,000 federal funds and $108,000 from the General Fund) for students who qualify as rehabilitation clients. In addition, there would be annual additional General Fund costs of at least $52,017 for blind students who would not be eligible for federal vocational rehabilitation assistance.

COMMENTS

Under current law, the Department of Rehabilitation receives state funds to purchase reader services for blind students who are not vocational rehabilitation clients. The department also provides reader services for student clients using federal vocational rehabilitation funds. This bill requires that the department provide blind students with reader services from any funds regardless of whether or not

-NEXT PAGE-

they are clients of the department.

An interagency agreement between the Department of Rehabilitation and postsecondary education institutions (community colleges, CSUS, and UC) provides for a transfer of funding and management of auxiliary services, including readers for the blind, from the Department of Rehabilitation to these postsecondary education systems. The Department of Rehabilitation cites federal law and state law to justify the responsibility of public postsecondary institutions to provide auxiliary educational services to handicapped students.

However, organizations representing the blind contend that the services they receive under the auspices and management of postsecondary systems will be much more limited than those they receive from the Department of Rehabilitation. They say that higher education institutions would not let them choose their own readers, and would place unacceptable restrictions upon the hours and locations where the reader services must be used. For this reason, these organizations prefer to have the reader services remain within the jurisdiction of the Department of Rehabilitation.

ED.gov

ATTACHMENT 3

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Auxiliary Aids and Services for Postsecondary Students with Disabilities

Higher Education's Obligations Under Section 504 and Title II of the ADA

U.S. Department of Education
Office for Civil Rights
Washington, D.C.

Revised September 1998

Section 504 of the Rehabilitation Act of 1973

In 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 (Section 504), a law that prohibits discrimination on the basis of physical or mental disability (29 U.S.C. Section 794). It states:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .

The Office for Civil Rights in the U.S. Department of Education enforces regulations implementing Section 504 with respect to programs and activities that receive funding from the Department. The Section 504 regulation applies to all recipients of this funding, including colleges, universities, and postsecondary vocational education and adult education programs. Failure by these higher education schools to provide auxiliary aids to students with disabilities that results in a denial of a program benefit is discriminatory and prohibited by Section 504.

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits state and local governments from discriminating on the basis of disability. The Department enforces Title II in public colleges, universities, and graduate and professional schools. The requirements regarding the provision of auxiliary aids and services in higher education institutions described in the Section 504 regulation are generally included in the general nondiscrimination provisions of the Title II regulation.

Postsecondary School Provision of Auxiliary Aids

The Section 504 regulation contains the following requirement relating to a postsecondary school's obligation to provide auxiliary aids to qualified students who have disabilities:

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

The Title II regulation states:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford

> an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

It is, therefore, the school's responsibility to provide these auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine their eligibility under Section 504 or the ADA, the recipient must provide auxiliary aids in the interim.

Postsecondary Student Responsibilities

A postsecondary student with a disability who is in need of auxiliary aids is obligated to provide notice of the nature of the disabling condition to the college and to assist it in identifying appropriate and effective auxiliary aids. In elementary and secondary schools, teachers and school specialists may have arranged support services for students with disabilities. However, in postsecondary schools, the students themselves must identify the need for an auxiliary aid and give adequate notice of the need. The student's notification should be provided to the appropriate representative of the college who, depending upon the nature and scope of the request, could be the school's Section 504 or ADA coordinator, an appropriate dean, a faculty advisor, or a professor. Unlike elementary or secondary schools, colleges may ask the student, in response to a request for auxiliary aids, to provide supporting diagnostic test results and professional prescriptions for auxiliary aids. A college also may obtain its own professional determination of whether specific requested auxiliary aids are necessary.

Examples of Auxiliary Aids

Some of the various types of auxiliary aids and services may include:

- taped texts
- notetakers
- interpreters
- readers
- videotext displays
- television enlargers
- talking calculators
- electronic readers
- Braille calculators, printers, or typewriters
- telephone handset amplifiers
- closed caption decoders
- open and closed captioning
- voice synthesizers
- specialized gym equipment
- calculators or keyboards with large buttons
- reaching device for library use
- raised-line drawing kits
- assistive listening devices
- assistive listening systems
- telecommunications devices for deaf persons.

Technological advances in electronics have improved vastly participation by students with disabilities in educational activities. Colleges are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of a student with a disability. An institution has flexibility in choosing the specific aid or service it provides to the student, as long as the aid or service selected is effective. These aids should be selected after consultation with the student who will use them.

Effectiveness of Auxiliary Aids

No aid or service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the education program or activity. Not all students with a similar disability benefit equally from an identical auxiliary aid or service. The regulation refers to this complex issue of effectiveness in several sections, including:

> Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.

There are other references to effectiveness in the general provisions of the Section 504 regulation which state, in part, that a recipient may not:

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

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

The Title II regulation contains comparable provisions.

The Section 504 regulation also states:

> [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

The institution must analyze the appropriateness of an aid or service in its specific context. For example, the type of assistance needed in a classroom by a student who is hearing-impaired may vary, depending upon whether the format is a large lecture hall or a seminar. With the one-way communication of a lecture, the service of a notetaker may be adequate, but in the two-way communication of a seminar, an interpreter may be needed. College officials also should be aware that in determining what types of auxiliary aids and services are necessary under Title II of the ADA, the institution must give primary consideration to the requests of individuals with disabilities.

Cost of Auxiliary Aids

Postsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Personal Aids and Services

An issue that is often misunderstood by postsecondary officials and students is the provision of personal aids and services. Personal aids and services, including help in bathing, dressing, or other personal care, are not required to be provided by postsecondary institutions. The Section 504 regulation states:

> Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Title II of the ADA similarly states that personal services are not required.

In order to ensure that students with disabilities are given a free appropriate public education, local education agencies are required to provide many services and aids of a personal nature to students with disabilities when they are enrolled in elementary and secondary schools. However, once students with

disabilities graduate from a high school program or its equivalent, education institutions are no longer required to provide aids, devices, or services of a personal nature.

Postsecondary schools do not have to provide personal services relating to certain individual academic activities. Personal attendants and individually prescribed devices are the responsibility of the student who has a disability and not of the institution. For example, readers may be provided for classroom use but institutions are not required to provide readers for personal use or for help during individual study time.

Questions Commonly Asked by Postsecondary Schools and Their Students

Q: What are a college's obligations to provide auxiliary aids for library study?

A: Libraries and some of their significant and basic materials must be made accessible by the recipient to students with disabilities. Students with disabilities must have the appropriate auxiliary aids needed to locate and obtain library resources. The college library's basic index of holdings (whether formatted on-line or on index cards) must be accessible. For example, a screen and keyboard (or card file) must be placed within reach of a student using a wheelchair. If a Braille index of holdings is not available for blind students, readers must be provided for necessary assistance.

Articles and materials that are library holdings and are required for course work must be accessible to all students enrolled in that course. This means that if material is required for the class, then its text must be read for a blind student or provided in Braille or on tape. A student's actual study time and use of these articles are considered personal study time and the institution has no further obligation to provide additional auxiliary aids.

Q: What if an instructor objects to the use of an auxiliary or personal aid?

A: Sometimes postsecondary instructors may not be familiar with Section 504 or ADA requirements regarding the use of an auxiliary or personal aid in their classrooms. Most often, questions arise when a student uses a tape recorder. College teachers may believe recording lectures is an infringement upon their own or other students' academic freedom, or constitutes copyright violation.

The instructor may not forbid a student's use of an aid if that prohibition limits the student's participation in the school program. The Section 504 regulation states:

> A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

In order to allow a student with a disability the use of an effective aid and, at the same time, protect the instructor, the institution may require the student to sign an agreement so as not to infringe on a potential copyright or to limit freedom of speech.

Q: What if students with disabilities require auxiliary aids during an examination?

A: A student may need an auxiliary aid or service in order to successfully complete a course exam. This may mean that a student be allowed to give oral rather than written answers. It also may be possible for a student to present a tape containing the oral examination response. A test should ultimately measure a student's achievements and not the extent of the disability.

Q: Can postsecondary institutions treat a foreign student with disabilities who needs auxiliary aids differently than American students?

A: No, an institution may not treat a foreign student who needs auxiliary aids differently than an American student. A postsecondary institution must provide to a foreign student with a disability

the same type of auxiliary aids and services it would provide to an American student with a disability. Section 504 and the ADA require that the provision of services be based on a student's disability and not on such other criteria as nationality.

Q: Are institutions responsible for providing auxiliary services to disabled students in filling out financial aid and student employment applications, or other forms of necessary paperwork?

A: Yes, an institution must provide services to disabled students who may need assistance in filling out aid applications or other forms. If the student requesting assistance is still in the process of being evaluated to determine eligibility for an auxiliary aid or service, help with this paperwork by the institution is mandated in the interim.

Q: Does a postsecondary institution have to provide auxiliary aids and services for a nondegree student?

A: Yes, students with disabilities who are auditing classes or who otherwise are not working for a degree must be provided auxiliary aids and services to the same extent as students who are in a degree-granting program.

For More Information

For more information on Section 504 and the ADA and their application to auxiliary aids and services for disabled students in postsecondary schools, or to obtain additional assistance, see the list of OCR's 12 enforcement offices containing the address and telephone number for the office that serves your area, or call 1-800-421-3481.

Top

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Last Modified: 03/10/2005

COMMONLY ASKED QUESTIONS ABOUT "MANDATED" VS "NON-MANDATED" DSP&S SERVICES

Q. What DSP&S services are colleges mandated to provide?

A. Because of the nature of serving students with disabilities there is no specific list of mandated versus non-mandated services.

Technically, no "DSP&S" services are required, because participation in DSP&S is voluntary on the part of each college. Colleges are governed by the Title 5 regulations regarding DSP&S only because they accept the DSP&S funds allocated to them every year. A college could refuse the DSP&S funds and not be subject to the requirements of Title 5 regarding DSP&S.

However, colleges are still subject to state and federal law regarding the civil rights of people with disabilities to be served in a non-discriminatory manner. State Government Code sections 11135-11139.5, Section 504 of the federal Rehabilitation Act and the federal American's with Disabilities Act all guarantee equal access to people with disabilities, and community colleges are subject to all of those laws.

Given all of that, the answer of what is "mandated" always depends on the disability-related educational limitation(s) of each individual student. You can never say that any specific type of service or accommodation is always "mandated", because there are some students with disabilities who won't need those services in order to receive equal access to the instruction, information, or programs offered by the college. For example, sign language interpreting for auditory information is a standard service that no one questions as an appropriate accommodation for people with disabilities. However, it is only "mandated" for those students, such as a deaf student, who cannot receive the information as it is originally presented unless they receive the accommodation of sign language interpreting. A student who is hard-of-hearing and can use an assisted listening device that provides the information as effectively as the sign language is not necessarily being denied a "mandated" service if the sign language interpreter is not also provided.

There is a slightly different answer regarding some services typically provided by DSP&S programs, depending if the question being asked is whether a service is legally required versus a requirement of receiving DSP&S funding. Two services that come up in such questions are Learning Disability assessment and High Tech Center instruction. Neither of these services is specifically required by state or federal law or regulation to be provided by colleges to students with disabilities. However, California community colleges have received increased funding in the past to address the assessment of learning disabilities and instruction in assistive computer software. Additionally, based on a federal Department of Education, Office of Civil Rights review of the California

community college system and subsequent resolution agreement with the Chancellor's Office, alternate media services (Braille, etext, large print, captioning) were specifically funded. So, while there is no direct legal or regulatory requirement to provide those services, there is a system standard and general programmatic expectation that has developed regarding access for students to such services, and in the case of alternate media and agreement with the federal government that such services will be provided at a higher level than in the past.

The issue of what is "mandated" must always be addressed on an individual basis, and consultation with district legal staff and the Chancellor's Office is recommended.

California Community Colleges

Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities

April 2000

Chancellor's Office
California Community Colleges
Sacramento, California

PUBLISHING INFORMATION

This document has been developed by the Chancellor's Office based on the recommendations of a Special Alternate Media Workgroup established by the Consultation Council to advise the Chancellor on this subject. It is published by the Chancellor's Office, California Community Colleges, 1102 Q Street, Sacramento, California, 95814-6511. This document can be obtained by contacting the Chancellor's Office at (916) 322-3234 or downloaded from the Chancellor's Office website at http://cccco.edu/cccco/ss/dsps/OCR/Amg4.doc.

Questions on the content of this publication should be addressed to Scott Hamilton, Coordinator, Disabled Students Programs and Services, at the address provided above; telephone (916) 327-5892; FAX (916) 327-8232.

California Community Colleges

Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities

April 2000

Developed By:

The Chancellor's Office
In Collaboration with the Alternate Media Workgroup

Table of Contents

PART II. GUIDELINES FOR IMPLEMENTATION OF ASSEMBLY BILL 422

APPENDICES

SAMPLE FORMS AND LETTERS

Preface

In March 1996, the U.S. Department of Education, Office for Civil Rights (OCR) undertook a statewide review of the extent to which community colleges were meeting their obligation under Title II and Section 504 to provide students with visual impairments access to print and computer-based information. OCR concluded that the California community colleges employed "methods of administration" which substantially restricted accomplishment of the educational objectives of community college students with visual impairments.

The OCR report, which was issued in January 1998, asked the Chancellor's Office to take steps in nine separate areas to improve access for blind and visually impaired students. One of these areas involved the provision of textbooks, instructional materials, and other printed information in alternate media such as braille, large print, or electronic text. OCR found that many colleges did not have adequate systems in place for responding in a timely and efficient manner to requests for materials in alternate media. OCR concluded that, in order to address this problem, the Chancellor's Office should work with the colleges to develop a coordinated systemwide approach that would streamline the present time-consuming and labor-intensive process of converting hardcopy print into electronic text and/or braille.

The Chancellor's Office has been working for the past two years to put in place the policies and procedures necessary to respond to the OCR report. In the Fall of 1998, the Chancellor asked the Consultation Council to establish a special Alternate Media Workgroup to advise staff regarding the best approach to take in addressing the problem of producing materials in alternate media.

After discussion of various options with the Workgroup, the Chancellor's Office decided to prepare and submit a Budget Change Proposal (BCP) for the 2000-2001 fiscal year requesting funding to assist colleges with acquiring the equipment and trained staff they will need to respond to requests for alternate media. The BCP also requests funding to establish a statewide Alternate Media Center which would centrally handle the larger or more difficult requests.

Final decisions about the 2000-2001 budget will not be made until July 2000. Even if the proposal is funded to establish the Alternate Media Center, it probably would not be operational until the middle of 2001 at the earliest. Moreover, the plan proposed in the BCP contemplates that local college staff will make decisions about how to satisfy requests for alternate media and that most small documents, especially those needed with a short turn-around time, would still be handled locally. Thus, even if the BCP is fully funded, colleges will continue to have considerable responsibility for production of materials in alternate media.

Part I of this document sets forth guidelines for colleges to use in responding to requests for materials in alternate media. The guidelines are based on the recommendations of the Workgroup and have been reviewed and revised based on input from the Disabled Student

Programs and Services Regional Coordinators, the High Tech Center Training Unit Advisory Committee, and other interested parties.

In a related development, on September 15, 1999, California Governor Gray Davis signed into law Assembly Bill 422 (Steinberg) which requires publishers of instructional material to provide the material at no cost in an electronic format for use by students with disabilities at the University of California, California State University, and California Community Colleges. This new law, which became effective January 1, 2000, will assist colleges in meeting their pre-existing obligations to provide instructional materials in alternate media. The electronic text supplied by a publisher may be used to produce large print, translated and sent to a braille embosser, or accessed directly with speech synthesizers or refreshable braille displays.

However, *California Education Code*, Section 67302, which was added by AB 422, provides that the Board of Governors must adopt guidelines for implementation of the new law. Part II of this document addresses the procedures to be used by colleges in taking advantage of the option provided by AB 422 to obtain electronic text from publishers.

Part I

PRODUCING MATERIAL IN ALTERNATE MEDIA

A. LEGAL REQUIREMENTS

Both state and federal law require community colleges to operate all programs and activities in a manner which is accessible to students with disabilities.

At the federal level, requirements for access for persons with disabilities were first imposed on recipients of federal funding by Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and its accompanying regulations set forth at *34 Code of Federal Regulations* (C.F.R.), Section 104. Similar requirements were later imposed on all public entities, regardless of whether or not they receive federal funding, by the Americans with Disabilities Act (42 U.S.C. § 12100 et seq.) and the regulations implementing Title II of the ADA which appear at 28 C.F.R. § 35.

In particular, the Section 504 regulations and the regulations implementing Title II of the Americans with Disabilities Act (ADA) contain nearly identical provisions stating that recipients of federal funds and public entities in providing any aid, benefit or service, may not afford a qualified individual with a disability an opportunity to participate that is not as effective as that provided to others. (See 34 C.F.R. § 104.4 (b)(1)(iii) and 28 C.F.R. § 35.130(b)(1)(iii).) Title II recognizes the special importance of communication, which includes access to information, in its implementing regulation at 28 C.F.R. § 35.160(a). The regulation requires that a public entity, such as a community college, take appropriate steps to ensure that communications with persons with disabilities are as effective as communications with others.

The United States Department of Education, Office for Civil Rights (OCR) is responsible for ensuring that all educational institutions comply with the requirements of all federal civil rights laws, including Section 504 and Title II of the ADA. As a result, the opinions of OCR are generally accorded considerable weight by the courts in interpreting the requirements of these laws. OCR has had occasion to issue several opinions applying the requirements of the Section 504 and ADA regulations to situations involving access to instructional materials.

OCR has held that the three basic components of effective communication include: "timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability." (OCR Docket No. 09-97-2145, January 9, 1998.)

In applying this test to a case involving access to materials in a college library, OCR commented that:

> "When looking at exactly which of its resources a library is obligated to provide in an accessible medium, the short answer is any resources the library makes available to nondisabled patrons must be made accessible to blind patrons. This includes the library catalogue, the archived microfiche, daily newspapers, and the internet (if that is a service provided to sighted patrons). A categorical decision by a public library not to even consider a request by a patron for a particular alternative format is in most instances a violation of Title II. However, when determining what alternative format is most appropriate, a library may take into account how frequently the material is used by patrons and the longevity of the material's usefulness. For instance, more serious consideration should be given to translating into braille frequently used reference materials which have a long (sic) 'shelf-life' than would be true for daily newspapers." (OCR Docket No. 09-97-2002, April 7, 1997.)

In another case, OCR required a college to provide a textbook in braille because

> "in some situations, the subject matter of the textbook is particularly ill-suited to an auditory translation. For example, mathematics and science textbooks, as well as textbooks to assist in acquiring proficiency in a written (rather than conversational) foreign language, ordinarily rely heavily on unique symbols, equations, charts, grids, subscripts, punctuation, underscores, and accent marks, which are often hard to effectively convey through auditory speech." (OCR Docket No. 09-97-2145, January 9, 1998.)

OCR also points out that the courts have held that a public entity violates its obligations under the ADA when it only responds on an ad hoc basis to individual requests for accommodation. There is an affirmative duty to develop a comprehensive policy in advance of any request for auxiliary aids or services.

There are also state laws and regulations which require community colleges to make printed materials available in alternate media. *California Government Code*, Section 11135 et seq. prohibits discrimination on various grounds, including mental or physical disability, by entities receiving funding from the state of California. The Board of Governors has adopted regulations at Title 5, *California Code of Regulations*, Section 59300 et seq. to implement these requirements with respect to funds received by community college districts from the Board of Governors or Chancellor's Office. These regulations require community college districts and the Chancellor's Office to investigate and attempt to resolve discrimination complaints filed by students or employees.

B. SCOPE AND PURPOSE

The remainder of this document sets forth guidelines developed by the Chancellor's Office to address specific issues community college districts will face in meeting their legal obligation to make instructional materials and other information resources available in alternate formats to persons with disabilities.

It should be noted that the legal requirements discussed in these guidelines are not limited to students in the classroom environment. A college would be required to make available, upon request, in alternate media, any publication it offers to the general public such as the college catalogue, announcements about cultural or recreational events sponsored by the college, job announcements, etc. Nevertheless, since most requests are likely to come from students, the primary focus in these guidelines will be on providing instructional materials in accessible formats. Colleges should, however, establish policies and procedures which take into account the possibility that others will also make such requests.

It is also important to keep in mind that colleges are required to provide access to all instructional materials or other information resources regardless of whether the source material is in printed, electronic, or some other form. On September 3, 1999, the Chancellor's Office issued guidelines addressing accessibility of curriculum, web pages, software and hardware used in distance education courses, *Distance Education: Access Guidelines for Students with Disabilities, August 1999*. Although those guidelines dealt specifically with distance education, the principles and technical information they contain are also relevant here and should be applied in making electronic resources accessible for use on-campus. This would include, for example, materials on CD-ROM used in a classroom, software used in computer labs, a database of job opportunities in the Career Center, or a web page providing information about college-sponsored events open to the general public. The present guidelines do provide some information on this subject (see Section K), but will, for the most part, focus on ways of converting instructional materials or other resources from print into alternate media.

As used in these guidelines, the terms "alternate media" or "accessible formats" generally refer to methods of making information accessible to persons with disabilities.[1] The most common types of accessible formats are audio, braille, tactile graphics, large print, or electronic text. OCR has found that most colleges rely heavily on use of readers or pre-recorded audio tapes as a means of making printed material accessible for blind or visually impaired students. (OCR Docket No. 09-97-2145, January 9, 1998.) Although these guidelines will briefly discuss the appropriate use of readers and audio format, the primary purpose of the guidelines is to help colleges identify situations where audio may not be an adequate medium and to describe how to make materials available in other formats.

[1] The OCR investigation dealt with services for blind and visually impaired students and the Chancellor's Office was asked to develop guidelines for production of materials in alternate media for that population. While the primary purpose of these guidelines is to address the issues raised by OCR, it is recognized that individuals with learning disabilities or other types of disabilities may also benefit from materials in alternate media.

These guidelines are not legally binding on districts, but the Chancellor's Office will apply these guidelines in determining whether a district has met its obligations under Title 5, Section 59300 et seq. Districts that follow these guidelines will generally be regarded as having met those obligations. Districts that do not follow these guidelines will bear the burden of demonstrating that they have achieved compliance with their legal obligation to provide access to printed materials.

C. BASIC PRINCIPLES

The following are general principles that should be followed in ensuring that instructional materials and other information resources are accessible to and usable by persons with disabilities. They represent the general concepts of the ADA and its regulations but do not provide a detailed legal analysis of the ADA requirements. Persons utilizing this document who are unfamiliar with the ADA may wish to consult the campus ADA Coordinator or Disabled Student Programs & Services (DSP&S) Coordinator for further interpretation. In the remainder of this document, specific guidelines will be provided for resolving access issues with respect to particular situations.

1. Colleges should establish procedures for responding in a timely manner to requests for materials in alternate media.[2] Issues concerning requests by students should be resolved through appropriate campus procedures as defined under Title 5, Section 56027.

2. Whenever possible, information should be provided in the alternative format preferred by the person making the request (i.e. braille, audio, tactile graphics, large print, electronic text). (28 CFR § 35.160(b)(2).)

3. If it would be difficult or expensive to provide the material in the requested medium by the time it is needed, the college may offer to provide it in another medium *which would be equally effective* given the needs of the person requesting the accommodation. To determine whether a proposed alternative format would be equally effective, the proposed alternative should be compared to the format originally requested in terms of accuracy, timeliness of delivery, the "shelf-life" or longevity of the material, and the extent to which the medium is appropriate to the significance of the message and the abilities of the individual making the request. Methods which are adequate for short, simple or less important communications may not be equally effective or appropriate for longer, more

[2] Timeliness is a relative term which depends on the context. For a student who requests a textbook in an accessible format, responding in a timely manner would involve providing the book in alternative format by the time other students in the class will be called upon to use the book. If the entire text cannot be supplied in alternate format by that time, it may be necessary to deliver it in installments that keep pace with the class. A student who requests the list of student organizations in Braille might be able to wait a while if there is no particular deadline by which he or she needs to decide about participating in an organization. On the other hand, a person who requests a large print copy of the program for a play will need it by the time the play is presented and providing it later will be of little value.

complex, or more critical material. (Example: It may be appropriate to have articles or handouts that will be used as general background material for a course read onto audio tape for use by a blind student. However, it would probably be legitimate for a braille user to expect that the course syllabus, critical reference materials, and texts to be discussed in class would be available in braille.)

4. Materials should be provided in a timely manner in the medium requested, or in another equally effective format, unless doing so would fundamentally alter the nature of the program or activity or result in undue financial and administrative burdens on the district. In such cases, the college must nevertheless provide an alternative accommodation which will permit the individual with a disability to participate in the program or activity to the maximum extent possible. (28 CFR § 35.164.)

5. After the adoption date of these guidelines, any instructional resources or materials purchased or leased from a third-party provider or created or substantially modified "in-house" must be accessible to students with disabilities, unless doing so would fundamentally alter the nature of the instructional activity or result in undue financial and administrative burdens on the district.

6. Colleges are encouraged to review all existing curriculum, materials and resources as quickly as possible and make necessary modifications to ensure access for students with disabilities. At a minimum, the Chancellor's Office will expect that the instructional resources or materials used in each course will be reviewed and revised as necessary when the course undergoes curriculum review pursuant to Title 5, *California Code of Regulations*, Section 55002 every six years as part of the accreditation process. In the event that a student with a disability enrolls in a course before this review is completed, the college will be responsible for acting in a timely manner to make instructional materials or resources used in the course accessible, unless doing so would fundamentally alter the nature of the instructional activity or result in undue financial and administrative burdens on the district.

7. In the event that a discrimination complaint is filed alleging that a college has failed to provide materials in an appropriate alternate media, the Chancellor's Office and the OCR will not generally accept a claim of undue burden based on the subsequent substantial expense of providing access, when such costs could have been significantly reduced by considering the issue of accessibility at the time the instructional or other materials were initially purchased.

8. Ensuring that instructional materials and other information resources are accessible to students with disabilities is a shared college responsibility. All college administrators, faculty and staff who are involved in the development and use of such materials or resources share this obligation. The Chancellor's Office will make every effort to provide technical support and training for faculty and staff

involved in the creation of accessible instructional materials and information resources.

D. ESTABLISHING POLICIES AND PROCEDURES

As discussed above, OCR has held that it is not sufficient for a college to wait and deal on an ad hoc basis with requests for materials in alternate media. Rather, policies and procedures for dealing with such requests should be developed so that requests can be handled promptly and efficiently when they do arise. Similarly, the regulations governing the Disabled Students Programs and Services (DSP&S) programs require that colleges receiving DSP&S funds establish policies and procedures for responding to requests for academic adjustments, including requests for instructional materials in alternate media. (Title 5, § 56027.)

For those colleges that already have in place policies and procedures for dealing with accommodation requests, those policies should be reviewed in light of these guidelines to be sure they deal appropriately with issues related to provision of materials in alternate media. Colleges that have not yet developed such policies should do so, consistent with these guidelines, and implement those policies as quickly as possible.

One important aspect of dealing with production of alternate media is adequate advance notice and planning. It may be desirable to have faculty, bookstore managers, DSP&S staff, and organizations of students with disabilities work together to devise a system which will give the needed lead time for obtaining materials in alternate media with the least disruption for all concerned. Faculty should be strongly encouraged to make textbook selections as far in advance as possible and to avoid changing the selection unless there are compelling reasons. Bookstores should remind faculty about the need to place orders as early as possible and should process the orders promptly once they are received. Faculty should also be asked to provide syllabi, handouts, and other materials in E-text whenever possible.

The policy should specify how far in advance a student needs to make a request for materials in alternate media in order to ensure a high probability that the college will meet the request. This notice requirement needs to be reasonable and take into account when faculty decide on textbook selections, when students register, and the fact that last minute changes will occur despite the best planning. Students should be strongly encouraged to plan their course schedules as early as possible and to take advantage of advanced registration. However, the policy should clearly state that every effort will be made to meet late requests.

The notice required should be based on the type of material being requested. For example, it would probably only take a few days to produce a short class handout in braille if the college has its in-house braille production system operational. One or two days might even be reasonable if the faculty member makes the handout available in E-text. On the other hand, getting a textbook recorded or produced in braille from outside

sources could take several months. It may be necessary to arrange to have the material shipped in installments sequenced to follow the syllabus and, even then, students should be asked to make requests as soon as faculty have made their selections.[3]

The policy should identify who should receive requests for alternate media and direct other faculty and staff who may receive requests to forward them to the designated individual. Although it need not be spelled out in the policy itself, colleges should also identify in advance the person or persons at the college who will be responsible for the actual production of alternate media or for obtaining it from outside sources. Those persons should be familiar with these guidelines, know how to produce or obtain all types of alternate media as quickly as possible, and have readily available the equipment, materials, and/or outside resources they will need.

Policies should include methods of informing students, faculty, staff, and the general public about the availability of materials in alternate media and the process to be used to make requests. Publications and documents should contain a brief notice indicating that the material is available in alternate media and who should be contacted to obtain it.

Colleges should also consider preparing some basic materials in alternate media even without a specific request. This is most appropriate for materials that would be of interest to a broad audience, particularly where such materials are available on demand to nondisabled individuals. For example, the college catalog and schedule of courses should be available in electronic text suitable for use with screen reading software. It would also be desirable to have these materials formatted and proofed for producing hardcopy braille. Then, if a request for braille is made, it can be produced relatively quickly. However, if no one needs the catalog or course schedule in braille, the college will avoid the full expense of producing it and will not need to deal with storing bulky unneeded materials.

E. TYPES OF ALTERNATE MEDIA

At this point, it may be useful to briefly discuss the various types of alternate media and the advantages and disadvantages of each.

1. Audio/Readers

Providing materials in a recorded audio format is one method of making information accessible to persons who are blind or visually impaired. Many individuals with learning disabilities also use materials in audio format because they find it

[3] This will mean that colleges will be beginning to process requests before the class begins and perhaps even before the student has registered for the class. Colleges may wish to impress upon students that changing their plans after work has begun will be expensive and disruptive to the program. However, colleges are well advised to encourage and act on early requests in order to be able to provide textbooks in alternate media in a timely manner. If a student makes a request well in advance and a college does not act, it will be difficult to justify failure to have the book available in alternate media at the beginning of the class.

difficult to process printed information. Audio material is commonly recorded on cassette tapes, but it may also be stored on CD-ROM or other storage media. It is also possible to produce material in audio format by having E-text read with a speech synthesizer.

A large number of literary works and standard college textbooks are already available in audio format from organizations such as Recordings for the Blind and Dyslexic (RFB&D).[4] Such organizations will also usually record books on request, although this may take some time.

Recorded books are generally available for free or at nominal cost.[5] They permit students to read large volumes of material relatively quickly and easily using inexpensive and readily available equipment. However, it is difficult to convey highly technical material, especially information which uses graphic symbols or charts (e.g. mathematics, science, foreign language, economics, or musical notation) in an audio format. Also, audio tapes are not well suited for use during classroom discussion or for accessing reference works, because locating specific passages on a tape is time-consuming and cumbersome.

Readers may also be used to provide access to printed materials. *California Education Code*, Section 67300 requires the California State Department of Rehabilitation (DR) to pay for reader services for community college students who are also clients of DR. DSP&S funds may also be used to provide reader services for those who cannot obtain them from DR.

Having material read aloud may be the most convenient and efficient way for a blind or visually impaired individual to deal with short handouts or articles, materials that are time sensitive, or forms that require brief written responses. Textbooks or other longer materials can also be accessed using readers, and some individuals prefer this approach, but it will generally be desirable to record such materials for subsequent review. Ideally, this should be done in a recording studio or other quiet environment with good quality recording equipment. If audio tapes are to be used, the recording equipment should have the capability to add tone-indexing signals that can later be used to more quickly locate pages and chapter headings. Readers should be familiar with the vocabulary of the source material and the best results will be obtained by having a second person read along to monitor the accuracy of the recording.

[4] The vast majority of the RFB&D collection is on audio tape, but RFB&D has begun to produce some books in new digital form and plans to significantly expand such offerings in the near future.

[5] State and federal nondiscrimination laws prohibit charging a student a fee for provision of accommodations. If a college chooses to rely on an outside provider, such as RFB&D, to supply taped materials, the college will bear the responsibility to pay any fees for use of such services. However, the Chancellor's Office permits DSP&S funds to be used for this purpose.

However, it may often be difficult to find or train readers to read with sufficient accuracy, clarity, and speed, especially for more complex materials. As with recorded books, it is difficult to handle highly technical or graphically-oriented materials through use of live readers. Moreover, a student using a reader is restricted to reading when the reader is available and is always at some risk that the reader will fail to arrive as scheduled for various reasons.

2. Braille

Braille is a system of reading and writing for blind individuals. The basic unit is the braille cell. It is composed of six raised dots configured as shown below.

dot 1 ** dot 4
dot 2 ** dot 5
dot 3 ** dot 6

From these six raised dots you can get 64 possible combinations. There are many more inkprint symbols than the 64 braille symbols. For example, most computer systems handle about 96 different inkprint symbols. This problem is solved by using contractions, assigning more than one braille cell to represent certain inkprint symbols, and in some cases, by using specialized codes for unique applications. Thus, learning to read and write braille requires considerable training and practice.

Approximately 10 percent of blind and visually impaired individuals use braille. For those who are proficient in its use, braille is usually the preferred medium for reading, at least for situations where mastery of detail is required.

Braille can be quickly referenced without any equipment and can include charts, tables, simple diagrams, and a reasonable approximation of the format of a printed document. Specialized braille codes exist for representing advanced mathematics, chemistry, foreign language, and musical notation. Braille also enhances literacy, writing skills, and employability because the reader naturally learns spelling, punctuation and how printed materials are organized[6]

On the other hand, braille is bulky and most braille readers cannot read large volumes of material in braille as quickly as is possible with recorded books or synthetic speech and electronic text. Braille is also somewhat difficult and expensive to produce, but the use of computer translation software and braille printers is ameliorating this to some degree.

It is recommended that each college have the in-house capacity for producing at least short, simple braille documents. This can be done using readily available braille translation software and specialized braille printers. As of 1999, colleges

[6] For this reason, colleges may wish to consider offering special classes in Braille. This would be an appropriate activity under the DSP&S program.

should expect to pay around $5,000 for the hardware and software necessary for small scale in-house braille production.[7]

If funding is provided in the state budget, the Chancellor's Office plans to establish an Alternate Media Center capable of handling most requests for transcription of longer or more complex materials. This center is expected to be operational by Spring of 2001. In the meantime, brailling of large or complex materials can be out-sourced to agencies and organizations which produce braille documents commercially. As of 1999, commercial production costs average about two dollars per braille page with one single spaced print page equaling approximately two print braille pages. The cost will depend, at least in part, on the nature of the material, with mathematics or other specialized materials being considerably more expensive. Production time through commercial providers can vary from days to weeks. A list of some organizations which provide braille transcription services is provided in Appendix II.

Braille documents should be printed on heavy paper stock designed for use with braille printers. (See Appendix III for suppliers of braille paper.) Documents should be formatted to preserve critical page layout elements (i.e. columns, tabular data, etc.) and proofed for accuracy. Contracts with outside sources should specify that such services will be provided. With respect to in-house production, colleges should understand that, even with the best available braille translation programs, all but the simplest documents will still require human intervention and proofreading by a trained person who reads braille.

Whenever possible, mathematics, tests, legal documents, and other materials where accuracy is crucial should be prepared by a braille transcriber certified by the Library of Congress. If such personnel are not available on staff, the transcribing may be contracted out, provided the work can be performed in a timely manner. Where accuracy is crucial and a certified transcriber is not available, other precautions will need to be taken. For example, some colleges provide a student with a test in braille and give the proctor a printed copy so he or she can provide clarification if any question arises about the braille translation.

With these caveats in mind, we have provided in Appendix IV some very basic tips on formatting braille documents that may be useful in handling simple and less critical materials.

3. Tactile Graphics

In the past, the only way to make diagrams and other graphic images accessible for blind persons was to copy them by hand using a tracing wheel which produced a line of fine raised dots. Today, many braille printers can, using specialized

[7] The budget augmentation requested by the Chancellor's Office for fiscal year 2000-2001 would provide funding for such equipment. It is anticipated that the Foundation for the California Community colleges will organize a voluntary cooperative purchase for a package of recommended hardware and software.

almost any word processing program. Such files typically have a ".txt" extension.

One drawback to use of plain E-text is that most formatting (tables, columns, tabs, bold, italic, etc.) will be lost. In some instances it will be possible to avoid this problem by using files in other common formats such as Microsoft Word or rich text format (".rtf"). Such files will preserve formatting and can be used by some speech output and braille translation programs. However, it is critical to confirm in advance that the hardware and software being used to access the document can handle a specialized file format.

Most text created on campus or downloaded from websites should already be available in either ASCII or one of the common word processing formats. Other proprietary formats used by publishers or manufacturers of electronic digital text may contain cryptic formatting for security purposes. If the text requires a proprietary viewer, it may be difficult or impossible to convert the file into a useable format. For this reason, colleges should henceforth avoid purchasing instructional software or other materials which incorporate such proprietary formats, unless the supplier will provide an alternative format that will support access or the college is certain it has the software, equipment, and expertise to perform the conversion.[9]

If the document is not readily available in any electronic form, it will be necessary to use a scanner to create an electronic version and then proofread it to eliminate scanning errors. This is often a time-consuming process, especially for longer documents. The passage of AB 422, which requires publishers of certain instructional materials to provide E-text, should help with this problem. Guidelines for implementation of AB 422 are set forth in Part II of this document. However, there are exceptions to the new law and there will continue to be situations in which scanning will be necessary.

If the E-text was obtained through scanning or was converted to ASCII from some more sophisticated or proprietary format, there is a high probability that some reformatting will be necessary to restore or simulate the structural integrity of the document. Maintaining or restoring structural integrity requires that the contents, headings, indices, footnotes, and other structures are accessible and provide for fast and efficient reading and comprehension. Suggestions about how to address these issues are set forth in Section K.

[9] To avoid such problems and maximize the utility of the materials obtained, the guidelines for implementation of AB 422, which are contained in Part II of this document, recommend that all information be obtained from publishers on a CD-ROM be in either Microsoft Word, Rich Text, or ASCII format.

software, produce some simple tactile graphics. There is also a technology which allows diagrams printed on special heat-sensitive paper to be heated in a specialized device to produce raised lines and images.[8]

It must be emphasized that there are significant limitations to the use of tactile graphics. It is not possible to represent or recognize fine detail using tactile graphics. Sometimes it will be possible to overcome this problem by increasing the scale of the diagram, but this may be impractical in many instances.

4. **Large Print**

For those with sufficient vision, large print is often desirable. Although they are somewhat bulkier, materials in large print have all the advantages of regular print. They are relatively portable, require no special equipment, convey all the graphic and spatial information contained in the original, and can be easily referenced. Producing large print copies of materials is simple if the document is not too lengthy and is available in electronic text, although some reformatting may be necessary. However, relatively few textbooks are available in large print and those that are tend to be expensive.

One alternative to hardcopy large print is the use of a closed-circuit television (CCTV) system which permits magnification of the page being viewed. This may be equally effective for many situations, but it is not possible to move through printed material with a CCTV as quickly or easily as if it were available in hardcopy large print. Moreover, older equipment may not be very portable. Thus, use of a CCTV may not be appropriate for accessing reference works or for handling some types of in-class assignments.

5. **Electronic Text**

In recent years, the use of electronic digital text (E-text) has emerged as a convenient and popular method of providing access for those who cannot use standard printed materials. Partially sighted individuals can use E-text by taking advantage of built-in options within many standard software applications (e.g. adjusting font size) or through the use of specialized screen magnification software. E-text can also be used with screen reading software to output the text to a speech synthesizer or refreshable braille display. The main advantage of E-text is that it can be easily stored, can be searched and indexed, and can be converted to large print or hard copy braille through use of a translation program.

E-text exists in many formats. Plain E-text (usually known as ASCII or DOS text) is the universal standard for exchange of text documents and can be used by

[8] Some diagrams and charts that illustrate science textbooks have already been produced using this latter technology through a special program at Purdue University: Tactile Access to Education for Visually Impaired Students. For the website address for this project, see Appendix II.

F. VERIFICATION OF DISABILITY AND FUNCTIONAL LIMITATIONS

Although some materials (such as the catalog) should be available in an accessible format on demand, in most instances the process of producing alternate media will be initiated by the receipt of a request. Once a request is received, the first step is to determine whether the person making the request has a disability which requires such an accommodation. Verifying the person's disability is permitted, but not required, under the ADA and Section 504. However, with respect to serving students, verification of disability is required if the college plans to claim DSP&S funds for serving the student. (Title 5, § 56006.) In addition, the DSP&S regulations require a determination that the student's disability results in a functional limitation which impedes the student's participation in the educational programs and activities of the college. (Title 5, § 56004.) Where a student requests materials in alternate media, this would require a showing that the student's impairment makes it difficult or impossible for him or her to read printed materials.

G. INDIVIDUAL PREFERENCE AND OFFERING ALTERNATIVES

Up to this point, the approach to handling a request for alternate media has involved the same type of analysis required in the case of any other type of accommodation issue. However, there are special considerations that must now be taken into account. By far the most significant of these considerations is the preference of the person making the request concerning the type of alternate format that will be most effective. Section 35.160 of the regulations implementing Title II of the ADA specifically states: "When determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." (28 CFR § 35.160(b)(2).) Thus, whenever possible, information should be provided in the alternative format preferred by the person making the request (i.e. braille, audio tape, large print, electronic text).

However, if it would be unduly difficult or expensive to provide the material in the requested medium by the time it is needed, the college may offer to provide it in another medium *which would be equally effective* given the needs of the person requesting the accommodation. To determine whether a proposed alternative format would be equally effective, the proposed alternative should be compared to the format originally requested in terms of accuracy, timeliness of delivery, the "shelf-life" or longevity of the material, and the extent to which the medium is appropriate to the significance of the message and the abilities of the individual making the request. Methods which are adequate for short, simple or less important communications may not be equally effective or appropriate for longer, more complex, or more critical material.

In deciding whether a given format would be appropriate for the needs of a particular individual, factors to consider include the person's learning style (tactile, auditory, visual, or multimodal), the person's proficiency in working with the format (e.g. knowledge of braille), and, for electronic text, the extent to which necessary hardware and software is

readily available. E-text should be provided in a format that will work with commonly available access technology, but colleges should be prepared to provide access to the necessary equipment and software and training for students who may not be familiar with its use.

H. ANALYZING REQUESTS

Based on the foregoing, it is recommended that colleges use the following steps as a general guide to analyzing and responding to requests for materials in alternate media. However, it must be emphasized that this is not a comprehensive or definitive discussion of how to handle every conceivable situation that may arise. Ultimately, it will be necessary to apply the legal principles discussed above to the particular facts of each case to decide what form of accommodation is most appropriate.

1. First, whenever possible, give preference to the student's choice of media.

2. If the student wants material in audio format, the request should generally be granted because chances are this will be the easiest and least expensive approach. Such requests could be satisfied by ordering recorded books which are already available, arranging to have the book recorded by an outside organization such as RFB&D, or having material read aloud and, where appropriate, recording it on cassette tape or some other storage medium. The college could also use E-text read with a speech synthesizer, but this may not work for material containing unusual words or symbols or complex formatting.

3. Colleges should usually grant requests for braille or large print, so long as:

   (a) the student has the training and tactile or visual acuity to efficiently use the requested material; and

   (b) the material is already available[10] or it is short and simple enough to be produced on campus or through a contract supplier in a timely manner.

4. If the student wants material in braille or large print that cannot be provided in a timely manner or would be very costly, then it would be appropriate to try to identify an equally effective substitute through collaboration between the student and the college staff person.

[10] At a minimum, college staff should check the California Community College Book Exchange to see if the textbook is already available in the requested media. The Book Exchange is a web page, developed by the staff at the High Tech Training Center Unit (HTCTU), which contains a listing of books available in alternate media. DSP&S staff, librarians, and ADA Coordinators can send e-mail requests to the registry to obtain books that have been produced in alternative formats by other colleges. The registry can be accessed at URL: http://bookex.htctu.fhda.edu. Other sources for braille and/or large print books are listed in Appendix II.

5. If E-text is already available or can be easily obtained, it may be a good alternative to large print or hardcopy braille. Producing the hardcopy braille or large print will take time and could be costly, especially for voluminous material. However, in order to ensure that E-text will provide an equally effective alternative, the following must be taken into account:

   (a) A partially sighted student will need a computer with software permitting print magnification.

   (b) A blind student who is a braille reader will need a computer or notetaker having a refreshable braille display. Assuming the student has such equipment, or the college makes it reasonably available, E-text probably would be an equally effective alternative to hardcopy braille, except in situations where spatial orientation or format is important, since such information is not readily conveyed by a refreshable braille display.

   (c) For simpler materials, or where format, punctuation, spelling, or technical detail are not crucial, a blind person may be able to use E-text with speech output as a substitute for braille. This may even be a better alternative if large volumes of information must be read quickly and the student will not be required to master or frequently refer to details in the text.

   (d) Many students with learning disabilities will benefit from using E-text with software which reads the text aloud while highlighting it on the screen.

   (e) In any case, the E-text will have to be free from errors and in a format compatible with the equipment being used to provide access.[11]

6. In some limited instances use of a reader or materials in a recorded audio format may be an equally effective alternative to either e-text or hardcopy braille or large print. Normally, this is only true where the material does not contain complex formatting (e.g. literature, history, business, etc.) and a general understanding of the material is sufficient. In such cases, audio may even be a superior format when compared to hardcopy braille, where large volumes of material must be covered quickly.

7. An audio recording generally will not be an equally effective alternative to E-text or hardcopy braille or large print when:

   (a) The material is complex or technical in nature.

[11] During fiscal year 2000-2001, the Chancellor's Office plans to purchase several notetakers with braille displays and house them at the HTCTU for loan to colleges with students who can benefit from their use.

(b) The student is expected to achieve detailed mastery of the information to complete a course or participate in a program or activity.

(c) The student is expected to quickly review material and provide an immediate response (e.g. review the material on page 57 and there will be a quiz in 10 minutes).

(d) The material must be used in class or as a frequent reference source outside class.

8. Providing an alternative that is not equally effective (e.g. a physics textbook on tape instead of in braille) can only be justified if the college makes a written determination that providing the requested accommodation would either:

(a) require a fundamental alteration in the nature of the class or other program or activity in which the individual is involved; or

(b) Impose undue financial or administrative burdens on the college.

I. EXAMPLES

Discussing a few examples may help to illustrate the recommended approach to handling requests for alternate media.

Example 1. A blind individual considering enrollment at the college requests the catalog and current schedule of classes in braille. Consistent with these guidelines, the college has these materials available in E-text form and offers this as an alternative. If the individual has a computer with access software/hardware, providing E-text would probably be considered an equally effective alternative and will most likely be accepted by the individual. However, if the individual does not have equipment necessary to use E-text, the braille version should be provided. In this case, allowing the person to use an electronic version on a computer at the college is probably not an equivalent accommodation because the person making the request is not yet a student and because other individuals have the option of having a catalog at home where they can refer to it frequently at their convenience. Providing the catalog in braille should not take long or involve significant additional expense if the college has already prepared the formatted braille file as suggested above.

Example 2. A member of the public using the college library requests large print versions of several novels. An effort should be made to ascertain whether large print versions of these books are available from the publisher, and if so, they should be obtained. If not, they may be available on tape and this option should

be offered to the patron. Failing this, the library would need to provide the equipment necessary for the individual to read the books with the needed magnification. This could be accomplished either through use of a CCTV or a scanner and computer with magnification software.

Example 3. A blind student taking a history course requests that both assigned textbooks be provided in braille. On further investigation, the faculty member advises that students are required to read both books, but only portions of one book will be used as the basis for testing in the class. Neither book is currently available in either braille or E-text, but they are available on tape. The college might appropriately offer to provide the taped versions and to scan and braille those portions of the one book on which the student will be tested.

Example 4. A blind student taking a geography course asks that the book be provided on audio tape, but wants maps and diagrams available in a tactile form. However, neither the taped book nor the tactile maps are readily available. The college should send the book to RFB&D for recording and, if the student is not a DR client, supply a reader to read the portions of the book which will be covered before the tapes are available. It should be possible to convert the maps and diagrams into tactile form using the Purdue University process discussed above. If this proves not to be technically feasible, the college could contract with an organization which does braille transcription and has the specialized capability to produce tactile maps.

Example 5. A student with a learning disability requests that the Career Center equip one of its computers with screen reading software and a speech synthesizer to enable her to more effectively access the Center's files containing information on career planning and employment opportunities. This is a reasonable request and should be granted, provided adaptive equipment can be obtained which is compatible with the hardware and software the Center uses. Indeed, if these guidelines are followed, the Center should already have one or more accessible workstations. If this is not the case, the adaptive equipment will need to be obtained and installed. In the interim, it may be necessary to provide the student with a reader or put material on disk so the student can access it using a computer at the High Tech Center.

Example 6. A blind student planning to pursue a mathematics degree at the University of California requests that several math textbooks for his transfer courses be provided in braille. The books are not currently available in braille and contracting to have them transcribed will cost several thousand dollars and take a few months. Assuming the student is a braille reader, there probably is no equally effective alternative to providing the texts in braille. Therefore, provided that the request is made enough in advance to make it practical, the college should arrange for the books to be transcribed.

Usually, it will be possible to arrange to have portions of the books shipped as soon as they are completed, but there may still be times when the student does not have a particular portion of the book in braille by the time it is covered in class. Under such circumstances, the next best alternative would probably be to obtain the needed portions of the book in E-text and offer to produce those portions in hardcopy braille using the college's in-house braille production capacity. In that case, it will be important to use software that can handle braille mathematics and have it carefully proofread by a knowledgeable individual. Alternatively, the college could provide the student with the E-text and access to a computer with a refreshable braille display. This probably would not be an equally effective alternative to having the book transcribed, but it might suffice as an interim measure while waiting for hardcopy braille to arrive. If the book cannot be obtained from the publisher in usable E-text format, then these latter alternatives may require scanning, proofreading, and correcting the text.

Example 7. A student in a psychology course is required to read several newspaper articles. She asks that the articles be provided in E-text so she can read them with her computer which has a speech synthesizer. More recent articles from many newspapers will already be available in E-text. If this is not the case, they can probably be scanned unless the print quality is too poor. If scanning proves impossible, the college could offer to put the material on tape. This would probably be an equally effective alternative unless the articles are to be frequently referenced in class or the student can provide a reasonable explanation why tape would not be adequate.

J. RESOLVING DISPUTES

The district policies on handling accommodation requests should set forth the procedure to be used when the student, the DSP&S or ADA coordinator, and the faculty do not all agree on the appropriate accommodation. Students should be advised of how to go about initiating this process if the student does not accept a proposal by the college to provide material in a format different than that originally requested. If the process provided in the accommodation policy still does not resolve the dispute, the individual should be advised of his/her right to file a discrimination complaint pursuant to Title 5, *California Code of Regulations*, Section 59300 et seq.

K. CONSIDERATIONS FOR FORMATTING E-TEXT AND DESIGNING SOFTWARE AND WEB PAGES

As discussed above, there are many advantages to the use of E-text, but to be useful as a method of providing accessibility, E-text must be appropriately formatted. The issues that need to be addressed in terms of formatting E-text will depend on the origin of the E-text itself.

1. **Considerations for Using ASCII Text Generated by a Scanner or From Another Outside Source**

When a printed page is scanned, the resulting electronic image can be saved in a variety of formats including ASCII text.[12] It is generally recommended that scanned documents be saved in the format which best preserves the "look and feel" of the original document. Although files saved in ASCII format may work well with screen reading programs, much of the formatting of the document will be lost. Depending on the nature of the document, this may or may not be a problem. For persons who are blind, some elements of page formatting such as page borders, different type sizes and fonts styles contribute little to document content. On the other hand, in some instances it may be important for the reader to know that information is presented in columns or that major headings are underlined. Such important information should be preserved in the finished document or manually restored when the scanned file is cleaned up to eliminate scanning errors.

Files in a variety of document formats, including ASCII text files, may also be obtained from other sources such as downloading from a website. In the interest of faster downloads, these files are sometimes "compressed" and must be decompressed with specialized software before the actual document file can be viewed.

File names that end with a "*.txt" have no specific word processor formatting. Extra carriage returns should be filtered out before using text in a word processor. The formatting should only contain a single carriage return at the end of each paragraph, none in the body of the paragraph, and no extra ones between paragraphs.

2. **Considerations When E-Text is Available in a More Sophisticated Format**

Sometimes E-text will be available in a common word processor format (e.g. Microsoft Word, WordPerfect, etc.). This is usually ideal as most modern screen reading programs can directly use such files without the need to convert the material to ASCII text. However, if a student does not have the necessary hardware and software to access such files, the college will need to convert the file to plain text (".txt") or make available a computer equipped to handle the word processing file format.

There are also a variety of proprietary file formats that cannot be used by screen reading software. For example, documents produced by many sophisticated page layout and design programs (i.e. FrameMaker, QuarkExpress, PageMaker) or documents saved in Portable Document Format (PDF), cannot be directly used with screen readers. In such cases, it will be necessary to convert the file into a

[12] Some newer scanners produce files in Portable Document Format (PDF). Unfortunately, as discussed below, PDF files are not directly accessible and must be converted to ASCII or some other usable format.

format that is accessible. [13] Where the screen reading software to be used will support a standard word processing file format (i.e. Microsoft Word), it will be preferable to convert to that format in order to preserve page formatting information. Of course, if conversion to a word processing format is not possible, or the screen reader cannot use such a file, then converting from the proprietary format directly to ASCII may be the only solution, despite the loss of format.

In either case, the key to conversion of E-text is maintaining the structural integrity of the instructional material, so that students with disabilities are afforded a quality learning experience. Maintaining structural integrity requires that the contents indices, and other structures are accessible and provide for fast and efficient reading and comprehension. If the file is converted from a non-accessible format, some formatting elements may be lost. If so, they will need to be restored manually.

3. **Considerations for Complex Electronic Documents, Software, and/or Web Pages**

Sometimes electronic text is embedded in web pages or software that also contains pictures, menu bars, hyperlinks, icons or other graphic symbols. In other cases, graphic elements, although not part of the text itself, may be incorporated in software in such a way that they must be used to navigate through the program to access the text file. Such graphical navigation elements can pose a barrier to access for persons who are blind. Screen readers cannot independently interpret graphical navigational elements unless such elements have been designed with text based alternatives.

The Chancellor's Office strongly recommends that, before purchasing new instructional media or software, colleges should confirm that the product is compatible with commonly available access equipment and software. If this is not the case, the college should purchase an alternative product that will provide accessibility, purchase the specialized equipment or software that will be necessary to make the product accessible, ask the vendor to modify the product, or be prepared to make such modifications itself. Where such materials will be developed in-house or through contractual arrangements, the college should ensure that newly developed software or electronic information resources are designed to be accessible.

Existing electronic instructional materials and software should be reviewed for accessibility and, where necessary, replaced or modified. This should be done as quickly as possible; but as noted above, the Chancellor's Office will expect that, at a minimum, it will be done when courses are reviewed every six years as part of the accreditation process.

[13] A "plug-in" is available to permit some PDF files to be read with a screen-reader. However, this may not work with more complex documents; and if the document is saved in ASCII, formatting will generally be lost.

The following information is intended to provide practical guidance about how to create accessible electronic documents, software or webpages and how to modify existing materials or webpages that may contain webpage design graphics or other elements that would interfere with access. Further information on this subject is also contained in Distance Education: Access Guidelines for Students with Disabilities, distributed by the Chancellor's Office in August 1999.

4. Considerations for Designing Software for Use by Persons Who are Blind

Increasing the compatibility of standardized software for use with screen reading programs used by blind persons requires some modifications, such as:

i using "Alt Tags" or alternative text to identify images used as submit buttons, bullets in lists, image maps or invisible images used to lay out a page. Alternative text does not describe the visual appearance of an image. Rather, it is used to represent the function that the image performs whether it be decorative, informative, or for purposes of layout. If alternative text is not provided, users who are blind, have low vision, or any user who cannot or has chosen not to view graphics will not know the purpose of the visual components on the page.

ii using a special technique to make the text known to screen reading software if text is embedded in a graphic image. Provide a long description of all graphics that convey important information.

iii using dragging system cursors (even if invisible) for highlighting or focusing techniques.

iv using consistent or predictable screen and dialog layouts.

v eliminating popup help balloons that disappear when the focus changes unless there is a way to lock them in place so that the focus (e.g. cursor) can be moved to read them.

vi using single column text whenever possible.

vii using logical names for controls, even if the name is not visible on screen (screen readers can access this information and use it to describe the type and function of the control on the screen).

viii using keyboard access to all tools, menus, and dialog boxes.

ix providing a draft mode, zoom, and wrap to window features.

x Since screen readers can only read text (or give names to separately identifiable icons or tools) it is a good idea to:

xi avoid unlabeled "hot spots" on pictures as a control scheme (unless redundant with menu selection).

xii avoid non-text menu items when possible or incorporate cues – visible or invisible (screen readers can 'see' text that is written to screen in an invisible color).

xiii avoid non-redundant graphic tool bars if possible.

xiv avoid conveying important information by color alone, or make it optional. Use only colors that the user can customize, ideally through Control Panel. Use colors in their proper foreground/background combinations, unless doing so would interfere with the student's ability to distinguish the information properly (e.g. color blindness).

xv omit background images drawn behind text.

xvi make applications compatible with system settings for sizes and fonts. Avoid hard coding font sizes smaller than 10 points.

xvii provide supplemental information needed to pronounce or interpret abbreviated or foreign text. Unless changes between multiple languages on the same page are identified, and expansions for abbreviations and acronyms are provided, they may be indecipherable when spoken or brailled. For abbreviations and acronyms use either ABBR or ACRONYM with the "title" attribute to specify the expansion.

There are a number of considerations that are aimed at increasing accessibility for screen readers, such as:

i designing all documentation and on-line help so that it can be understood by reading the text only (e.g. information presented in pictures and graphics is also presented with a description in text).

ii ensuring that all messages and alerts stay on screen until they are dismissed.

iii writing language in a manner which is as straightforward as possible, both on screen and in the documentation.

iv devising simple and consistent screen layouts that are predictable. Wherever possible, follow system standards and style guides. This makes it easier for people with cognitive disabilities to predict and understand how things should operate and what they mean. For people who are blind and use screen readers to find out what is on the screen, predictable

layouts and controls are easier to figure out. Also, adaptive software manufacturers can build techniques into their software to handle the standard objects and appearances, but not unique or one of a kind implementations. Structure, label, and group information. Tables also present special problems to users of screen readers. Provide summaries for tables. Identify headers for rows and columns. Where tables have structural divisions beyond those implicit in the rows and columns, use appropriate markup to identify those divisions. Provide abbreviations for header labels.

v ensuring that all the information on the page may be perceived entirely visually and entirely through auditory means, and that all information is also available in text.

5. **Considerations for Design of Documents/Software for use by Persons with Low Vision**

Students with low vision may experience a variety of situations that affect their vision ranging from poor acuity (blurred or fogged vision) to loss of all central vision (only see with edges of their eyes) to tunnel vision (like looking through a tube or soda straw) to loss of vision in different parts of their visual field, as well as other problems (glare, night blindness, etc.).

For students with low vision, a common way to access the information on the screen is to enlarge or otherwise enhance the current area of focus.

Direct accessibility of software applications for students with low vision may be increased by:

i allowing the user to adjust the fonts, colors, and cursors used in the program to make them more visible.

ii using a high contrast between text and background.

iii avoiding the placement of text over a patterned background where the two might interfere with each other.

iv using a consistent or predictable layout for screens and dialogs within the program.

v providing access to tools, etc., via menu bar.

vi using recommended line width information when drawing lines (if such information is provided by the system).

vii using the system pointers wherever possible, as well as the system caret or insertion bar if one is available.

6. Considerations for Formatting E-text to Produce Hardcopy Large Print

Large print documents printed from electronic files should be produced using a font size of 14 point (or larger) and sans serif type faces such as Helvetica for visual clarity. Documents should be reformatted as necessary to preserve critical page layout elements. All colors should be set for maximum print contrast. Further information about formatting large print documents is provided in Appendix III.

Part II

GUIDELINES FOR IMPLEMENTATION OF ASSEMBLY BILL 422

A. SCOPE AND PURPOSE

As noted in the preface to these guidelines, Assembly Bill 422 (Stats. 1999, ch. 379), added Section 67302 to the *California Education Code* requiring that publishers of certain instructional materials provide electronic versions of those materials to community colleges so that students attending the college may have access to the materials in alternate media. (See Appendix VI for the full text of AB 422.)

The bill requires the Chancellor's Office to adopt guidelines for implementation of its provisions. Those guidelines are set forth below.

The Chancellor's Office is seeking funding for the 2000-2001 fiscal year to establish a single statewide center to handle requests for electronic versions of instructional materials under AB 422 and their conversion into alternate media for students throughout the system. However, there is no guarantee that such funding will be forthcoming from the state and, even if it is, the statewide center would probably not be operational until the middle of 2001 at the earliest. Thus, the purpose of these guidelines is to provide interim guidance to colleges about how to take advantage of the AB 422 process until a statewide center is established.

B. BASIC COVERAGE AND LIMITATIONS OF AB 422

AB 422 applies only to:

1. Textbooks and other materials written and published primarily for use by students in postsecondary instruction; and

2. Which are required or essential to a student's success; and

3. Are to be used by a student with a disability in a course in which the student is enrolled at the college.

Put another way, AB 422 does not require publishers to provide electronic versions of materials which are published for a general audience, even though they may be of use to students. Such materials might include dictionaries, encyclopedias, professional journals, and other reference works used extensively outside of higher education.

Moreover, even if a particular work is published primarily for use by students in postsecondary education, it may not be available in electronic form under AB 422 if it is not required or essential for the participation of a student with a disability in a college course. For example, if an instructor designates a textbook as "optional background reading," then the publisher would not be obliged to provide it in electronic form under AB 422. Guidelines for determining which materials are "required or essential" are provided in Section F.

AB 422 may also be of only limited value in terms of obtaining electronic versions of mathematics and science materials or "nonprinted instructional materials." The limitations on availability of these specialized materials are discussed in Sections H and I below.

Finally, it is important to keep in mind that, even when it applies, AB 422 only obliges a publisher to provide electronic text to the college. It remains the college's responsibility to provide instructional materials in an alternate media appropriate to the needs of the student. For example, if the student requests a book in braille, and it is determined that this is appropriate (pursuant to the guidelines in Part I), the college will then need to use a braille translation program to convert the electronic text supplied by the publisher into braille or arrange with an outside contractor to do this work.

C. ALTERNATE MEDIA CENTERS

Subsection (a) of *California Education Code*, Section 67302 provides that, subject to the limitations discussed above, publishers shall, upon request, provide electronic versions of printed instructional materials to the University of California, the California State University, or any community college in California. Thus, the basic structure of the law contemplates that each publisher will deal directly with individual colleges. However, at the request of the publishing industry, language was added in subdivision (g) permitting each of the systemwide offices to designate one or more "centers" to process requests for electronic versions of instructional materials pursuant to AB 422. As discussed above, the Chancellor's Office is in the process of seeking the funding necessary to establish a single statewide center to handle all such requests.

In the meantime, each college may directly contact publishers and make requests for E-text pursuant to AB 422. Although it is not required, multi-college districts may establish an alternate media center at the district office or at one of the colleges in the district to handle requests for electronic text on behalf of students attending all colleges in the district. Similarly, two or more districts may, by written mutual agreement, establish a single alternate media center to handle requests for electronic text on behalf of all students attending colleges in districts participating in the agreement. Such centers must be designated by the Chancellor's Office, so prior to requesting electronic text from any publisher, the district or districts must advise the Chancellor's Office of the area to be

served by the center and the name of the person who will serve as the liaison with publishers.

However, before considering designation as an alternate media center, a college or district should understand the additional obligations it will be assuming. *California Education Code*, Section 67302(g) makes clear that, once a center is established, publishers are only required to honor requests which come through the center. As a result, the law specifies three basic responsibilities such a center must perform:

1. The colleges designated as within the jurisdiction of a center shall submit requests for electronic versions of instructional materials to the center which shall transmit the request to the publisher or manufacturer of the instructional material.

2. Each center shall make every effort to coordinate requests with other centers. To this end, each center should check the Book Exchange on the HTCTU website before submitting a request to a publisher to determine whether the instructional material is already available in electronic form from another center. Also, each center should post on the Book Exchange a description of all instructional materials the center has in its library of electronic texts, whether obtained from publishers or created in-house.

3. Once a publisher or manufacturer has responded to a request for instructional materials by a center, all subsequent requests for these instructional materials from a college served by the center shall be satisfied by that center. This means that the center will have the responsibility for maintaining an E-text library, duplicating requested materials, and delivering copies in a timely manner. To accomplish this, the center will need the capacity for high speed duplication of CD-ROMs. This is a practical necessity since the electronic versions of most textbooks or other instructional materials will be far too large to be stored on a floppy disk.

While the law and these guidelines allow for the establishment of such centers, the Chancellor's Office anticipates that it will be simpler for most colleges to contact publishers directly until the statewide center is established. The remainder of these guidelines are written based on this assumption, but colleges or districts interested in the possibility of serving as an alternate media center may contact the Statewide Coordinator of the DSP&S Unit in the Chancellor's Office, for more detailed information. The form which must be completed to request designation as an alternate media center is provided in Appendix X.

D. CERTIFICATION OF REQUESTS

AB 422 provides that publishers are only required to supply electronic versions of instructional materials in response to a written request which is signed by the DSP&S

Coordinator or the ADA Coordinator certifying that certain conditions have been satisfied.[14] Those conditions include:

1. E-text is needed in order to provide instructional materials in alternate media for a student with a verified disability that prevents him or her from using standard instructional materials;

2. The student is/plans to be enrolled or registered for a course at the college;

3. The instructional material is required or essential to the student's success in the course; and

4. The standard instructional material has been purchased by the student or on behalf of the student by the college.[15] [16]

E. SECURITY OF E-TEXT

The above conditions apply to all requests for E-text from publishers under AB 422. However, some additional conditions are applicable in instances where the college will be providing the student with direct access to the E-text, as opposed to using it to produce secondary alternate media in braille or large print that will be given to the student. In such cases, Section 67302(c) requires that "the disk or file shall be copy-protected or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. § 101 et seq.)." (See Appendix V for a discussion of the relevant provisions of the Copyright Act.)

At this time, the Chancellor's Office is not aware of any method for copy-protecting files or disks that will permit their continued use with screen readers or braille translation software. Unless and until such a system is available, each college should develop policies providing for sanctions to be imposed on students who improperly distribute electronic versions of copyrighted materials. Such policies could be incorporated in the student code of conduct and include penalties similar to those imposed for cheating or plagiarism. Another approach would be to cover this issue in the policy developed pursuant to Title 5, *California Code of Regulations*, Section 56010 permitting suspension

[14] Of course, other staff may gather and evaluate the information necessary to prepare the certification document. The law requires only that it be signed by the ADA or DSP&S Coordinator.

[15] Ordinarily, textbooks and most instructional materials will have been purchased by the student. However, the statute also covers situations where the college purchases instructional materials for use by students. The underlying concept is that, since the bill requires E-text to be provided at no additional charge, the publisher is entitled to ensure that a standard copy of the instructional material was purchased by someone.

[16] In order to facilitate processing requests in advance of the beginning of a class, it may sometimes be necessary for the college to complete the certification before print books are available for purchase in the bookstore. In such cases, the Chancellor's Office recommends that the college require the student to place an order for the book before completing the certification. Then, before providing the student with the book in alternate media, the college should verify that the purchase was actually completed.

of DSP&S services to students who misuse such services. For example, such a policy might provide that a student who improperly copies E-text will be required to use it under supervision on a computer at the college, and that repeated violations will result in denying future requests for access to E-text for one year. Students must be provided with a copy of such policies when they first apply for DSP&S services and it would be advisable to again bring the provision regarding copying of E-text to the student's attention when such files are provided.

In addition, AB 422 permits a publisher to insist that a student who will directly use E-text must sign an agreement stipulating that the E-text will be used solely for his or her own educational purposes, and that s/he will not copy or duplicate the instructional material for use by others. Although the law does not require such an agreement unless the publisher so desires, colleges are encouraged to make such an agreement a standard part of the procedures to be used in cases where students are given direct access to E-text.

There are also some measures each college should take to safeguard E-text in its possession. All colleges should maintain an inventory of E-text files received from publishers. Special precautions should be taken to ensure the electronic media is stored in a safe and secure area. A regular back-up protocol and schedule needs to be devised, and at least two staff should have access to and knowledge of the process and procedures related to electronic text instructional materials. Proper means of information security should be developed which prohibit unauthorized access, modification, or misuse of the electronic text.

F. DETERMINING WHICH MATERIALS ARE REQUIRED OR ESSENTIAL

As discussed above, AB 422 only obligates publishers to provide electronic versions of instructional materials which are deemed to be "required or essential" for the student's success in the course in which he or she is enrolled.[17] The statute provides that the determination of which materials are required or essential to the student's success is to be made by the instructor of the course in consultation with the DSP&S coordinator or ADA Coordinator who will certify the request. Although the law does not so require, it would also be appropriate to discuss this issue with the student. The following points should be considered in making this determination:

[17] It is the opinion of the Chancellor's Office that this requirement does not apply to subsequent requests for use of E-text previously supplied by a publisher. In other words, if a college has previously obtained the electronic version of an instructional material from a publisher, when subsequent requests are made for copies of that file, it is not necessary to establish that the material is required or essential for the student who will now be using the E-text. All other requirements would still apply--the student must be enrolled in a course, have a disability which prevents using the standard instructional material, and the material must have been purchased by or on behalf of the student.

Of course, there may be some question as to whether the college is obligated to provide material in alternate media when the material is not required or essential for success in a course. For example, even though an E-text file is available, producing the material in braille might be unduly difficult or expensive and the college might offer access to the E-text as an alternative accommodation in a case where the material was not required or essential for student success. The guidelines in Part I should be consulted in analyzing specific accommodation requests.

1. Is the material in question listed as "required" in the course syllabus, Outline of Record, or other curriculum documents? If so, this will generally be conclusive. However, even where this isn't the case, materials may be effectively required or essential in the situations discussed below.

2. Will the student realistically need to use the instructional material in the completion of course assignments which are used to evaluate the student (i.e. to determine the student's proficiency level or assign a grade)?

3. Would it be difficult or impossible for the student to achieve his or her educational objectives without access to the particular instructional material? For example, if a student expects to major in a subject or transfer to a four-year institution in that field, he or she may need to do more than what is minimally necessary to pass a class. In such circumstances, the use of the instructional material may not be critical for every student, but it would be required or essential in order for the particular student to gain the needed experience from the course.

G. FILE FORMATS

Upon receipt of a request containing the certification discussed in Section E, AB 422 requires a publisher to supply the electronic version of an instructional material at no additional cost and in a timely manner. The statute specifies that it must be provided "in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary." (Cal. Ed. Code, § 67302(a).)

Many publishers use popular desktop publishing programs such as Quark Express or Page Maker to prepare text for printing. The files created by these programs cannot be used with braille translation or screen reading software. Efforts are currently underway to develop software that will allow conversion of desktop publishing files into new file formats such as Open E-book or XML which could, in turn, be converted to a format that will work with braille translation or screen reading software while largely retaining the format and structure of the original file. However, at present, this conversion process has not been perfected nor has a single format emerged as the standard for electronic text.

However, most of the desktop publishing programs used by publishers will permit saving files in Microsoft Word or Rich Text format. This format will generally satisfy the requirements of the law. Many screen reading programs, braille displays, and braille translation programs can access Microsoft Word or Rich Text files, and such files will maintain many (although not all) formatting elements created in desktop publishing programs. Moreover, most other word processors will recognize Microsoft Word files,

so such files should be usable even if a particular student will be using WordPerfect or some other word processing program.

Thus, until a better alternative is developed and readily available, the Chancellor's Office recommends that colleges begin discussions with publishers by requesting files in Microsoft Word or Rich Text format. There may, however, be circumstances where this will not completely resolve the matter. Some publishers may use proprietary software that will not produce files in Microsoft Word or Rich Text format. In other instances, the format and structure of the particular document may be such that conversion to one of these formats will not preserve the "structural integrity" of the printed document. Section 67302(e)(4) states that the term:

> "'Structural integrity' means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. 'Structural integrity' need not include nontextual elements such as pictures, illustrations, graphs, or charts."

Sometimes a simple conversion of the publisher's file to Microsoft Word or Rich Text will not produce an accessible file which retains all of the enumerated elements of the structural integrity of the original. In such cases, the college and the publisher should attempt to identify and agree upon some alternative format that will maintain the structural integrity of the printed document and still be usable with screen reading and/or braille translation software. If that is not possible, it may be necessary to require the publisher to convert the file to Microsoft Word or another usable format and then modify the converted file to reconstruct or simulate the structural elements that were lost or garbled. *California Education Code*, Section 67302(a) clearly contemplates that this may be required when it says that the file provided by the publisher must "maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and *include corrections and revisions as may be necessary.*" (Emphasis added.)

Finally, AB 422 provides a "default option" in case the publisher and the college cannot agree on an appropriate file format. *California Education Code*, Section 67302(e)(4) provides that:

> "If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible."

As discussed in Part I of these guidelines, there are significant limitations on the formatting that can be provided by ASCII text. Thus, it will usually be desirable for the

college to make every effort to work out an agreement with the publisher that will avoid the necessity of relying on the default option. However, the law does guarantee the availability of ASCII text (enhanced to preserve as much as possible of the structural integrity of the original), and there may be situations in which this is the best approach to providing access for the student.

H. MATHEMATICS AND SCIENCE MATERIALS

AB 422 contains two provisions which exempt publishers from having to provide electronic versions of certain types of instructional materials. One such exemption is provided by *California Education Code*, Section 67302(e)(1), which excludes from the definition of instructional materials "nontextual mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities." A careful reading of this provision reveals two important points about the scope of the exemption:

First, the exemption is time limited and dependent on the state of technology. It is the opinion of the Chancellor's Office that the exemption does not apply to any material which can be successfully converted to Microsoft Word or other commonly available word processing formats. Since such files can be used with screen reading programs and/or refreshable braille displays, technology already exists today to permit converting such materials into alternate media. Of course, whether such a conversion is possible will depend on the nature of the material and will have to be determined on a case by case basis.

Second, the exemption applies only to "nontextual" mathematics and science materials. This refers to graphs, charts, equations, diagrams, and other similar graphic elements. The exemption does not extend to the textual portions of math and science texts wherein the concepts to be taught are described in narrative form. Thus, a college could ask a publisher to provide the textual portions of a math book and then the file provided by the publisher could be edited to add in the nontextual portions that could not be directly converted. Obviously, there will be many cases where this is impractical because the nontextual elements are extensive or scattered throughout the book. However, this may be a viable option for materials that are predominantly textual in nature.

I. NONPRINTED INSTRUCTIONAL MATERIALS

The other similar exemption in AB 422 applies to "nonprinted instructional materials." These are defined to mean "instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource, including, but not necessarily limited to, software programs, video disks, and video and audio tapes." (Cal. Ed. Code, § 67302(e)(3).) Publishers are not required to comply with AB 422 with respect to nonprinted

instructional materials until technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials and is compatible with braille translation and speech synthesis software. (Cal. Ed. Code, § 67302(d).)

Of course, some nonprinted instructional materials, such as video tapes or software that uses computer graphics, are inherently visual in nature and, at the present time, there is no way to convert these materials into a format that would be compatible with speech or braille translation software.[18] However, some other types of materials, such as reference works on CD-ROM, may be largely textual in nature even though they are produced and distributed in electronic form, in addition to, or instead of being printed. In such cases, it may be possible for the college and the publisher to identify a way to convert all or part of the instructional material into a file format that can be used with screen reading or braille translation software.

J. REVISING FILES RECEIVED FROM A PUBLISHER

For the reasons discussed above, it should be clear that there may be many situations in which a college will not be able to fully discharge its obligations under the law by simply passing on the file received from the publisher. If too much of the structural integrity of the original document has been lost, the E-text (or braille or large print produced from it) may be unusable or deficient. Should this occur, despite the best efforts of the college to obtain usable files from the publisher, the college will have to take steps to ensure that the student receives a usable version of the document. This may necessitate human intervention to reconstruct or simulate elements missing from the file. In some cases, it may even be necessary to scan all or part of the document and use the scanned text to supplement the file provided by the publisher.

Again, the point is that the college has an obligation under federal and state law to make instructional materials available in alternate media. AB 422 may make it possible, in some cases, to obtain E-text that will allow the college to quickly and easily discharge its responsibility. But, where that isn't the case, the college will have to do whatever is necessary to produce the document in usable alternate media.

K. RECOMMENDED PROCESS FOR HANDLING REQUESTS

The following is a suggested step-by-step approach to handling a request from a student that requires obtaining E-text from a publisher pursuant to AB 422. Colleges are not required to follow the precise details of this process, provided the basic requirements of the law are satisfied.

[18] There is a technique, known as descriptive video, which can provide access to video tapes for individuals with visual impediments. the tape is copied and a narration track is added on which a narrator describes visual scenes during natural pauses in the dialog. Publishers are not required to provide this service under AB 422, but colleges can and should contract with an appropriate commercial service to have video tapes narrated.

1. The bookstore manager sends a letter to all publishers [19] advising them of the requirements of AB 422 and indicating that they should expect to receive such requests directly from either the DSP&S coordinator or the ADA Coordinator. (See Appendix VII for a sample letter.) The bookstore also includes in book purchase contracts with publishers a provision requiring electronic text to be available on request. [20]

2. Using appropriate college procedures, a student requests that instructional materials be made available in alternate media.

3. The DSP&S (or ADA Coordinator) determines that E-text is the appropriate medium for use by the student or that E-text will be needed to produce materials in the appropriate medium (e.g. braille or large print). If so, the student is asked to provide information necessary to satisfy the requirements of AB 422--that the student has a disability which prevents using standard instructional materials, that the student is or will be registered/enrolled in a course at the college, that the student has ordered/purchased the instructional material or it is being otherwise purchased, and that the instructor of the course has determined that the instructional material in question is required or essential to the successful completion of the course. [21] A suggested form for collecting necessary information from the student is provided in Appendix VIII.

4. The DSP&S (or ADA Coordinator) determines whether the instructional material is already available through the HTCTU Book Exchange or from some other source. If so, the source is contacted and a copy is obtained.

5. If it will be necessary to obtain the E-text from the publisher, the DSP&S or ADA Coordinator completes the certification required by AB 422 and forwards it to the publisher. (See Appendix IX for a suggested form.)

6. DSP&S (or the ADA Coordinator) works with the publisher to agree upon a format for the E-text which will be compatible with screen reading or braille

[19] The Chancellor's Office will contact major publishers of instructional materials and request that each publisher designate statewide or regional representatives to whom requests should be directed. Such contact information as is provided by publishers will be placed in a database accessible through the HTCTU website (http://htctu.fhda.edu).

[20] This is not required by AB 422, but colleges would have discretion to require such a provision if they wish. This may be most appropriate where the bookstore is ordering relatively large numbers of commonly used books or materials. Such a provision might read as follows: "In accepting this order, (name of publisher) agrees that it will provide, upon request, an electronic version of the material being purchased for use in accommodating the needs of students with disabilities consistent with the requirements of California Education Code Section 67302."

[21] As discussed above, it is the view of the Chancellor's Office that the "required or essential" test need only be satisfied when the electronic version of an instructional material is first requested from the publisher. Thus, some requests could be processed without this information, but it is suggested that it be collected at this stage of the process to avoid further delay in those cases where it is required.

translation software and maintain the structural integrity of the instructional material. [22]

7. DSP&S (or the ADA Coordinator) arranges for the E-text to be provided to the student or for production of secondary alternate media, if necessary. If E-text is given directly to the student, the student is required to sign an agreement prohibiting duplication of the material and the student is advised of the consequences of violating said agreement. Suggested wording for such an agreement is included on the sample form provided in Appendix VIII.

8. DSP&S (or the ADA Coordinator) arranges for storing a master copy of the E-text and posts a description of the material on the HTCTU Book Exchange website.

L. ENCOURAGING PUBLISHERS TO ENHANCE ACCESSIBILITY

In addition to satisfying specific requests, it is recommended that each college establish an ongoing relationship with major publishers to encourage the publishers to work toward enhancing the accessibility of their products. To this end, the college should:

1. Ensure that publishers and manufacturers of the printed instructional material are aware of disability access issues and are informed that their products are frequently used by students with disabilities. The sample letter set forth in Appendix VII is intended to accomplish this purpose.

2. Work with the publisher to identify specific product support people who are knowledgeable about making instructional materials accessible or who will be assigned to acquire training in this area. As discussed in footnote 18, the Chancellor's Office will ask major publishers to designate statewide or regional representatives to receive requests pursuant to AB 422. These individuals may not be able to deal with all access issues, but they should be able to identify those individuals within the publisher's organization who can.

3. Notify the publisher of any issues that are discovered to create difficulties with screen readers or braille translation software.

4. Encourage the publisher to have product designers address accessibility problems in the design of future instructional materials.

[22] If the college is served by an alternate media center located at the district office or another college, the request would be forwarded through that center. However, for the purposes of this illustrative step-by-step process, we assume each college will be interacting directly with publishers until the statewide center is established.

Appendix I

Alternate Media Committee Members

CHANCELLOR'S OFFICE CALIFORNIA COMMUNITY COLLEGES
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Carolyn Norman, Coordinator
Scott Hamilton, DSP&S Coordinator
Peggy Tate, DSP&S Program Assistant
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ASSISTIVE TECHNOLOGY SPECIALIST AND FACULTY RESOURCE CENTER
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ACADEMIC SENATE
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CHIEF INSTRUCTIONAL OFFICER
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CHIEF STUDENT SERVICES OFFICER
Dr. Wilma McLeod, VP, Student Services
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REPRESENTATIVE FROM STUDENT ORGANIZATIONS OF THE BLIND
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STUDENT SENATE
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Helen Elias, DSP&S Coordinator

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Imperial Valley College
380 E. Aten Road
Imperial, CA 92251-0158

LIBRARIANS REPRESENTATIVE
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El Camino College
16007 Crenshaw Boulevard
Torrance, CA 90506-0002

San Diego City College
1313 - 12th Avenue
San Diego, CA 92101

HIGH TECH CENTER TRAINING UNIT
Carl Brown, Director
De Anza College
21050 McClellan Road
Cupertino, CA 95014

Dr. Catherine Campisi, former Dean of Student Services with the Chancellor's Office, left the agency in December 1999 to accept an appointment as Director of the California Department of Rehabilitation. Although she is no longer with the Chancellor's Office, she contributed significantly to the work of the Task force and the development of these guidelines.

Appendix II

Alternate Media Resources

Braille Resources

Dozens of commercial braille production companies are available to colleges wishing to outsource. Many of the resources have Web addresses and accept electronic submission of materials to be brailled. Prices, production times and quality vary.

National Braille Press
88 St. Stephen Street
Boston, MA 02115
Phone: (617) 266-6160
Toll-free: (800) 548-7323
Fax: (617) 437-0456
http://www.nbp.org/

The American Printing House for the Blind, Inc.
1839 Frankfort Avenue
Mailing Address: P.O. Box 6085
Louisville, Kentucky 40206-0085
U.S.A.
Phone: (502)-895-2405
Toll Free Customer Service: (800)-223-1839 (U.S. and Canada)
Fax: (502)-899-2274
http://www.aph.org/contact.htm

Braille Institute
741 N. Vermont Avenue
Los Angeles, CA 90029
(323) 663-1111
FAX: (323) 663-0867
http://www.brailleinstitute.org/Press.html

Educational Transcription Center (ETC)
Ventura College
4667 Telegraph Road
Ventura, CA 93003
(805) 648-8927
http://www.etcbrille.org

Braille Transcribers
http://www.spedex.com/directories/braille.htm

Braille Jymico Inc.
http://www.braillejymico.qc.ca/products.htm

NMSU List of Braille Transcription Resources
http://www.nmsu.edu/Resources_References/access/public_html/trans.html

Quik-Scrybe
http://www.quikscrybe.com/

Large Print Resources

Braille Institute
Los Angeles Sight Center (323) 663-1111
Desert Center (760) 321-1111
San Diego Center (619) 452-1111
Santa Barbara Center (805) 682-6222
Orange County Center (714) 821-5000
Youth Center (213) 851-5695
http://www.brailleinstitute.org

Library Reproduction Service (LRS) -1 (800) 225-5002
lrsprint@aol.com

American Printing House for the Blind (502) 895-2405
"LOUIS" Database search resource for braille, large print,
sound recordings, audio, and computer
www.aph.org

Other Alternate Media Resources

California Community Colleges Alternate Media Book Exchange

The Book Exchange is a web page, developed by the staff at the High Tech Training Center Unit (HTCTU), which contains a listing of books available in alternate media. DSP&S staff,

librarians, and ADA Coordinators can send e-mail requests to the registry to obtain books that have been produced in alternative formats by other colleges. The registry can be accessed at: http://bookex.htctu.fhda.edu.

Recording for the Blind and Dyslexic (RFB&D)
RFBD is a national non-profit organization that serves as the nation's educational library for people that cannot effectively read standard print because of a visual, perceptual, or physical disability. Information is provided in recorded and computerized formats at every academic level.
http://www.rfbd.org

TAEVIS Online, Purdue University
TAEVIS Online is an electronic library containing tactile diagrams. These diagrams, redrawn to tactile specifications are created from college-level course material and can be used to transmit visual information such as that found in graphs, chemical structures, and biological drawings.
http://www.taevisonline.purdue.edu

American Thermoform Corporation
2311 Travers Avenue
City of commerce
Ca. 90040
(800) 331-3676
(213) 728-8877 (fax)
American Thermoform Corp. is a major California-based supplier of braille paper and related supplies. Braille paper is available in various widths and in weights suitable for both draft and final documents.
http://www.atcbrleqp.com

HTCTU Book Exchange (De Anza Community College)
http://htcoff1.htctu.fhda.edu/tango/bookex/bookex.html

Organizations Involved in the Development of Alternate Media Standards

DAISY
The DAISY Consortium is the worldwide coalition of libraries and institutions serving print disabled persons, developing the open standards, tools, and techniques for the next generation of "digital talking books"
http://www.daisy.org

CAST
CAST is a not-for-profit organization whose mission is to expand opportunities for individuals with disabilities through the development of and innovative uses of technology. CAST pursues this mission through research, product development, and work in schools and educational settings that further universal design for learning.
http://www.cast.org

Appendix III

BRAILLE INSTITUTE
EDUCATION AND AWARENESS

A Guide To Large Print For People With Low Vision

Many people with visual impairments beyond those correctable by prescription lenses still read, often with the assistance of special aids such as lighting or magnification devices. People with reduced sight often find that conventional print appears blurred, dim and very difficult, if not impossible, to read. Central damage to the retina, for example, prevents some people from seeing small print clearly and reduces their ability to move their eyes in the ways needed for reading. Text can be made more legible for some of these readers through the use of large print. There are many factors to consider when producing large-print material, and it is important to note that the variety of visual impairment and subsequent impact on the ability to read is extensive.

CONTRAST: Text should be printed with the highest possible contrast. **Use of boldface type generally provides greater legibility, as the letters are darker and thicker.** Black or dark blue inks are preferable to lighter colors. Color backgrounds generally should be avoided, although some studies suggest that black ink on a bright yellow background is easy to read. Buff, cream or light yellow backgrounds usually are acceptable, but not dark or bright color backgrounds. Some visually impaired people are unable to distinguish type at all with black ink on a dark red background.

REVERSE type—"white" type on a dark background-improves readability for some. Reverse type often is an available option with some computers and special closed-circuit cameras used for reading, and might be good for some signs or other items with limited text. Backgrounds should be solid.

SIZE: Type often is measured in points and should be as large as practical.

Text should be 14 points or larger, preferably 18 points.

Headlines should be at least 24 points, larger if possible.

LEADING: The spacing between lines of text, called leading, should be greater than that traditionally used in regular text. Many people with low vision have difficulty finding

the beginning of the next line when reading if the lines of type are too close together. A ratio of 150 percent (12-point type receives 18-point leading) is a good guideline for text.

STYLE: An ordinary typeface, such as this one (Helvetica), a sans-serif font (one without the fine lines projecting from the main strokes of letters found on some fonts, such as Palatino or Times, usually is the best choice for large print. Other styles of type frequently used in regular print are not easily read by people with low vision. These include ALL CAPS, SMALL CAPS, *italics* and ornate, decorative fonts like this. Text should be in Upper and Lower Case, with wider spacing between lines, for maximum readability.

LETTER SPACING: The spacing (track) between individual letters on each line should be wider than usual whenever possible. Text with close letter spacing is particularly difficult for partially sighted readers who have central visual field defects.

MARGINS: Extra-wide binding margins are very helpful in large-print books and other bound material because they make the volumes easier to hold flat. Many visual aids, such as stand and video magnifiers, are easier to use on a flat surface.

PAPER: Paper with a glossy finish can interfere with legibility because it tends to catch and reflect the glare of lights in a room. Glare is a common problem for many readers who are partially sighted. Print on paper with a matte (dull) finish whenever possible. Those wishing to use recycled paper will find a good selection of paper stock. Ink type—petroleum-based versus soy-based—is not a factor.

ALIGNMENT of text, hyphenation of words and other factors can slow a reader who is visually impaired and are worth considering when producing materials for this audience. Text created "flush left" is easiest to read. Paragraphs indented too far (.125 inches is a suggested maximum) might be replaced by paragraphs with extra space between them.

Text that is centered is harder to follow because
the reader must search for the start of each line.

Text created "flush right" also is a potential problem.

Text that is "justified" appears to create no special problems, although many computer programs typically compact some type when this alignment is used, which can reduce the readability. Justified type also uses a lot of hyphenation, which can slow the reading process for someone who is visually impaired to a greater degree than it does for sighted readers.

When producing large-print materials for people with reduced sight, keep the above principles in mind and your readers will be able to make full use of their remaining vision.

Los Angeles Sight Center (213) 663-1111•Desert Center (760) 321-1111
San Diego Center (619) 452-1111•Santa Barbara Center (805) 682-6222
Orange County Center (714) 821-5000•Youth Center (213) 851-5695
www. braillleinstitute.org

Appendix IV

FORMATTING BRAILLE DOCUMENTS

Today, most braille is produced using braille translation software to convert E-text into a format that can be printed with a braille printer. For documents involving primarily straight text (those that do not include mathematics, foreign language, computer code, etc.), these programs will generally produce an accurate word-for-word translation, but the formatting of the document will almost always require human intervention.[23]

The Library of Congress establishes standards for braille transcription and certifies transcribers. It is recommended that, whenever possible, colleges hire or contract with certified braille transcribers, or organizations which employ such transcribers, to produce braille materials. However, a person well versed in the rules for formatting braille and the use of a translation program may be able to produce reasonably good quality braille documents even without Library of Congress certification. The guidelines set forth below are by no means a thorough treatment of the subject and following them will not eliminate the need for proper training. However, they should help college staff avoid some of the more obvious pitfalls of braille production.[24]

1. Contractions

Braille only has one set of letters. By itself, a braille letter is assumed to be in lower case. To show an uppercase letter, put the capitalization indicator (dot 6) in front of a braille letter. To show an uppercase word, you put two capitalization indicators in front of the word.

The number sign (used to indicate an occasional number in a text document[25]) is dots 3-4-5-6. This symbol comes just before the number.

An important thing to realize about braille is that you cannot write the dot patterns smaller or larger. An 11-1/2 by 11 inch piece of braille paper contains about 900 braille cells. This cause braille volumes to be much bulkier than inkprint.

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[23] As noted earlier, there are special braille codes for mathematics, musical notation, computer code, etc. There are even some computerized translation programs that can produce these specialized types of braille. However, discussion of formatting considerations for such materials is beyond the scope of these guidelines. In most instances, colleges will want to contract out for such work unless specially trained staff are available to perform the transcription.

[24] The material which follows has been adapted from information provided by Braille Planet, a company which developed and sells some of the leading braille translation programs. The California Community Colleges Chancellor's Office gratefully acknowledges the work of Braille Planet in creating this excellent overview of braille.

[25] The number sign is not used in Nemeth Code which is the system used for braille mathematics.

To reduce the bulkiness of braille there is a system of braille contractions, or abbreviations known as Grade II Braille.[26] For general text production, materials should be provided in Grade II Braille. Grade II Braille is the format most commonly used by persons who are blind.

A braille contraction is a combination of one or more cells used to shorten the length of a word. For example, to write the word "mother," you would use a two-cell contraction rather than spelling out the word "mother." Just because a contraction can be used does not mean it should be used. The word "chemotherapy" contains the sequence "mother." Some braille translation programs are smart enough to know not to use the contraction for "mother" in "chemotherapy" (most of the braille rules are based on pronunciation; you do use the "mother" contraction in "smother," since this is pronounced like "mother").

In braille, if you have the letter "d" with a space or punctuation on either side, the "d" stands for the word "do." To show you really mean the isolated letter "d," precede it with a braille cell called the letter sign, dots 5-6. This alerts the braille reader to the fact that the next letter is to be read as a letter of the alphabet rather than an abbreviation.

Decoding braille by comparing inkprint and braille sequences can be tricky. The words "to," "into," and "by" are jammed up against the next word in braille. The words "a," "the," "for," "of," and "and" within braille are single cells which can be jammed up against each other. For example, "with" is a single cell with spaces on either side, but "with the" comes out as two cells jammed together. Numbers use the number sign followed by the letters a-j (312 comes out as #cab). One braille symbol means "dis" if it shows up in the beginning of a word, means "dd" if it shows up in the middle of a word, and is used for the period punctuation symbol if it shows up at the end of a word.

2. Basic Page Formatting

Another component of braille is format. When material is laid out on paper for the sighted reader, it is done so for visual effect. The reader is attracted to what is pleasing to the eye. However, in braille the object is maximization of space. Due to the bulkiness of braille volumes, you want to put as much material as possible on the page, while at the same time maintaining readability.

According to the Library of Congress, there are certain criteria for the output page. A page of braille contains a maximum of about 40 characters per line and 25 lines per page. For normal literary format, the braille page number appears at the upper right-hand corner of each page. However, you may need to change these values according to the specifications of your brailler.

[26] Grade I Braille does not contain any contractions (abbreviations), but it does represent capitalization, numbers, and punctuation with the correct braille symbols. Grade I Braille is used only for specialized applications where the braille contractions might be confusing, such as in spelling lists.

Because of the physical (rather than visual) nature of braille, format standards are especially important. Small differences in where text is placed on the page can tell the braille reader a lot about what they are reading. In any braille format, with or without a braille translation program, certain elements are especially crucial components of page layout. These include treatment of indent and runover, braille page numbers, inkprint page indicators, and running heads.

One of the major differences between braille and print format pertains to paragraphs. Rather than having an indent of five spaces, braille paragraphs have a two cell indent. The first character of the paragraph begins in cell three. There are no blank lines between paragraphs. Except in special circumstances, you do not put two or more spaces in a row in braille. Thus only one space is used between sentences.

When material is underlined or emphasized in print, there are different ways of indicating it. In braille there are italics marks which indicate something is being emphasized. A special symbol of dots 4-6 is placed before each word to be emphasized if there are three or fewer words in a row. If four or more words are emphasized, a double italics sign (dots 4-6, dots 4-6) is placed before the first word. A single italics sign (dots 4-6) is placed in front of the last emphasized word. Please note that you do not show all uses of inkprint emphasis in braille. Emphasis is only used in headings when it is necessary to preserve the distinctions shown in inkprint.

3. Indent and Runover

Instructions for braille transcribing often say indent to cell #. The farthest left position in which a cell may appear is cell 1. The farthest right position ranges from cell 30 to cell 40, depending on the carriage width of your brailler.

The placement of the first cell in a paragraph is called the indent. When transcribing instructions say, "indent to cell 3," put the first cell of that segment in cell 3, regardless of where the preceding line began. The position at which all subsequent lines of the same segment begin is the runover. When instructions say, "runover to cell 1," begin all subsequent lines of that segment in cell 1. If instructions say, "indent to cell 7, runover to cell 5," begin the first line of that segment of text in cell 7, and all subsequent lines in cell 5.

Sometimes the indent is a smaller number than the runover, as in, "indent to cell 1, runover to cell 5." In print, this is called outdenting, or a hanging indent. In braille, the position of the first cell of a segment of text is always called the indent, regardless of whether it is to the left or the right of the remaining text.

Another common braille instruction is block, as in, "block to cell 5." This simply means that the indent and the runover are equal to each other. It is the same as saying, "indent to cell 5, runover to cell 5."

4. Headings

There are three kinds of headings in braille: major headings, minor headings, and paragraph headings.

A major heading is centered, with a blank line before the heading, and a blank line after it. Some braille groups do not put a blank line after a major heading. Technically, this is a violation of the rules for braille.

A minor heading is blocked to cell five. This means that the heading starts on the fifth cell of the line. Any runover also starts on the fifth cell of the line. Usually, there is a skipped line before a minor heading, but not after a minor heading.

A paragraph heading is a line or phrase in italics (or some other emphasis) that labels a paragraph and is immediately followed by text on the same line. If this is done in inkprint, do the same in braille, using italics.

Braille rules require that there be at least one line of body text after a heading or headings on the same page. If there is not enough room on the page for the heading(s) and a line of body text, then the heading(s) need to be postponed to the top of the next braille page.

Before you start a braille project, you need to structure the document. You need to analyze how many levels of headings there are. You need to decide which of these should be done as a major heading, and which should be done as a minor heading.

5. Braille Page Numbers

As in print, each physical page in a braille volume is given a sequential page number. This braille page number merely orders the pages in the book. It does not provide the reader with any information about the pagination of the inkprint original. The braille page numbers appear in different spots in different formats.

6. Print Page Indicators

Many braille formats consider the braille reader's need to know where each inkprint page begins. When required, inkprint page indicators appear in addition to the sequential braille page numbers. Textbooks are one instance where this information is essential. With it, the braille reader can follow class discussion, locate homework assignments, and generally keep up with the users of the inkprint original.

A single print page usually occupies several braille pages. For example, if inkprint page 87 is found on three braille pages, then these are marked with inkprint page indicators 87, a87, and b87.

Inkprint page indicators are also extremely useful when transcribing anything that has a table of contents or an index. When inkprint page indicators are not included on the

braille page, indexes and such must be completely rewritten to refer to the braille page numbers. When inkprint page indicators are included, then page numbers may be transcribed exactly as they appear in print.

7. **Running Heads**

Many braille formats require that the title of the work being transcribed appear on the first line of every page, with an appropriate page number. When the title is too long to fit on one line, it is abbreviated. The running head never uses more than one line.

8. **Literary v. Textbook Format**

Whenever you begin a new transcribing project, with or without a braille translation program, there is some planning to do before you start data entry. There are a number of things to look for in the first scan through the book: check to see if there are a large number of foreign words, a table of contents or index, and graphs or pictures in the book.

One of the first things you must decide is whether to use textbook or literary format. Here are some guidelines for making this decision. Textbook format uses inkprint page indicators; literary format does not. When there is any possibility that the braille reader needs inkprint page indicators, use textbook format. Both formats may be used with or without running heads. Textbook and literary formats are also different from each other in the way they handle preliminary pages, indexes, and certain special cases such as tables and graphs.

In general, literary format allows the transcriber a certain amount of latitude. The overriding concern of textbook format is to represent things in braille EXACTLY as they appear in print. Anything added or omitted in the transcribing process must be explained in a transcriber's note.

9. **Literary Format**

In literary format without a running head, text appears on every line of the braille page. The braille page number appears in the rightmost cells of the first line, with at least three blank cells before the number. Text on the first line must break to allow room for this.

Literary format with a running head has text on lines 2 through 25. Line 1 begins with at least three blank cells, followed by the running head, at least three more blank cells, and the braille page number.

10. **Textbook Format**

The major difference between textbook and literary formats in the main body of text is inkprint page indicators. Textbook format has them; literary format doesn't. For textbook format with no running head, text appears on every line. On line 1, the inkprint page indicator appears in the rightmost cells with at least three blank cells before it. The

braille page number appears in the rightmost cells of the last line on the page. Again, at least three blank cells are placed before the braille page number.

Textbook format with a running head has text on lines 2 through 25. Line 1 begins with at least three blank cells, followed by the running head, at least three more blank cells, and the inkprint page indicator. Line 25 breaks the text to allow room for three blank cells and the braille page number at the end of the line.

Appendix V

Relevant Provisions of The Federal Copyright Law

Copyright Law Amendment
PL 104-197, December 1996

BACKGROUND

The free national library program of reading materials for visually handicapped adults administered by the National Library Service for the Blind and Physically Handicapped (NLS), Library of Congress, was established by an act of Congress in 1931. The program was expanded in 1952 to include blind children, in 1962 to include music materials, and in 1966 to include individuals with physical impairments that prevent the reading of standard print.

From the beginning, this program was dependent upon the cooperation of authors and publishers who granted NLS permission to select and reproduce in special formats copyrighted works without royalty. Although many factors influence the length of time it takes to make a print book accessible in a specialized format, the period required to obtain permission from the copyright holder has sometimes been significant.

PUBLIC LAW 104-197

Under the Legislative Branch Appropriations Bill, H.R. 3754, Congress approved a measure, introduced by Senator John H. Chafee (R-R.I.) on July 29, 1996, that provides for an exemption affecting the NLS program. On September 16, 1996, the bill was signed into law by President Clinton.

The Chafee amendment to Chapter 1 of Title 17, *United States Code*, adds section 121, establishing a limitation on the exclusive rights in copyrighted works. The amendment allows authorized entities to reproduce or distribute copies or phonorecords of previously published nondramatic literary works in specialized formats exclusively for use by blind or other persons with disabilities.

The act making appropriations for the Legislative Branch for the fiscal year ending September 30, 1997, sets forth the Chafee amendment as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that . . . and for other purposes, namely:

(a) IN GENERAL—Chapter 1 of Title 17, United States Code, is amended by adding after section 120 the following new section:

"SEC.121. Limitations on exclusive rights: reproduction for blind or other people with disabilities

"(a) Notwithstanding the provisions of sections 106 and 710, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

"(b)

(1) Copies or phonorecords to which this section applies shall—

"(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

"(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

"(C) include a copyright notice identifying the copyright owner and the date of the original publication.

"(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

"(c) For purposes of this section, the term—

"(1) 'authorized entity' means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

"(2) 'blind or other persons with disabilities' means individuals who are eligible or who may qualify in accordance with the Act entitled 'An Act to provide books for the adult blind,' approved March 3, 1931 (2 U.S.C. 35a; 46 Stat. 1487) to receive books and other publications produced in specialized formats; and

"(3) 'specialized formats' means braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities."

(b) TECHNICAL AND CONFORMING AMENDMENT—The Table of Sections for Chapter 1 of Title 17, United States Code, is amended by adding after the item relating to section 120 the following:

"121. Limitations on exclusive rights: reproduction for blind or other people with disabilities."

Appendix VI

Chaptered Legislation, Bill Number AB 422
(Chaptered 09/15/99)

CHAPTER 37

FILED WITH SECRETARY OF STATE SEPTEMBER 15, 1999
APPROVED BY GOVERNOR SEPTEMBER 15, 1999
PASSED THE ASSEMBLY AUGUST 26, 1999
PASSED THE SENATE AUGUST 23, 1999
AMENDED IN SENATE JUNE 30, 1999
AMENDED IN SENATE JUNE 16, 1999
AMENDED IN ASSEMBLY MAY 25, 1999
AMENDED IN ASSEMBLY APRIL 5, 1999
INTRODUCED BY Assembly Member Steinberg
(Coauthors: Assembly Members Aroner, Corbett, Kuehl, and Thomson)
FEBRUARY 12, 1999

An act to add Section 67302 to the *Education Code*, relating to instructional materials.

LEGISLATIVE COUNSEL'S DIGEST

AB 422, Steinberg. Instructional materials: disabled students.

Under existing law, a publisher or manufacturer of instructional materials offered for adoption or sale in California is required to comply with specified requirements, including providing to the state, at no cost, the right to transcribe, reproduce, and distribute the material in braille, large print, recordings, or other accessible media for use by pupils with visual disabilities. This right includes computer diskette versions of instructional materials if made available to any other state, and those corrections and revisions as may be necessary.

This bill would require every individual, firm, partnership or corporation publishing or manufacturing printed instructional materials, as defined, for students attending the University of California, the California State University, or a California Community College to provide to the university, college, or particular campus of the university or college, for use by students at no additional cost and in a timely manner, any printed instructional material in unencrypted electronic form upon the receipt of a written request, provided that the university or college complies with certain conditions.

This bill would require that the computer files or electronic versions of printed instructional material maintain their structural integrity, as defined, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary.

This bill would authorize the Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California to each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials, as prescribed.

This bill would also require an individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College to provide computer files or other electronic versions of the nonprinted instructional materials for use by students, subject to the same conditions for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional material that is compatible with braille translation and speech synthesis software.

This bill would provide that willful failure to comply with these requirements would be subject to sanctions under the law relating to full and equal access of disabled persons to public accommodations.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 67302 is added to the *Education Code*, to read:

67302. (a) An individual, firm, partnership or corporation that publishes or manufactures printed instructional materials for students attending the University of California, the California State University, or a California Community College, shall provide to the university, college, or particular campus of the university or college, for use by students attending the University of California, the California State University, or a California Community College, any printed instructional material in an electronic format mutually agreed upon by the publisher or manufacturer and the college or campus. Computer files or electronic versions of printed instructional materials shall maintain the structural integrity of the printed instructional material, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary. The computer files or electronic versions of the printed instructional material shall be provided to the university, college, or particular campus of the university or college at no additional cost and in a timely manner, upon receipt of a written request that does all of the following:
(1) Certifies that the university, college, or particular campus of the university or college has purchased the printed instructional material for use by a student with a disability or that a student with a disability attending or registered to attend that university, college, or particular campus of the university or college has purchased the printed instructional material.
(2) Certifies that the student has a disability that prevents him or her from using standard instructional materials.

(3) Certifies that the printed instructional material is for use by the student in connection with a course in which he or she is registered or enrolled at the university, college, or particular campus of the university or college.
(4) Is signed by the coordinator of services for students with disabilities at the university, college, or particular campus of the university or college or by the campus or college official responsible for monitoring compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) at the university, college, or particular campus of the university or college.
(b) An individual, firm, partnership or corporation specified in subdivision (a) may also require that, in addition to the conditions enumerated above, the request shall include a statement signed by the student agreeing to both of the following:
(1) He or she will use the electronic copy of the printed instructional material in specialized format solely for his or her own educational purposes.
(2) He or she will not copy or duplicate the printed instructional material for use by others.
(c) If a college or university permits a student to directly use the electronic version of an instructional material, the disk or file shall be copy-protected or the college or university shall take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).
(d) An individual, firm, partnership or corporation that publishes or manufactures nonprinted instructional materials for students attending the University of California, the California State University, or a California Community College shall provide computer files or other electronic versions of the nonprinted instructional materials for use by students attending the University of California, the California State University, or a California Community College, subject to the same conditions set forth in subdivisions (a) and (b) for printed instructional materials, when technology is available to convert these nonprinted instructional materials to a format that maintains the structural integrity of the nonprinted instructional materials that is compatible with braille translation and speech synthesis software.
(e) For purposes of this section:
(1) "Instructional material or materials" means textbooks and other materials written and published primarily for use by students in postsecondary instruction that are required or essential to a student's success in a course of study in which a student with a disability is enrolled. The determination of which materials are "required or essential to student success" shall be made by the instructor of the course in consultation with the official making the request pursuant to paragraph (4) of subdivision (a) in accordance with guidelines issued pursuant to subdivision (i). "Instructional material or materials" does not include nontextual mathematics and science materials until the time software becomes commercially available that permits the conversion of existing electronic files of the materials into a format that is compatible with braille translation software or alternative media for students with disabilities.
(2) "Printed instructional material or materials" means instructional material or materials in book or other printed form.
(3) "Nonprinted instructional materials" means instructional materials in formats other than print, and includes instructional materials that require the availability of electronic equipment in order to be used as a learning resource, including, but not necessarily limited to, software programs, video disks, and video and audio tapes.
(4) "Structural integrity" means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and

subheadings, footnotes, indexes, glossaries, and bibliographies. "Structural integrity" need not include nontextual elements such as pictures, illustrations, graphs, or charts. If good faith efforts fail to produce an agreement pursuant to subdivision (a) between the publisher or manufacturer and the university, college, or particular campus of the university or college, as to an electronic format that will preserve the structural integrity of the printed instructional material, the publisher or manufacturer shall provide the instructional material in ASCII text and shall preserve as much of the structural integrity of the printed instructional material as possible.

(5) "Specialized format" means braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities.

(f) Nothing in this section shall be construed to prohibit a university, college, or particular campus of the university or college from assisting a student with a disability by using the electronic version of printed instructional material provided pursuant to this section solely to transcribe or arrange for the transcription of the printed instructional material into braille. In the event a transcription is made, the campus or college shall have the right to share the braille copy of the printed instructional material with other students with disabilities.

(g) The Chancellor of the California Community Colleges, the Chancellor of the California State University, and the President of the University of California may each establish one or more centers within their respective segments to process requests for electronic versions of instructional materials pursuant to this section. If a segment establishes a center or centers, each of the following shall apply:

(1) The colleges or campuses designated as within the jurisdiction of a center shall submit requests for instructional material made pursuant to paragraph (4) of subdivision (a) to the center, which shall transmit the request to the publisher or manufacturer.

(2) If there is more than one center, each center shall make every effort to coordinate requests within its segment.

(3) The publisher or manufacturer of instructional material shall be required to honor and respond to only those requests submitted through a designated center.

(4) If a publisher or manufacturer has responded to a request for instructional materials by a center, or on behalf of all the centers within a segment, all subsequent requests for these instructional materials shall be satisfied by the center to which the request is made.

(h) Nothing in this section shall be deemed to authorize any use of instructional materials that would constitute an infringement of copyright under the Copyright Revision Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

(i) The governing boards of the California Community Colleges, the California State University, and the University of California shall each adopt guidelines consistent with this section for its implementation and administration. At a minimum, the guidelines shall address all of the following:

(1) The designation of materials deemed "required or essential to student success."

(2) The determination of the availability of technology for the conversion of nonprinted materials pursuant to subdivision (d) and the conversion of mathematics and science materials pursuant to paragraph (4) of subdivision (e).

(3) The procedures and standards relating to distribution of files and materials pursuant to subdivisions (a) and (b).

(4) Other matters as are deemed necessary or appropriate to carry out the purposes of this section.

(j) Failure to comply with the requirements of this section shall be a violation of Section 54.1 of the Civil Code.

Appendix VII

Sample Letter for Initital Contact with Publishers

Date:

Publisher's Name/Address
Attn:

Dear Sir or Madam:

The purpose of this letter is to advise you that **name of college** will be requesting your company's assistance in providing legally required accommodations for students with disabilities attending **(Name of College)**. *California Education Code* Section 67302 requires publishers of instructional materials to provide those materials to institutions of public postsecondary education in California in an electronic format, so that colleges can meet their obligations to provide instructional materials in alternate media to their students with disabilities. For your convenient reference, we have enclosed the applicable provisions of law.

The **(Name of College)** may, from time to time, request electronic text pursuant to this law. Section 67302 requires publishers to provide electronic files in a format which is compatible with commonly used braille translation and screen-reading software used by persons with disabilities. Therefore, we will generally ask that you provide files in **name of platform and file format.** If you believe you will be unable to provide electronic files in this format, please let us know immediately so that we can discuss other alternatives with you.

California law requires that you provide the electronic text at no cost and in a timely manner. Requests from **(Name of College)** will be forwarded from **(Name/Title of Designated Individual at the Community College)**. Attached is a sample copy of the Electronic Text Alternate Media Request form which we will be using to submit these requests.

If you have any questions, please contact **(Name/Title of Designated Individual at the Community College)** at **(Insert address/telephone number/FAX/e-mail address)**.

Sincerely,

(Signature of College Bookstore Manager)

Appendix VIII

Sample Electronic Text Request Documentation Form

NOTE: In some instances, satisfying a request by a student to receive instructional materials in an alternate media may require the college to obtain electronic text from the publisher or manufacturer of the instructional material pursuant to *California Education Code* Section 67302. In such cases, the accommodation request must be accompanied by a completed copy of this form with necessary documentation attached as specified below.

STUDENT INFORMATION

Name: _____

Address: _____

Telephone: _____ FAX: _____

E-Mail Address: _____ Social Security Number: _____

Providing your Social Security Number is strictly voluntary. The Privacy Act of 1974 (PL 93-574) and the Information Practices Act of 1977 (Civil Code Sections 1798, et seq.) require that this notice be provided when collecting personal information from individuals. The Community College District and the State of California use information requested on this form for the sole purpose of determining whether a student is eligible to receive special services. Personal information recorded on this form will be kept confidential in order to protect against unauthorized disclosure. Portions of this information may be transferred to other entities for the purpose of determining appropriate alternate media specifications. However, disclosure to these parties is done in strict accordance with current statutes regarding confidentiality.

REGISTRATION/ENROLLMENT INFORMATION

District: _____ College: _____

Mailing Address: _____

Telephone: _____ FAX: _____

I have or will ☐ Register or ☐ Enroll in the academic term identified below:

☐ Fall 20-___/20-___ ☐ Spring 20-___/20-___ ☐ Summer 20-___/20-___

☐ Other (specify): _____

ACQUISITION OF STANDARD INSTRUCTIONAL MATERIAL IN ORIGINAL FORMAT

One of the conditions identified below must be substantiated for each request:

☐ I have purchased or ordered the standard instructional material (*Attach copy of original sales receipt or bookstore order form.*)

☐ The instructional material is supplied by the college to all students.

_____ _____

Signature of Instructor or Other Official *Date*

☐ The standard instructional material has been purchased or ordered on my behalf by the Department of Rehabilitation or some other agency. (*Attach copy of sales or ordering transaction.*)

☐ Other (specify): _____

VERIFICATION OF DISABILITY

One of the conditions identified below must be substantiated:

I have a disability that prevents me from using standard instructional materials. Documentation verifying this disability is either:

☐ Attached to this form or ☐ On file with the DSP&S office.

_____ _____

Signature of Instructor or Other Official *Date*

SECURITY OF ELECTRONIC TEXT

I understand that any electronic text, which may be supplied to me, is solely for my own educational purposes. I will not copy or distribute any such electronic text in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.). I understand that failure to abide by this agreement may constitute a violation of the Student Code of Conduct, and/or of the college policy regarding responsible use of DSP&S services. I have received and read a copy of the policy on responsible use of DSP&S services and I understand that a violation of that policy, including improper distribution of electronic text, may result in suspension of DSP&S Services.

Signature of Instructor or Other Official *Date*

COURSE INSTRUCTOR CERTIFICATION

Course Code: ______ **Course Title:** ______
Instructional Material Title: ______
General Description of Course Material: ☐ Textbook ☐ Workbook ☐ Other (specify) ______
Original Format of Instructional Material: ☐ Printed ☐ Nonprinted

I hereby certify that the instructional material is required or essential to the above student's success in the course in which the student is or will be registered or enrolled.

Course Instructor's Signature *Date*

COURSE INSTRUCTOR CERTIFICATION

Course Code: ______ **Course Title:** ______
Instructional Material Title: ______
General Description of Course Material: ☐ Textbook ☐ Workbook ☐ Other (specify) ______
Original Format of Instructional Material: ☐ Printed ☐ Nonprinted

I hereby certify that the instructional material is required or essential to the above student's success in the course in which the student is or will be registered or enrolled.

Course Instructor's Signature *Date*

COURSE INSTRUCTOR CERTIFICATION

Course Code: ______ **Course Title:** ______
Instructional Material Title: ______
General Description of Course Material: ☐ Textbook ☐ Workbook ☐ Other (specify) ______
Original Format of Instructional Material: ☐ Printed ☐ Nonprinted

I hereby certify that the instructional material is required or essential to the above student's success in the course in which the student is or will be registered or enrolled.

Course Instructor's Signature *Date*

Appendix IX

Sample Electronic Text Alternate Media Request

Date:

Publisher's Name/Address
Attn:

Dear Sir or Madam:

The purpose of this letter is to request your assistance in providing legally required accommodations for a student with a disability attending **(Name of College)**. *California Education Code* Section 67302 requires publishers of instructional materials to provide those materials to institutions of public postsecondary education in California in an electronic format, so that colleges can meet their obligations to provide instructional materials in alternate media to their students with disabilities.

The **(Name of College)** is requesting electronic text **(specify platform and file format)** of **(Name of Instructional Material)**. The enclosed certification complies with the requirements set forth in *California Education Code* Section 67302:

The electronic text supplied by a publisher may be used with translation software to produce hardcopy Braille or may be accessed with speech synthesizers or refreshable Braille displays. In the event that the electronic text will be made available to the student, he or she will be asked to sign an agreement stipulating that the electronic text will be used solely for his or her own educational purposes, and that s/he will not copy or duplicate the instructional material for use by others. In addition, the college will take other reasonable precautions to ensure that students do not copy or distribute electronic versions of instructional materials in violation of the Copyright Revisions Act of 1976, as amended (17 U.S.C. Sec. 101 et seq.).

The California law requires that you provide the electronic text at no cost and in a timely manner. We therefore request that it be supplied in the format specified above by **(Insert Date)**. If you are unable to supply electronic text in the specified format, will be unable to provide it by the date requested, or if you have any questions, please contact me at **(Insert address/telephone number/FAX/e-mail address)**.

Sincerely,

(Signature of Designated Individual at the Community College)

Sample DSP&S/ADA Coordinator Certification

- ☐ I request that **(Name of Publisher)** supply electronic text **(specify platform and file format)** of **(Name of Instructional Material)** for use by **(Name of Student)**. The electronic text is needed in order to provide instructional materials in alternate media for this student who has a verified disability that prevents him or her from using standard instructional materials.
- ☐ The student is enrolled in a course at the college or will be registered for such a course in an upcoming term.
- ☐ The instructional material is required or essential to the student's success in the course.
- ☐ The standard instructional material has been purchased by the student or on behalf of the student by the college.

Signature of DSP&S/ADA Coordinator **Date**

Appendix X

STATE OF CALIFORNIA
CHANCELLOR'S OFFICE - CALIFORNIA COMMUNITY COLLEGES

ALTERNATE MEDIA CENTER (ELECTRONIC TEXT)
PROGRAM PARTICIPATION AGREEMENT FORM
AMFORM3.DOC

Date:

To: **Chancellor's Office – California Community Colleges**
Attn. DSP&S Coordinator
1102 Q Street – 3rd Floor
Sacramento, CA 95814-6511

From: **District/College Name/Address:**
Attn:

The **(Name of District or College)** hereby requests designation as an Alternate Media Center for the purpose of providing electronic text to **(Names of Colleges to be served)** for use in accommodating students with disabilities. **(Name of District or College)** will operate the Alternate Media Center in compliance with *Education Code* Section 67302 and will be responsible for the following functions:

- ☐ Listing any instructional materials it obtains or produces in alternate media on the High Tech Center Training Unit, Book Exchange Website to allow for the coordination of requests within the Community College system.
- ☐ Checking to see if a requested electronic text is listed on the HTCTU Book Exchange as already being available from another college or Alternate Media Center and, if so, contacting that college or center to request the text.
- ☐ Establishing back-up protocols and maintaining a library of electronic text produced by the Center or obtained from publishers.
- ☐ Forwarding electronic text supplied by a publisher to the requesting college in a timely manner. Responding, in a timely manner, to requests for copies of electronic text already in its library from any colleges identified above.
- ☐ Responding, to the extent possible, to requests for copies of electronic text in the Center's library from other Alternate Media Centers or from colleges or universities not served by the Center.
- ☐ Implementing measures designed to ensure that electronic text will not be distributed to individuals or organizations other than as provided herein.

President/Superintendent CCD **Date**

Chancellor's Office DSP&S Coordinator **Date**

Appendix XI

Glossary of Terms

AB 422
Assembly Bill 422 (Ch. 37, Statutes of 1999) was authored by Assemblymember Darrell Steinberg. This bill added Section 67302 to the *California Education Code* effective January 1, 2000. It requires every individual, firm, partnership or corporation publishing or manufacturing printed instructional materials, as defined, for students attending the University of California, the California State University, or a California Community College to provide to the university, college, or particular campus of the university or college, for use by students at no additional cost and in a timely manner, any printed instructional material in unencrypted electronic form upon the receipt of a written request, provided that the university or college complies with certain conditions.

Accessible formats
With reference to printed materials, accessible formats include braille, large print, audio and electronic text formats.

Accommodation
Altering existing facilities, instruction, and/or services so they are readily accessible to and usable by individuals with disabilities.

ADA
The Americans with Disabilities Act of 1990 (42 U.S.C. 12100 et seq.). This federal civil rights law guarantees and defines equal access for people with disabilities.

Alternate Media
Generally refers to text or other materials produced in a specialized format intended for use by persons with disabilities. Types of alternate media include, but are not limited to, braille, large print, audio material, certain types of electronic files, and video with closed or open captioning.

Alternate Media Center
A campus or state-wide facility for the production of text in alternate media.

ASCII text
American Standard Code of Information Interchange. ASCII provides a numerical equivalent for the letters and symbols which can be displayed on a computer screen. The most basic of all electronic text formats.

Audio format
Text materials spoken by a human reader or speech synthesizer and recorded on audio tape, CD ROM, DVD, MP3, or other electronic media.

BCP
Budget Change Proposal. This is the process used by California state agencies, such as the Chancellor's Office for the California Community Colleges, to request changes in their level of funding.

Book Exchange
A web based electronic database for retrieval of information about textbooks and other print materials available in alternate media: http://htcoff1.htctu.fhda.edu/tango/bookex/bookex.html.

Braille
Braille is a system of tactile reading and writing in which raised dots represent the letters of the alphabet. Braille also contains equivalents for punctuation marks and provides symbols to show letter groupings. Braille is read by moving the hand or hands from left to right along each line. Both hands are usually involved in the reading process, and reading is generally done with the index fingers. The average reading speed is about 125 words per minute, but greater speeds of up to 200 words per minute are possible.

Braille cell
The basic unit of braille is the braille cell. It is composed of six dots: the upper left dot is dot 1, the middle left dot is dot 2, the lower left dot is dot 3, the upper right dot is dot 4, the middle right dot is dot 5, and the lower right dot is dot 6. From these six dots you can get 64 possible combinations.

Braille formats
When material is laid out on paper for the sighted reader, it is done for visual effect. However, in braille the object is maximization of space. Due to the bulkiness of braille volumes, you want to put as much material as possible on the page, while at the same time maintaining readability. There are different formats for literary works and textbooks. (See below). Because of the physical (rather than visual) nature of braille, format standards are especially important. Small differences in where text is placed on the page can tell the braille reader a lot about what they are reading. In any braille format, with or without a braille translation program, certain elements are especially crucial components of page layout. These include treatment of indent and runover, braille page numbers, inkprint page indicators, and running heads.

Braille page
One single-spaced print page equals two to three braille pages.

Braille printers
Also called embossers. The devices used to produce hard copy braille.

Braille production
The process of translating, proofing, formatting and printing braille documents.

Braille translation
The process of translating inkprint or electronic documents into Grade II, Nemeth Code or other forms of braille.

Braille translation software
Specialized software capable of accurately translating text into Grade II braille and preserving simple page formatting.

California Code of Regulations
The *California Code of Regulations* (CCR) contains the regulations that have been formally adopted by California state agencies, including those adopted by the Board of Governors of the California Community Colleges.

CCTV
Television equipment used by persons with low vision to magnify inkprint and other text materials for more convenient viewing, usually of desktop size.

CD-ROM
Compact Disk - Read Only Media. CD and DVD (Digital Versatile Disk) media are high capacity storage formats which can be used to save and retrieve text, audio and video information.

Certified Transcriber
An individual trained in the proper transcription of printed materials into braille who has been certified by the National Library Service for the Blind and Physically Handicapped of the Library of Congress.

Compatible with braille translation software
An electronic text file which can be translated into braille using commonly available braille translation software. Files provided by publishers pursuant to AB 422 are required to be in such a format.

Convert the file
Generally refers to converting a file from one format to another (i.e. PageMaker to Microsoft Word).

Department of Rehabilitation
The state of California agency whose mission is to assist Californians with disabilities in obtaining and retaining employment and maximizing their ability to live independently in their communities.

Distance education
Generally refers to one of a variety of instructional delivery methods which can include one or two-way (interactive) television, web based courses, e-mail or software. In all cases, participating students attend most or all classes from home, their worksite or other location.

Dot
The smallest element of a braille cell.

Download
To copy the contents of an electronic file from one location to another. Possibly across the internet, from one location to another on a campus network or to removable media.

DSP&S
Disabled Students Programs and Services. Established in 1976 through the passage of AB 77 (Lanterman), which funded support services and instructional programs for students with disabilities in the California Community Colleges so that they can participate fully in their educational activities.

Electronic form
A digital representation of a paper form. Generally used for data collection.

Electronic text
Text in MS Word, ASCII or other proprietary format. Also called "e-text".

Electronic versions of instructional materials
Textbooks, tests, catalogs or other materials stored on floppy, zip, CD ROM, DVD or other storage media. Exact or similar in appearance to inkprint versions of the same material.

Elements
Generally refers to page formatting elements such as headings, subheadings, headers, footers, sidebars and marginalia of various types.

File format
The unique public or proprietary file storage format in which a document has been saved.

Formatting E-text
Generally refers to the process of preserving the page location or text content of titles, paragraphs, columns, sidebars, footnotes, headers, footers, graphics, etc when scanning pages or moving documents between file formats.

Grade II braille
To reduce the bulkiness of braille there is a system of braille contractions, or abbreviations known as Grade II Braille. For general text production, materials should be provided in Grade II Braille. Grade II braille is the format most commonly used by persons who are blind.

Graphics
Usually refers to charts, drawings, photographs, animated objects, or digital video.

Hardcopy
Text printed on paper.

High Tech Center Training Unit
Located at DeAnza College, a training and support facility for community college faculty wishing to acquire or improve teaching skills, methodologies, and pedagogy in Assistive and Instructional Computer Technology.

Inkprint
Text printed on paper.

Instructional material
A general term referring to textbooks, multimedia, tests, forms, class handouts or other materials written and published primarily for use by students in postsecondary instruction.

Large Print
Inkprint or electronic text displayed at a size greater than or equal to 14 point.

Literary format
A particular method of formatting literary works and other general purpose texts in braille. In literary format without a running head, text appears on every line of the braille page. The braille page number appears in the rightmost cells of the first line, with at least three blank cells before the number.

Nemeth Code
Letters in the Nemeth Code are those of standard braille, but nearly every other cell has a different meaning than in standard English braille. Nemeth numbers for the digits 1-9, 0 are the letters a-i, j except that they are dropped one row. This number definition is possible because the letters a-j are all upper cells. In SEB most of these dropped cells are punctuation marks, so a blind person learning math must learn to interpret dropped cells as punctuation marks when reading text and as numbers when reading math.

OCR
The United States Department of Education, Office for Civil Rights. This is the federal entity charged with enforcement of civil rights, including the rights of persons with disabilities, in educational institutions.

Page layout
The arrangement of text and graphics on an inkprint or electronic page.

Proofread
Within the context of alternate media, proofreading might mean, in addition to checking for errors in spelling, correcting page formatting errors, formatting braille documents so they maintain critical content design elements, or listening to the audio content of a recorded book to assure that it remains faithful to the inkprint version.

Proprietary formats
Refers to text formatting, storage and retrieval methods often used by textbook publishers and printers. Examples include Quark Express, FrameMaker, PageMaker and PDF.

Recorded books
Also known as books on tape. Thousands of popular titles and textbooks are available through Recordings for the Blind and Dyslexic and other agencies.

Refreshable braille display
When used in conjunction with screen reading software, these devices provide the text content of a document, web page or other information displayed on the computer screen in "real-time" braille.

RFB&D
Recording for the Blind & Dyslexic was founded in 1948 to help blind and disabled veterans take full advantage of the GI Bill educational benefits. RFB&D is a volunteer organization whose sole purpose is to provide educational materials in recorded and computerized formats at every academic level. RFB&D materials are for all people unable to read standard print because of a visual, perceptual, or other physical disability.

RTF
RTF (Rich Text Format) is a file format that lets you exchange text files between different word processors in different operating systems. For example, you can create a file using Microsoft Word 97 in Windows 95, save it as an RTF file (it will have a ".rtf" file name suffix), and send it to someone who uses WordPerfect 6.0 on Windows 3.1 and they will be able to open the file and read it. (In some cases, the RTF capability may be built into the word processor. In others, a separate reader or writer may be required.).

Scanning
The process of imaging printed pages with a desktop or commercial scanner, using optical character recognition software to convert the scanned pages to text, correcting text misrecognition errors and reformatting as necessary to preserve the structural integrity of the document.

Screen reading software
Software used by persons who are blind or have learning disabilities to verbalize the text contents of the computer screen. Many screen reading programs are highly sophisticated and capable of reading very complex page formats and web pages.

Specialized formats
See proprietary formats.

Speech synthesis software
Software used with a computer's sound card to reproduce near-human sounding speech.

Speech synthesizer
Hardware/software used by speech synthesis software to produce near human sounding speech.

Structural integrity
Structural integrity' means all of the printed instructional material, including, but not limited to, the text of the material, sidebars, the table of contents, chapter headings and subheadings, footnotes, indexes, glossaries, and bibliographies. 'Structural integrity' need not include nontextual elements such as pictures, illustrations, graphs, or charts.

Tables
A text formatting protocol used to arrange information in rows and columns.

Tactile graphics
Graphic images produced as raised images. Such raised images may be produced by a device using heat and heat-sensitive paper. This enables high quality tactile graphics, suitable for blind and visually impaired people, to be made quickly and easily. Some tactile graphics can also be produced using a braille embosser.

Tapes
Refers to audio tapes of books or other materials read aloud by a human reader or by a speech synthesizer.

Textbook format
The format used for producing textbooks in braille. The major difference between braille textbook and braille literary formats in the main body of text is inkprint page indicators. Textbook format has them; literary format doesn't. For textbook format with no running head, text appears on every line.

Title 5
That portion of the *California Code of Regulations* governing the administration of education in the state of California. The regulations of the Board of Governors of the California Community Colleges appear in Division 6 of Title 5.

Transcription
To move the content of a document from one format to another as in transcribing the content of audio tape to text or from print to braille.

Web Pages
Documents formatted in one of several page layout or "mark up" languages including html, dhtml and xml.

Word processing formats
Refers to public and proprietary software systems used for embedding non-ASCII characters into a document for the purpose of formatting the appearance of information on the computer screen. Examples of word processing formats include Microsoft Word and WordPerfect.

Zip files

Zip files are "archives" used for distributing and storing files. Zip files contain one or more files. Usually the files "archived" in a Zip are compressed to save space. Zip files make it easy to group files and make transporting and copying these files faster.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ON IX
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, California 94102

ATTACHMENT 6

August 21, 2001

Thomas J. Nussbaum, Chancellor
Chancellor's Office
California Community Colleges
1102 Q Street
Sacramento, California 95814-6511

(In reply, please refer to Docket Number 09-97-6001.)

Dear Chancellor Nussbaum:

This letter signifies resolution of Docket Number 09-97-6001, a compliance review under Title II of the Americans with Disabilities Act of 1990 (Title II) and Section 504 of the Rehabilitation Act of 1973 (Section 504), in which OCR and the Chancellor's Office collaborated to address critical issues of first impression concerning access to print and technology by California Community Colleges students with visual disabilities. This document acknowledges the final progress report (May 29, 2001) to OCR from the Chancellor's Office, closes the above referenced case docket number, summarizes the history of this case, and specifies the actions chosen and implemented by the Chancellor's Office to resolve the issues presented in this statewide compliance review.

Introduction

The California Community Colleges constitute the world's largest community college system, with 107 colleges in 72 districts, enrolling 2.3 million students. During 1996 - 1999 the California Community Colleges system has been implementing the Telecommunications and Technology Infrastructure Program (TTIP).

Developed as a result of a 1996-1997 Strategic Telecommunications Plan through an U.S. Department of Commerce grant, the California Community Colleges TTIP is designed to be implemented in stages. The first stage of the TTIP, referred to as Technology I, was funded by the state for three years: 1996 - 1997 at $9.3 million, 1997 - 1998 at $18 million, and 1998-1999 at $28 million, respectively.

Technology I was successful in using technology to link 124 sites, including the Chancellor's Office. Technology I had a systemwide focus that linked the California Community Colleges campuses together in four major areas: (1) data and Internet access via connection to the 4CNet (the statewide network in partnership with the California State University (CSU) system), (2) video conferencing capabilities at each college and district site, (3) dual satellite down-link capability (analog and digital) for each college and district office, and (4) library automation and electronic information resources.

In this environment of rapid development of technology infrastructures in the California Community Colleges system, OCR initiated this compliance review, in part to ensure that students with visual impairments were provided access to these new technological opportunities. The results of this OCR review may be attributed to the work of many individuals from all components of the California Community Colleges system, who creatively explored how to solve the problems associated with effectively serving students with visual impairments in a mainstream educational environment that is highly visual, e.g., computer-based information and Internet research tools, as well as the traditional educational instructional materials such as printed books, written examinations, typed handouts, etc. When the problem-solving process began, the solutions to some of the most difficult questions were in many instances not yet identified.

Several factors played a part in the final outcome of this review. First, the California Community Colleges system was fortunate in already having a well-established statewide center with a high level of staff expertise dedicated to supporting community colleges in providing students with disabilities access to technology (known as the High Tech Center Training Unit or HTCTU). Second, at critical junctures in the resolution process of this case, the Chancellor's Office chose to break new ground. Third, adaptive technology was sufficiently developed as to realistically offer a cost effective, viable solution for the needs of the majority of students with visual impairments. Finally, prior to this compliance review, OCR and the Chancellor's Office had a longstanding history and practice of working in partnership to successfully resolve issues concerning civil rights matters.

In short, as a result of the talent and commitment evidenced throughout the California Community Colleges system, and in particular the willingness of the Chancellor's Office and its HTCTU to provide leadership and vision, this state post-secondary system not only exponentially increased print and technology access on its campuses, but the California Community Colleges system has gone on to become nationally recognized as setting the standards for post-secondary state

systems with regard to providing students with visual impairments access to print and computer-based information.

Some of the most important accomplishments occurring during the time period of this compliance review were (1) to establish statewide those best practices already being implemented at some individual community colleges, (2) to maximize the colleges impact as consumers by negotiating in unison with vendors of adaptive technology, (3) to make receipt of technology grants from the Chancellor's Office contingent on a showing by the grantee that technology purchased would be accessible, (4) to develop statewide access guidelines for Distance Education as well as the production of Braille/electronic text (which guidelines are now used as a model nationally), (5) to require, through passage of a state law, that publishers cooperate in providing printed textbooks in an electronic format to colleges in the California state post-secondary system (thus eliminating the onerous task of scanning hard copy paper), and (6) to centralize, in one center for 107 colleges, the task of producing Braille and electronic versions of printed books/materials.

Legal Framework

OCR is responsible for enforcing Section 504 and the Department implementing Regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit recipients of Federal financial assistance from the Department from discriminating on the basis of disability in programs and activities. OCR also has jurisdiction as a designated agency under Title II, and the implementing Regulation at 28 C.F.R. Part 35, which similarly requires equal educational opportunity with regard to disability in public educational institutions, including public colleges and universities. Since the Chancellor's Office and California Community Colleges receive Federal financial assistance through the Department, as public educational institutions they are subject to OCR jurisdiction under both Section 504 and Title II, and the implementing Regulations.

This compliance review examined whether students with visual impairments, particularly blind students, were accorded an equal educational opportunity by California Community Colleges, or whether they were being discriminated against on the basis of their disability [34 C.F.R. § 104.4(a); 28 C.F.R. § 35.130]. The courts have held that a public entity violates its obligations under the Americans with Disabilities Act when it simply responds to individual requests for accommodation on an ad-hoc basis. A public entity has an affirmative duty to establish a comprehensive policy in compliance with Title II in advance of any request for auxiliary aids or services. In particular, OCR considered the effect of the Chancellor's Office "methods of administration" on the ability of the California

Community Colleges educational program to accomplish their objectives with respect to students with visual impairments [34 C.F.R. § 104.4(b)(4)].

Title II of the Americans with Disabilities Act (Title II) requires a public college to take appropriate steps to ensure that communications with persons with disabilities "are as effective as communications with others" [28 C.F.R. § 35.160(a)]. OCR has repeatedly held that the term "communication" in this context means the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources of the Internet. Title II further states that, in determining what type of auxiliary aid and service is necessary, a public college shall give primary consideration to the requests of the individual with a disability [28 C.F.R. § 35.160(b)(2)].

In construing the conditions under which communication is "as effective as" that provided to nondisabled persons, on several occasions OCR has held that the three basic components of effectiveness are timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.

Survey/Self-Evaluation

On September 18, 1996, the Chancellor's Office distributed to all colleges a survey/self-evaluation prepared by OCR to assess the extent to which colleges were prepared to provide access to print and electronic information to students with visual impairments. OCR obtained a 100 percent response rate to the survey/self-evaluation - in other words, every California Community College completed and returned the survey/self-evaluation to OCR. During 1997 the results of this survey were compiled and analyzed by researchers Jamie Dote-Kwan (California State University at Los Angeles) and Jeff Senge (California State University at Fullerton), culminating in an "Analysis and Final Report of the California Community Colleges Survey and Self-Evaluation: Information Access for Students with Visual Impairments" (approximately 50 pages) received by OCR on May 11, 1998.

OCR Onsite Visits

On March 26, 1997, OCR met with the Chancellor, the General Counsel, and other Chancellor's Office staff, to notify them that OCR was beginning onsite visits to college campuses. During Spring 1997 OCR conducted fifteen onsite visits to

California Community Colleges throughout the state,[1] with the goal of completing at least one onsite in each of the ten regions. In general, each onsite consisted of six components:

First, at the High Tech Centers in the Disabled Student Program and Services (DSPS) Offices, OCR observed demonstrations of adaptive technology for the visually impaired. OCR also spoke with DSS staff regarding the availability of alternative format for printed materials such as textbooks, examinations, class handbooks, and campus publications.

Second, OCR visited outlying computer labs used by nondisabled students, both within departments (e.g., education, mathematics, business) and general "open" labs used by students to prepare course assignments. The purpose of visiting department labs and open labs was to determine the degree to which such mainstream computer labs are prepared to integrate blind students by providing adaptive technology, or whether the only means of accommodating blind students wanting access to computers is to refer them to the High Tech Center operated by the DSPS Office.

Third, on campuses that had already developed a system for promoting campuswide standardization of computer technology, OCR discussed the cost effectiveness of the campus' master technology committee/administrator addressing the issue of accessibility as early as possible when purchasing computer technology.

Fourth, at the campus library OCR shared resources available to librarians seeking to ensure accessibility to blind and low vision patrons, and inquired about the manner in which books, as well as newly computerized information such as card catalogues and CD ROM resources, were being made accessible.

Fifth, with respect to distance learning and computer networks, such as the campus LAN and the Internet, OCR spoke with pertinent campus

[1] Those colleges were Region II Sacramento City College (February 7), Region III Diablo Valley College (May 14), Contra Costa College (May 14), City College of San Francisco (May 22), Santa Rosa Junior College (June 24), Region IV San Jose City College (March 11), DeAnza College (March 11), Region V San Joaquin Delta College (May 13), Region VI Santa Monica College (April 17), Santa Barbara City College (April 21), Region VII Los Angeles City College (March 17), El Camino College (March 18), Region VIII Saddleback College (April 16), Region X San Diego City College (May 6), Palomar College (May 7). OCR also met with the President of Ventura College on October 16, 1997 to hear about its plans to establish a Braille Transcription Center.

administrators and technicians to determine what adaptive technology was being used to provide access for the visually impaired.

Sixth, at almost every campus OCR spoke directly with blind students regarding their experiences in accessing computer-based information and printed materials.

OCR Summary Report

On January 22, 1998, OCR issued its Summary Report based on the survey/self-evaluation results as analyzed in the Dote-Kwan/Senge Preliminary Report, information obtained during the OCR onsite visits, and several other sources of data collected by the California Community Colleges. The Report's conclusions included the following:

- Access to technology is recognized by California Community Colleges as a high priority for its students. Yet despite rapidly expanding technology opportunities for sighted students, students with visual impairments faced overwhelming barriers to such access.

- It is extremely expensive for community colleges to meet their legal obligations to provide communications as effective as those provided to nondisabled students when each college attempts to individually serve a handful of students whose disability requires print and computer-based information to be translated into an alternative medium. Consequently, students with visual impairments, particularly blind students, who are scattered throughout the community college system, are drastically underserved by Disabled Student Programs and Services (DSPS) Offices whose budgets are stretched thin.

- Braille proficient students are under-identified by colleges, the majority of whom are not prepared to provide timely Braille translations for examinations and classroom handouts, much less textbooks.

- Adaptive technology to eliminate most barriers facing students with visual impairments is on the market. However, use of adaptive technology requires an upfront capital outlay and specialized staff training not yet available. In many situations adaptive technology not only removes barriers to information/technology in ways personal readers do not, but in many cases adaptive technology offers long term savings over labor-intensive methods of accommodation. For

example, once translated into the proper electronic digital text, information can be cost-effectively output into a variety of alternative formats (e.g., synthesized speech, Braille, screen magnification) that will benefit not only under-served students with visual impairments but students with other types of disabilities (e.g., learning disabilities, acquired brain injury, etc.)

- Acquisition of technology and expansion into distance education, including the Internet, is occurring at an explosive rate among California Community Colleges. Failure at this time to take into account the needs of students with visual impairments will foreseeably result in substantial investment to inaccessible products and program structures, thus unnecessarily raising the subsequent cost of accommodating students with visual impairments, and in some cases precluding such accommodation altogether.

- Present methods of administration by the Chancellor's Office are failing to effectively respond to the above.

Voluntary Resolution

By letter dated January 22, 1998, OCR provided the Chancellor's Office with copies of the Summary Report and suggested nine strategies as one method for addressing OCR areas of concern. Those nine strategies were 1) undertake a systemwide cost-effective approach to purchasing adaptive technology, 2) expand the purposes and resources of the state's DeAnza High Tech Center Training Unit to enable the Center to provide adaptive technology training more closely aligned with the current needs of the community colleges, 3) develop Access Guidelines for Distance Learning and Campus Webpages, 4) ask those receiving technology grants from the Chancellor's Office to ensure that technology purchased with those funds be accessible to persons with disabilities, 5) adopt a systemwide approach to translating printed materials into electronic text/Braille, e.g., an Alternative Format Center, 6) establish a central registry of textbooks already translated into alternative format, such as Braille, so that a textbook translated for a student at one college may be re-used by students at other colleges, 7) make a concerted effort to alert community college libraries to their print/computer access responsibilities, and to acquaint them with resources available to assist in better serving patrons with disabilities, 8) incorporate print and computer-based information access as a component of the Chancellor's Office (Vocational and Educational Services) annual reviews of the DSPS offices, and 9) conduct a follow-

up survey after implementing such strategies to evaluate their impact on the colleges delivery of services to students with visual impairments.

OCR staff met with the Chancellor and his staff on April 20, 1998, in Sacramento, California. On September 10, 1998, the General Counsel of the Chancellor's Office provided OCR written assurance that the Chancellor's Office had either already started to implement the preceding strategies, or that it intended to implement such strategies within the next two to three years.

By letter dated October 1, 1998, OCR communicated to the Chancellor that the General Counsel's September 10, 1998 written assurance, coupled with the Chancellor's Memorandum to Chief Executive Officers of the colleges and districts dated June 12, 1998, was sufficient to establish a basis for voluntary resolution of issues raised in OCR statewide compliance review. The Chancellor was informed that in the next year OCR would look for progress reports by January 30 and June 30, 1999. Thus, on October 1, 1998, OCR closed the investigative stage of the compliance review, and began monitoring the Chancellor's Office implementation of its strategies to assist community colleges in their responsibilities to provide students with visual impairments access to print and computer-based information.

Progress Reports

On March 9, 1999, and September 8, 1999, the Chancellor's Office submitted progress reports to OCR. By letter dated February 24, 2000, OCR commended the Chancellor's Office for four accomplishments in particular:

1) the development of the Long Distance Education Access Guidelines (which is now used nationally by other colleges and universities as a model),
2) the key role played by the Chancellor's Office in actively participating in the negotiations between the publishers' legislative advocate, author's office and the sponsoring organization surrounding Assembly Bill 422, which requires publishers of instructional materials, such as textbooks, to provide their product in alternative format upon request,
3) the progress made toward negotiating several cooperative purchasing agreements (both for adaptive technology and for accessible mainstream software such as MicroSoft), and finally
4) the progress made toward developing a statewide Alternate Text Production Center to handle the more complex requests for production of Braille and other alternate format materials.

On May 29, 2001, OCR received the Chancellor's Office Final Progress Report. The progress reports received by OCR on March 9, 1999, September 8, 1999, and May 29, 2001, show that the following activities have been completed:

Cost Effective Approach to Technology Acquisition

Cooperative Purchasing Agreements

The Foundation for California Community Colleges (FCCC) has, as part of its Higher Education Cooperative Purchase Consortium, negotiated favorable agreements with a number of vendors that provide assistive technology and services. In addition, the Chancellor's Office succeeded in obtaining a substantial augmentation in the 2000-20001 budget for the Disabled Students Programs and Services (DSPS) to provide funding for implementation of some of the programs discussed herein. One part of this augmentation provided approximately $600,000 to allow each college to purchase equipment and software necessary to establish a braille production capacity at the local level. From July 2000 to the present, the FCCC has concentrated on developing and administering a cooperative purchase package for this braille production equipment.

Specifically, the FCCC, working with the Chancellor's Office and the high Tech Training Center Unity (HTCTU), solicited bids and negotiated a standardized braille production package consisting of an Index Basic-D Braille Embosser, a scanner, optical character recognition software, and the Duxbury Braille translation program. To date, this package has been purchased by ninety-two (92) of the colleges at a considerable savings compared to retail prices. The standardization of this braille production package will allow for technical support and training to be provided in colleges through the HTCTU. It will also allow the statewide Alternate Text production Center (see below) to prepare and send electronic files in a standardized format to permit quick onsite embossing of shorter braille documents.

Moreover, the FCCC has also established agreements with vendors to provide colleges with resources to caption distance education and audiovisual materials. These agreements provide competitive fee rates and pricing structures that allow colleges to meet their obligation to ensure such media is accessible to persons who are deaf or hearing impaired.

Finally, the FCCC provides an online orientation covering accessibility issues for vendors participating in the High Education Cooperative Purchase Consortium [see http://www.foundationccc.org/documents/dOrientation10-2000.doc].

Access Provisions Included in Vendor Contracts

In an effort to ensure that the goods and services provided under the Higher Education Cooperative Purchase Consortium Program are accessible or can be made accessible to individuals with disabilities, all vendor agreements through the Higher Education Cooperative Purchase Consortium Program currently include the following provision:

> Both Vendor and Customer are committed to making the offered products and services as accessible to disabled and Americans with Disabilities Act (ADA) compliant as possible. To this end the Customer will provide at no cost to the Vendor a five-day training program at the High Tech Center Training Unit (HTCTU) De Anza Community College, Cupertino, CA. The Vendor agrees to send appropriate personnel to receive this special training program.

As a result of further discussions between the Chancellor's Office and the FCCC, the FCCC has agreed to add the following language to all of its new agreements:

> Vendor hereby warrants that the products or services to be made available under this agreement fully comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d) and its implementing regulations set forth at 36 Code of Federal Regulations, part 1194. Vendor agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services which is brought to its attention. Vendor further agrees to indemnify and hold harmless the Foundation for the California Community Colleges, the Chancellor's Office of the California Community Colleges, and any California community college purchasing the vendor's products or services from any claim arising out of its failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a breach and be grounds for termination of this agreement.

Finally, the Chancellor's Office has recommended that FCCC contact each of its current vendors and give them a deadline by which they will be expected to provide written assurances that their products meet the new requirements. The FCCC could then exercise its right to cancel any agreement with a vendor which fails to make appropriate changes in its products.

Vendor Negotiations

The FCCC has continued to work specifically with Microsoft to discuss the need for built-in accessibility features (particularly for their database application entitled Access). The FCCC has had a number of ongoing discussions with Microsoft, but did not feel that formal correspondence would contribute toward future progress in

this area. Instead, Microsoft has committed to continue the dialogue between the two entities as they work towards complete accessibility of their products. Representatives from both the FCCC and Microsoft have agreed that incorporating accessibility into new product development will add value to the process, and result in a more usable product.

Microsoft has stated that it is committed to accessible technology for everyone, and has launched a website (www.microsoft.com/enable/) that provides accessibility information for users, and allows users to contact specially trained staff to discuss accessibility solutions. The customer service support personnel at Microsoft are available by telephone to respond to inquiries regarding accessibility at 1 800 426-9400 or TTY 1 800 892-5234.

Adaptive Technology Training

As described in its website at http://www.htctu.fhda.edu, the High Tech Center Training Unit (HTCTU) of the California Community Colleges is a state-of-the-art training and support facility for community college faculty wishing to acquire or improve teaching skills, methodologies, and pedagogy in Assistive and Instructional Computer Technology. The Center supports Assistive Computer Technology programs at one-hundred fourteen California community colleges. More than seven thousand students with disabilities are currently enrolled in High Tech Center programs state-wide.

Now entering its twelfth year of operation, the High Tech Center Training Unit carries out extensive research, testing and evaluation of new and emerging technologies of potential benefit to persons with disabilities. The Center's findings are made available through a series of continuously evolving trainings and workshops attended each year by hundreds of California community college faculty.

HTCTU Library Access Training
The HTCTU developed and delivered thirteen (13) training workshops geared specifically towards librarians and library staff (see below, Library Access, for description).

HTCTU California Virtual College (CVC) Training
The HTCTU conducted a comprehensive survey of each California Virtual College (CVC) site in order to determine the present level of knowledge and expertise about accessible design and future training needs. Faculty and staff at the CVC centers are incorporating accessibility for students with disabilities in the design and

delivery of curriculum, web pages, and other instructional materials. CVC staff are also beginning to incorporate universal access design concepts to ensure accessible electronic media for online distance education. The HTCTU will soon be in a position to expand its training for CVC staff and its efforts to work with the CVC centers. Part of the budget augmentation for fiscal year 2000-2001 increased funding for the HTCTU and a new full-time Instructor/Specialist was recently hired to support the development of accessible web-based instructional resources. The Chancellor's Office has also taken steps to supplement the training available to CVC staff by providing a one-time augmentation of approximately $150,000 to the Professional Development Center to contract with outside trainers recommended by HTCTU. (see below, Distance Education, for further description of CVC accessibility activities)

Distance Education and Campus Web Pages

Distance Education Access Guidelines

The Chancellor's Office established a Distance Education Accessibility Work Group to develop comprehensive guidelines on making distance education accessible for students with disabilities. The work group, in consultation with the HTCTU. developed a comprehensive technical assistance publication entitled Distance Education: Access Guidelines for Students with Disabilities. Posted at the HTCTU website at http://www.htctu.fhda.edu, these guidelines contain the basic requirements for providing access for students with various disabilities, including visual impairments. These guidelines also identify specific access modes for the delivery of distance education instruction. It should be noted that the Distance Education Access Guidelines were finalized after being reviewed by a variety of groups within the California Community Colleges system including the Academic Senate Committee, DSPS Regional Coordinators, and the High Tech Center Training Unit (HTCTU) Advisory Committee. To OCR knowledge this was the first distance education access standards adopted by a statewide educational system. These guidelines are now being used around the nation as a model for post-secondary institutions seeking to set standards to ensure that students with disabilities have access to distance education programs.

California Virtual College (CVC) - Distance Education Resource Centers

The Chancellor's Office, System Advancement and Resource Development Division, has awarded grants to fund four regional centers, known as California Virtual Colleges (CVC), to increase delivery of curriculum through distance learning conducted online. The grants require the staff at the four centers to, among other things, provide technical assistance and support for colleges and individual faculty members about how to make distance education courses accessible to students

with disabilities. In particular, the staff at these centers will assist colleges with respect to providing access to Web pages and other computer-based instruction for blind students, the captioning of auditory information for students with hearing impairments and the provision of the accommodation of test proctoring in off-site locations.

The four CVC regional centers are located in the Greater Bay Area (Foothill-DeAnza Community College District-DeAnza College), Greater Los Angeles Region (Rio Hondo College, in collaboration with Pasadena City College, Long Beach City College, and College of the Canyons), Southern Los Angeles, Orange and San Diego Counties (Coastline Community College, in cooperation with San Diego Community College District), and Allan Hancock, Butte, Merced, and Victor Valley Colleges (Cerro Coso, in partnership with the Los Rios Community College District).

In addition to the above grants, the Chancellor's Office awarded an additional grant to support the development and dissemination of distance education standards, training resources and exemplary practices among distance educators. A major component of the grant was the exchange of research information and resources as well as consultation and technical assistance on accessibility requirements for students with disabilities. The grant was awarded to El Camino Community College District, El Camino College in partnership with Santa Monica College, Santa Rosa Junior College, the four California Virtual College (CVC) Regional Centers, @ONE, and other related programs and organizations.

Finally, the Chancellor's Office awarded a grant to provide training, technical support, and online resources associated with the creation of accessible video and Web based education. The grant provides $300,000 over a two-year period to the Foothill-DeAnza Community College District to be carried out by the HTCTU, which is located at DeAnza College. Through this grant CCC staff and faculty as well as CVC regional center staff will have access to highly specialized trainings (see description of Adaptive Technology trainings, above), guidelines, technologies, and techniques used for creating accessible distance education resources for students with disabilities.

Linking Technology Grants to Grantee College's Accessibility

At this time, California's primary support for technology procurement by colleges is provided through the Telecommunications and Technology Infrastructure Program (TTIP) funding for 2000-2001which is distributed through an allocation formula. Districts receiving TTIP funding for 2000- 2001 will be reporting in the next few months on how they have used their funding to provide access for students with

disabilities to the technology resources supported with state funding. Districts will specifically be asked to indicate the extent to which accessible computer workstations are currently available to students with disabilities. Beginning in 2001-2002, districts will be required to explicitly discuss how they will address accessibility issues in the plan or certification document they must submit prior to receiving their allocation of TTIP funds.

In addition, the Chancellor's Office provides funding for the acquisition of technology through a variety of grants. All grants currently contain a provision requiring that software or hardware purchased with grant funds be accessible or that appropriate adaptive equipment is obtained in order to provide access when needed. That provision included in grants reads as follows:

> By signing this agreement, Grantee assures the state that it complies with the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C.12101 et seq.), which prohibits discrimination on the basis of disability, as well as all applicable regulations and guidelines issued pursuant to the ADA. Grantee shall, upon request by any person, make any materials produced with grant funds available in braille, large print, electronic text, or other appropriate alternate format. Grantee shall establish policies and procedures to respond to such requests in a timely manner. All data-processing, telecommunications, and/or electronic and information technology (including software, equipment, or other resources) developed, procured maintained or used under this grant, whether purchased, leased or provided under some other arrangement, shall comply with the regulations implementing Section 508 of the Rehabilitation Act of 1973, as amended, set forth at 36 C.F.R. 1194. Design of computer or web-based instructional materials shall conform to guidelines of the Web Access Initiative (see http://www.w3.org/WAI/GL/WD-WAI-HAG) or similar guidelines developed by the Chancellor's Office.

Printed Materials Provided in Electronic Text/Braille

Alternate Text Production Center (ATPC)

In addressing the needs of colleges to provide printed materials in alternate media, the Chancellor's Office decided upon a two-pronged approach. The Chancellor's Office concluded that colleges should have the capacity to produce some braille materials on-campus. This was considered to be particularly important in dealing with class handouts and documents with a short useful lifetime. However, producing textbooks and other long or more complex materials was felt to require a level of expertise and staffing which could not be cost-effectively duplicated at every campus. Thus, the Chancellor's Office also decided to establish a statewide

Alternate Text Production Center (ATPC) which will serve all California community colleges. The ATPC will obtain electronic text from publishers or produce it using scanning technology, provide electronic text to colleges for direct use by students, produce materials in braille or large print, and/or send formatted files to colleges for production of braille materials onsite.

In April 2000, the Chancellor's Office issued interim guidelines ("Guidelines for Producing Instructional and Other Printed Materials in Alternate media for Persons with Disabilities") to assist colleges in handling request for production of materials in alternate media (those guidelines are posed at the HTCTU website at http://www.htctu.fhda.edu).

In October 2000, the Chancellor's Office released a Request for Application (RFA) to establish the ATPC. By telephone on June 22, 2001, the General Counsel for the Chancellor's Office informed OCR that Ventura Community College would serve as the ATPC for both Braille production and e-text conversion. It was anticipated that the grant would be awarded and the project underway during Summer 2001. The Chancellor's Office is requiring that the ATPC establish mechanisms for providing services to other colleges and universities on a contractual fee-for-service basis.

Standardized Assessment Instruments in Alternate Media

The Seymour-Campbell Matriculation Act of 1986 (Cal. Ed. Code 78210 et seq.) establishes a system of assessment testing and counseling for all community college students. The matriculation regulations adopted by the Board of Governors (Cal.Code Regs., tit. 5, 55500 et seq.) have for years required colleges to ensure that their assessment tests are made accessible for students with disabilities, but in 1999 the Chancellor's Office Matriculation Advisory Committee voted to require that publishers of commercially produced tests be required to make their tests available in alternate media on request. This requirement was incorporated into the new standards for approval of assessment tests issued in February 2001. The list of instruments approved by the Chancellor's Office is being revised based on these new standards, and publishers will be asked to affirmatively certify that they are in compliance with this requirement. Such certifications have not yet been received by the Chancellor's Office. In addition, the Chancellor's Office is surveying all colleges to ascertain whether publishers have supplied testing materials in alternate media when requested to do so. The Chancellor's Office has indicated that it will contact any publisher who is reported by colleges as not appropriately responding to requests for alternate media.

State Law (AB 422) Requiring Textbook Publishers to Provide Alternate Media
On September 15. 1999, California Governor Gray David signed into law Assembly Bill 422 (Steinberg) which requires publishers of instructional material to provide the material at no cost in an electronic format for use by students with disabilities at the University of California, California State University, and California Community Colleges. This law became effective January 1, 2000. Information to colleges regarding how to implement AB 422 was included in the "Guidelines for Producing Instructional and Other Printed Materials in Alternate Media for Persons with Disabilities" released by the Chancellor's Office in April 2000.

Following a request from Assemblyman Steinberg's Office for a progress report on the implementation of AB 422 within the California Community College system, twelve colleges voluntarily provided information that was used by the Chancellor's Office in February 2001 to respond. Thereafter, on April 11, 2001, a meeting was convened by Assemblyman Steinberg on April 11, 2001, to discuss strategies for implementation of AB 422. Those attending the meeting included representatives from the publishing industry and from all three of the systemwide offices for the systems of public post-secondary education. One outcome of the meeting was the establishment by the Chancellor's Office of a Listserv to provide a means by which those serving students with disabilities in all three segments can communicate and exchange information about the implementation of AB 422. The industry representatives also identified a person with each major publisher who would serve as a single point of contact for requests under AB 422.

Finally, on a national level OCR notes that in a meeting on June 27, 2001, the Association of American Publishers reached a final agreement on the text of proposed national legislation entitled the Instructional Materials Accessibility Act of 2001. Participants at the meeting included the American Foundation for the Blind (AFB), National Federation of the Blind, American Council of the Blind, and the Association for Education and Rehabilitation of the Blind and Visually Impaired, Recording for the Blind & Dyslexic, American Printing House for the Blind, the Texas Education Agency, and other constituencies of the AFB Solutions Forum. These organizations intend to work together to develop the necessary strategies to get the bill introduced, passed and signed into law.

Central Registry of Textbooks in Alternate Format

In the Chancellor's March 13, 1998 progress report to OCR, it agreed that a centralized registry of textbooks available in alternate format would be a significant resource to the colleges. Accordingly, the HTCTU staff developed a Web page where colleges may list books which have been produced in alternate media. DSPS

staff, librarians, and ADA coordinators can send email requests and obtain books which have been produced in alternative formats by other colleges. The registry can be accessed at http://htcoff1.htctu.fhda.edu/tango/bookex/bookex.html

Library Access

HTCTU Training for Libraries

The HTCTU developed and delivered thirteen (13) training workshops entitled "Assistive Computer Technology for Library Access" between July 1998 and March 2001. Literature announcing these training opportunities was targeted to librarians and library staff. The "Assistive Computer Technology for Library Access" training focused on key concepts related to internet-based library automation systems, access issues, basic capabilities using selected assistive computer technologies, and evaluation measures for determining the accessibility of web interfaces provided by different electronic library databases.

These two-day training courses provided Librarians and Library staff with hands-on experience in the use of assistive computer technologies typically found in the library setting. A total of ninety-three (93) participants attended the training. Of these participants, twenty-nine (29) individuals attending the training were librarians and/or library staff. The total training participants represented fifty-nine (59) of the one hundred and eight (108) California Community Colleges. The HTCTU is in the process of hiring new staff and, once this process is complete, expects to offer additional training for librarians and library staff.

During the Summer 2000 term, the HTCTU conducted a survey of eighteen (18) training participants representing California Community College Libraries. The purpose of the survey was to determine the present availability of assistive technologies and the perceived training and support needs of Librarians. Although the response rate from the survey was not sufficient to produce any valid findings, the information that was collected led to the creation of an audiovisual (VCR format video) resource intended to provide Librarians with basic information about assistive computer technology. The audiovisual resource material will be compiled and released during the Summer 2001 term. Librarians and/or Library staff that were unable to attend the training at the HTCTU may view the audiovisual material, and contact the HTCTU for additional assistance.

At the onsite of the training workshops, the HTCTU established a Listserv for Librarians interested in discussing issues related to the installation and a maintenance of assistive computer technologies in library settings. This Listserv provided a forum for follow-up communication and technical support among

professionals interested in assistive computer technologies, strategies, and solutions in the Library setting.

In addition, Peggy Tate, a Specialist in the DSPS Unit in the Chancellor's Office made two presentations on access for students in the library setting. These presentations were: October 4, 2000 - Annual Library Deans and Directors Training (Sacramento, CA), DSPS Update, and November 9, 2000 - Library and Learning Resources Second Friday: Stay at Work Conference Series (Sacramento, CA) DSPS Update.

Funding Request for Library Access

The HTCTU, in cooperation with the Chancellor's Office, and Librarians throughout the State, formulated a comprehensive hardware and software list of assistive computer technologies needed in libraries and an associated budget for the statewide costs of these systems. The plan calls for spending approximately $11 million to provide three accessible workstations (one for the blind and visually impaired, one for the learning disabled, and one for those with limited manual dexterity) in each college library. This information was incorporated in the Budget Change Proposal requesting funding for the Technology II Strategic Plan, which Plan (requesting a total of $94 million in State funding) was not included in the Governor's proposed budget for 2001-2002. However, the Chancellor's Office and other groups within the community college system continue to advocate for its funding through the legislative budget process. If the Tech II Plan is not funded for 2001-2002, the Chancellor's Office believes that it is likely that funding will be sought again in future years and that the Tech II Plan will ultimately be funded in some form.

Annual DSPS Reviews

The Chancellor's Office has developed a checklist which is used by the review teams conducting Disabled Students Programs and Services (DSPS) program reviews to ensure that they address information access issues for students with visual impairments. In addition, the Chancellor's Office is also using this same checklist when its contractor conducts civil rights reviews of vocational education programs at the colleges.

Follow-Up Survey of Colleges

Once the Alternate Text Production Center is fully operational for the 2002-2003 academic year, the Chancellor's Office intends to conduct a survey of the California Community Colleges to determine the impact the activities of the Chancellor's

Office have had on enhancing the abilities of the colleges in providing students with visual impairment access to print and computer-based information. This follow-up survey will document improvement in delivery of services and provide a comparison to the results of the original OCR survey conducted five years ago at the beginning of this OCR compliance review.

In closing the OCR monitoring stage of this compliance review, OCR wishes to thank the numerous individuals whose hard work and commitment to access have contributed so significantly to the accomplishments of the Chancellor's Office described herein. In particular, Vice-Chancellor/General Counsel Ralph Black and HTCTU Director Carl Brown, along with consultant and Assistive Technology Specialist Laurie Vasquez from Santa Barbara City College, have demonstrated initiative and leadership that has enabled the California Community Colleges to acquire a national reputation as a model and resource for other post-secondary educational institutions who are seeking to strategically and effectively serve a component of the student community that has been historically difficult to provide equal educational opportunity.

If you have any questions, please contact either Paul D. Grossman (415) 556-4275 or Sarah Hawthorne at (415) 556-4158.

Sincerely,

Stefan M. Rosenzweig
Director
San Francisco Enforcement Office
Western Division

cc: Ralph Black, Vice-Chancellor
General Counsel, Chancellor's Office
California Community Colleges

Original List Date: 6/18/2003
Last Updated: 4/26/2007
List Print Date: 05/06/2008
Claim Number: 02-TC-22
Issue: Disabled Student Programs and Services

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Ms. Beth Hunter Centration, Inc. 8570 Utica Avenue, Suite 100 Rancho Cucamonga, CA 91730	Tel: (866) 481-2621 Fax: (866) 481-2682
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ITEM 3
(02-TC-22)
Disabled Student Programs and Services
Vol. 2 0F 2

EXHIBIT H

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Mandate Reimbursement Services

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June 24, 2008

RECEIVED
JUN 25 2008
COMMISSION ON
STATE MANDATES

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 02-TC-22
West Kern Community College District
Disabled Student Programs and Services

Dear Ms. Higashi:

I have received the Draft Staff Analysis dated May 6, 2008, for the above referenced test claim, to which I now respond on behalf of the test claimant.

The DSA (page 2) concludes that:

> "[F]or the statutory and regulatory DSPS program there is an underlying federal mandate imposed directly on the community colleges and the state has set up an optional program for the community colleges to receive additional funding to meet those requirements. The state's offer of financial assistance to community college districts to meet such requirements does not impose a state-mandated program."

The conclusions are misleading. There is an underlying federal mandate, but the state statutes and regulations exceed the federal mandate. The "optional program" for the colleges to "receive additional funding" to comply with the federal requirements is not optional because it is the only source of substantial state funds to implement the federal and state requirements. The funding is not an "offer" of financial assistance for an optional program. The state has created its own DSPS program that includes both federal mandates and state mandates. The DSPS funding cannot be characterized as new money for voluntary implementation of a voluntary state program when it is the

only source of funding to implement the underlying federal mandate which the state chose to impose on the college districts.

PART A. PROVIDING DSPS SERVICES

1. The Rehabilitation Act of 1973 imposes a federal mandate on the states that California has elected to increase and to impose on the community college districts.

The DSA (14) asserts that Section 504 of Rehabilitation Act of 1973 is an underlying federal mandate imposed directly on community college districts. The DSA (19) cites Hayes for this conclusion:

> "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no 'true choice' in the manner of implementation of the federal mandate."

The relevant holding from *Hayes* is more specific:

> "This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state . . . Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. . . . If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.
>
> The Education of the Handicapped Act . . . leaves primary responsibility for implementation to the state. . . . In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention."

Hayes remanded the issue of excess K-12 special education state requirements to the Commission. The Commission made the court-ordered evaluation to distinguish the

program activities that are federal activities the state has decided to redirect to the college districts without subvention of funds from the state activities imposed on the school districts that are in excess of the federal special education requirements. The Commission must make the same *Hayes* analysis in this test claim because the Commission asserts a pre-existing and underlying federal mandate.

Although 29 U.S.C.A. § 794 does prohibit discrimination by postsecondary and vocational education programs receiving federal funds, it must be viewed and interpreted within the larger context of the Rehabilitation Act of 1973. 29 U.S.C.A. § 721 requires the *states* to develop and enact a *state plan* that implements the Act's substantive requirements, and specifies that the states are ultimately responsible for reporting and compliance. 29 U.S.C.A. § 714 states: "The application of any State rule or policy relating to the administration or operation of programs funded by this chapter [29 U.S.C.A. § 701 et seq.] (including any rule or policy based on State interpretation of any Federal law, regulation, or guideline) shall be identified as a State imposed requirement."

The same rationale applies to the *Lucia Mar* program-shift issue. In *Lucia Mar*, the California Supreme Court found that Article XIII B, Section 6 was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services. The DSA (16,17) asserts that there is no *Lucia Mar* shift because the colleges "have a preexisting and continuing duty" to provide these services. The Department of Rehabilitation is a state agency. Education Code Section 67300 shifts financial responsibility for the services to disabled students from this state agency to community college districts, therefore, it calls for those districts to support a "new program" within the meaning of Section 6. Assuming to the contrary that the DSA assertion is correct, the DSA does not compare or quantify the scope of the "pre-existing" federally-compelled duties with the actual responsibilities shifted from the state Department of Rehabilitation to the college districts and whether the DSPS funds cover these excess costs.

2. The American's with Disabilities Act of 1990 imposes a general "civil rights" federal mandate on public and private entities with nondiscrimination and accessibility requirements similar to the Rehabilitation Act of 1973, which has been made more specific by the State of California.

The DSA (9, 18, 19) asserts that the American's with Disabilities Act of 1990 is a federal mandate, without regard to the receipt of federal funding, upon the colleges not to discriminate and to provide reasonable accessibility independent of the Rehabilitation Act of 1973, and that these duties are not reimbursable pursuant to *County of Los Angeles*. The DSPS program places the colleges in the same situation as school districts implementing the "voluntary" integration programs that were the subject of the *Long Beach* case (225 Cal.App.3d 155). In *Long Beach*, the State asserted that

various executive orders did not mandate a higher lever of service or a new program because "school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools." The court concurred that there was an existing duty to alleviate racial segregation and the executive orders were not new programs, but they were a higher level of service because the requirements of the executive orders "go beyond constitutional and case law requirements." Further, that "[w]here courts have *suggested* that certain steps and approaches may be helpful, the Executive order and guidelines *require* specific actions."

While the colleges may have a federal responsibility under the ADA to prevent discrimination and promote accessibility, this responsibility is made specific by the statutes and regulations of the state DSPS program. Therefore, the Commission analysis is incomplete. The Commission needs to determine which Education Code and Title 5 sections are restatements of the federal mandate and which are in excess of the federal mandate.

3. The DSPS program is not truly voluntary because the DSPS funding is essential for the colleges to comply with the Rehabilitation Act of 1973 and to prevent funding encroachment on other college programs.

The DSA (21) concludes that "[t]he plain language of Education Code section 84850 and California Code of Regulations, title 5, section 56000 express that compliance with the DSPS rules and regulations is as a condition of receiving state DSPS funding." The test claimants assert that the colleges are practically compelled to take the funds, and therefore, to implement the state mandates. In order for colleges to utilize the DSPS funding to implement the federal mandate, the colleges must implement state requirements in excess of the federal requirements.

The DSA (22-24) asserts that the *Kern* decision supports the conclusion that the DSPS activities are voluntary unless the college accepts the program funds. The DSA misconstrues the *Kern* school site councils case. In *Kern*, the court concluded that the new state open meeting requirements were just "downstream" (*City of Merced*) requirements that result from the school district's initial choice to participate in the grant program. The school districts could have terminated their participation in the grant programs in order to avoid compliance with the new state open meeting rules, albeit a somewhat drastic action. Thus, there was an avoidable economic penalty. Here, the colleges did not choose to implement the Rehabilitation Act federal mandate, nor can the colleges discontinue implementing the Act, whether the state funds the implementation or not.

The state has recognized for more than thirty years that the special education program encroaches on other college programs. The DSA (4, 5) cited the historical commitment (since Statutes of 1971, Chapter 1619, now found in Education Code section 84850) of the state to fund "the excess cost of providing special facilities, special education

material, educational assistance, mobility assistance, and transportation for handicapped students." This funding was (since Statutes of 1972, Chapter 1123) conditioned upon a certification by the college "that it has made every reasonable effort to secure federal funds or other state funds for the purpose, and has been unable to secure sufficient funds." These funds prevented the cost of providing special education to college students from encroaching on funds to provide all other college programs.

The DSPS funding provided in annual state budget acts ($111,084,597 for FY 2007-08) is an appropriation to the college districts based upon an allocation formula and not on actual costs. In addition, as a matter of law (Title 5, Section 56060), the DSPS program funds only "direct excess costs" of the program (as defined in Section 56064) and intentionally does not fund other related (e.g., "administrative") costs. Therefore, the DSPS funding, voluntary or not, is as matter of law insufficient to fund both the federal and state requirements.

However, even though the DSPS funding is not complete or actual cost reimbursement, it is substantial. As described in *Hayes*, just as the federal funding to the states to implement the Education of the Handicapped Act utilizes a "cooperative federalism" scheme (characterized as the "carrot and stick" approach), the DSPS funding here makes substantial state funding available to the colleges to implement the substantive terms of the program. The state DSPS funding is not trivial or insubstantial.

So the ultimate question is whether the colleges' participation in the DSPS program is truly voluntary. The alternatives are to participate in the DSPS program and obtain significant funding or to decline to participate and severely encroach on other program funding since the colleges are compelled to accommodate the educational needs of the special education students in any event. Borrowing language from *Kern*, the DSA (24) asserts that the colleges will decline participating in the DSPS program if and when they determine "that the costs of program compliance outweigh funding benefits." It is unlikely that there will come a time when the colleges will decline $111 million in DSPS funds each year when it is the only significant source of funds to mitigate the federal special education mandates, so there is no true "*Kern*" choice.

PART B. INSTRUCTIONAL MATERIALS

The DSA (26, 27) concludes that the duty for the colleges to provide special education instructional materials is derived from the Rehabilitation Act and the ADA and that the state has provided an efficient means for the colleges to meet those requirements. These activities should also be evaluated to determine where the specific state regulations exceed the federal mandates. In addition, the ultimate and actual cost of the excess state requirements is a question of fact which is not mitigated by characterizing the process as "efficient."

PART C. PARKING SERVICES

Education Code Section 67301 requires the adoption of parking services for disabled students that are arguably more specific and in excess of the Rehabilitation Act and the ADA (which only require "readily accessible" programs). These activities should also be evaluated to determine where the specific state regulations exceed the federal mandates.

Section 54100, Title 5, CCR, limits the amount of fees that can be collected for this purpose to the fee allowed by Education Code section 76360 for all parking uses. The DSA (28, 29) cites *County of Sonoma* for the proposition that "lost revenue" was not contemplated by Article XIII B, Section 6, and that "some actual cost must be demonstrated, and not merely decreases in revenue." The facts of Sonoma were that in response to the 1992 budget crisis, the Legislature reduced the share of property taxes previously allocated to local governments and simultaneously placed an equal amount of property tax revenues into Educational Revenue Augmentation Funds (ERAFs) for distribution to school districts. The court decided that the state was not obligated to reimburse local governments for this reallocation of property tax revenues because it did not result in reimbursable "costs." The "program" was jointly funded by state and local governments at the time Section 6 became effective, and it would be effectively an "equitable remedy" to cure a perceived unfairness resulting from political decisions on funding priorities. The court believed that the Legislature in referring to "actual costs" meant that reimbursement is intended to replace actual costs incurred, but not compensation for revenue that was never received.

Without analogizing the present facts to *Sonoma*, the DSA (29) characterizes the limitation on parking fees to Education Code section 76360 as "decreased potential revenues." Decreased potential revenues were not the subject of *Sonoma*. This test claim is alleging the increased costs of providing parking accessible to disabled students which cannot be recovered in the form of fees. The test claim statutes and regulations do not eliminate existing or larger revenue sources, but merely limit a source of local income to offset the cost of the state mandate in excess of the federal mandate. The parking fees were not funded by the state or the result of a joint funding shift resulting from a political decision on funding priorities. *Sonoma* does not apply. The focus of *Sonoma* was reallocation of revenue to the state, not limitation on the ability or availability of fees for new services. Instead, the appropriate analysis is for the test claim decision to determine the scope of the excess state mandates, and then for claimants to annually report those costs reduced by the amount of relevant parking fees collected, pursuant to the parameters and guidelines.

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CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,

Keith B. Petersen

Attachment: California Community Colleges System Office
FY 2007-08 DSP&S Funding Summary (P2)

C: Per Mailing List Attached

	2007-2008 College Allocation	2007-2008 DHH Distribution	FUNDS from PADS Account	Access to Print & Electronic Information	Sub-Total	2007-2008 Mid-Year Re-Allocation / Reduction (PADS, DSP&S, DHH)	2007-2008 College Total Funding	2007-2008 District Total Funding
ALLAN HANCOCK								$ 1,085,239
Allan Hancock	$ 1,004,057	$ 58,634	$ -	$ 19,384	$ 1,082,075	$ 3,164	$ 1,085,239	
ANTELOPE VALLEY								842,846
Antelope Valley	782,599	40,000	-	17,083	839,682	3,164	842,846	
BARSTOW								236,684
Barstow	224,898	-	-	11,786	236,684	-	236,684	
BUTTE								810,570
Butte	793,199	11,617	-	17,371	822,187	(11,617)	810,570	
CABRILLO								1,852,778
Cabrillo	1,834,477	-	-	18,301	1,852,778	-	1,852,778	
CERRITOS								1,920,748
Cerritos	1,342,021	555,915	-	22,812	1,920,748	-	1,920,748	
CHABOT-LAS POSITAS								1,764,443
Chabot	870,468	339,599	-	17,658	1,227,725	-	1,227,725	
Las Positas	522,342	-	-	14,376	536,718	-	536,718	
CHAFFEY								1,171,327
Chaffey	1,114,212	37,144	-	19,971	1,171,327	-	1,171,327	
CITRUS								805,003
Citrus	703,732	83,747	-	17,524	805,003	-	805,003	
COAST								2,849,918
Coastline	866,931	9,000	-	17,072	893,003	-	893,003	
Golden West	778,758	66,799	-	17,371	862,928	-	862,928	
Orange Coast	1,072,230	-	-	21,757	1,093,987	-	1,093,987	
COMPTON								252,321
Compton	239,855	-	-	12,466	252,321	-	252,321	
CONTRA COSTA								2,855,692
Contra Costa	838,703	-	-	14,628	853,331	-	853,331	
Diablo Valley	1,276,239	118,868	-	21,807	1,416,914	-	1,416,914	
Los Medanos	570,454	-	-	14,993	585,447	-	585,447	
COPPER MT. DISTRICT								258,716
Copper Mt.	247,666	-	-	11,050	258,716	-	258,716	
DESERT								749,257
Desert, College of the	652,575	81,364	-	15,318	749,257	-	749,257	
EL CAMINO								1,639,057
El Camino	1,380,516	235,475	-	23,066	1,639,057	-	1,639,057	
FEATHER RIVER								292,992
Feather River	281,791	-	-	11,201	292,992	-	292,992	
FOOTHILL								3,294,043
De Anza	1,361,062	-	-	24,893	1,385,955	-	1,385,955	
Foothill	1,886,208	-	-	21,880	1,908,088	-	1,908,088	
GAVILAN								715,790
Gavilan	701,762	-	-	14,028	715,790	-	715,790	
GLENDALE								1,935,973
Glendale	1,587,994	325,000	-	22,979	1,935,973	-	1,935,973	
GROSSMONT								1,928,170
Cuyamaca	415,568	105,724	-	16,680	537,972	-	537,972	
Grossmont	1,220,936	150,000	-	19,262	1,390,198	-	1,390,198	
HARTNELL								660,375
Hartnell	619,709	25,000	-	15,666	660,375	-	660,375	
IMPERIAL VALLEY								602,813
Imperial Valley	536,213	52,214	-	14,386	602,813	-	602,813	
KERN								2,072,683

FY 2007-08 &S FUNDING SUMMARY (P2)

	2007-2008 College Allocation	2007-2008 DHH Distribution	FUNDS from PADS Account	ess to int & Electronic Information	Sub-Total	2007-2008 Mid-Year Re-Allocation / Reduction (PADS, DSP&S, DHH)	2007-2008 College Total Funding	007-2008 strict Total Funding
Bakersfield	1,022,756	-	-	18,779	1,041,535	-	1,041,535	
Cerro Coso	451,390	-	-	13,213	464,603	17,105	481,708	
Porterville	537,470	-	-	11,970	549,440	-	549,440	
LAKE TAHOE								463,143
Lake Tahoe	430,647	20,000	-	12,496	463,143	-	463,143	
LASSEN								356,948
Lassen	335,726	-	-	11,222	346,948	10,000	356,948	
LONG BEACH								1,583,422
Long Beach City	1,334,087	225,000	-	24,335	1,583,422	-	1,583,422	
LOS ANGELES								6,417,213
East Los Angeles	741,585	11,617	-	28,629	781,831	-	781,831	
Los Angeles City	989,816	280,000	-	20,954	1,290,770	-	1,290,770	
Los Angeles Harbor	461,783	-	-	15,343	477,126	-	477,126	
Los Angeles Mission	467,712	-	-	15,191	482,903	-	482,903	
Los Angeles Pierce	849,388	280,000	-	21,316	1,150,704	-	1,150,704	
Los Angeles Southwest	182,099	-	-	20,387	202,486	17,105	219,591	
Los Angeles Trade-Tech	676,163	103,050	-	14,665	793,878	-	793,878	
Los Angeles Valley	873,473	-	-	18,956	892,429	-	892,429	
West Los Angeles	312,185	-	-	15,796	327,981	-	327,981	
LOS RIOS								5,064,497
American River	2,264,581	400,000	-	29,701	2,694,282	-	2,694,282	
Cosumnes River	495,445	80,000	-	16,806	592,251	-	592,251	
Folsom Lake	289,583	126,107	-	14,082	429,772	-	429,772	
Sacramento City	1,242,849	82,069	-	23,274	1,348,192	-	1,348,192	
MARIN								1,432,774
Marin	1,406,267	11,617	-	14,890	1,432,774	-	1,432,774	
MENDOCINO-LAKE								488,749
Mendocino	395,909	80,000	-	12,840	488,749	-	488,749	
MERCED								866,747
Merced	838,215	11,617	-	16,915	866,747	-	866,747	
MIRA COSTA								712,144
Mira Costa	614,348	80,000	-	17,796	712,144	-	712,144	
MONTEREY								930,090
Monterey Peninsula	866,987	45,000	-	18,103	930,090	-	930,090	
MT. SAN ANTONIO								2,169,269
Mt. San Antonio	1,734,693	382,054	-	32,253	2,149,000	20,269	2,169,269	
MT. SAN JACINTO								673,378
Mt. San Jacinto	655,740	-	-	17,638	673,378	-	673,378	
NAPA								1,979,302
Napa	1,963,988	-	-	15,314	1,979,302	-	1,979,302	
NORTH ORANGE								2,651,704
Cypress	621,497	60,000	-	16,996	698,493	-	698,493	
Fullerton	1,771,598	145,047	-	36,566	1,953,211	-	1,953,211	
OHLONE								1,704,112
Ohlone	1,072,856	611,399	-	16,893	1,700,948	3,164	1,704,112	
PALO VERDE								239,498
Palo Verde	227,008	-	-	12,490	239,498	-	239,498	
PALOMAR								1,396,614
Palomar	969,143	400,000	-	27,471	1,396,614	-	1,396,614	

	2007-2008 College Allocation	2007-2008 DHH Distribution	FUNDS from PADS Account	Access to Print & Electronic Information	Sub-Total	Mid-Year Re-Allocation / Reduction (PADS, DSP&S, DHH)	2007-2008 College Total Funding	2007-2008 District Total Funding
PASADENA								1,278,030
Pasadena City	1,132,237	120,000	-	25,793	1,278,030	-	1,278,030	
PERALTA								2,504,225
Alameda	642,061	50,000	-	13,869	705,930	20,269	726,199	
Laney	603,061	50,000	-	17,779	670,840	20,269	691,109	
Merritt	499,124	-	-	14,458	513,582	-	513,582	
Berkeley City	420,448	160,000	-	12,887	593,335	(20,000)	573,335	
RANCHO SANTIAGO								2,482,846
Santa Ana	1,645,892	304,000	-	40,584	1,990,476	-	1,990,476	
Santiago Canyon	474,541	-	-	17,829	492,370	-	492,370	
REDWOODS								1,070,545
Redwoods, College of the	1,057,487	-	-	13,058	1,070,545	-	1,070,545	
RIO HONDO								811,932
Rio Hondo	748,929	40,000	-	23,003	811,932	-	811,932	
RIVERSIDE								1,814,136
Riverside City	1,476,511	310,086	-	27,539	1,814,136	-	1,814,136	
SAN BERNARDINO								1,219,270
Crafton Hills	345,028	-	-	13,130	358,158	-	358,158	
San Bernardino Valley	745,297	95,532	-	17,119	857,948	3,164	861,112	
SAN DIEGO								4,523,200
San Diego City	815,585	100,000	-	19,964	935,549	-	935,549	
San Diego Mesa	973,854	110,000	-	22,926	1,106,780	-	1,106,780	
San Diego Miramar	2,154,453	290,000	-	36,418	2,480,871	-	2,480,871	
SAN FRANCISCO								3,007,918
San Francisco City	2,832,456	110,779	-	44,414	2,987,649	20,269	3,007,918	
SAN JOAQUIN								2,006,611
San Joaquin Delta	1,624,806	361,639	-	20,166	2,006,611	-	2,006,611	
SAN JOSE								1,347,672
Evergreen	490,936	11,617	-	16,340	518,893	10,743	529,636	
San Jose City	684,795	114,104	-	15,973	814,872	3,164	818,036	
SAN LUIS OBISPO								948,724
Cuesta	829,491	102,584	-	16,649	948,724	-	948,724	
SAN MATEO								1,775,723
Canada	387,745	-	-	13,705	401,450	-	401,450	
San Mateo, College of	735,383	-	-	16,499	751,882	-	751,882	
Skyline	607,172	-	-	15,219	622,391	-	622,391	
SANTA BARBARA								1,121,808
Santa Barbara City	1,049,435	42,612	-	29,761	1,121,808	-	1,121,808	
SANTA CLARITA								655,099
Canyons, College of the	608,996	25,000	-	21,103	655,099	-	655,099	
SANTA MONICA								1,523,248
Santa Monica	1,292,947	184,879	-	28,317	1,506,143	17,105	1,523,248	
SEQUOIAS								947,854
Sequoias, College of the	880,938	30,739	-	15,908	927,585	20,269	947,854	
SHASTA								788,502
Shasta	692,968	63,313	-	15,116	771,397	17,105	788,502	
SIERRA								1,341,627
Sierra	1,248,265	72,947	-	20,415	1,341,627	-	1,341,627	
SISKIYOU								365,785
Siskiyous, College of the	353,768	-	-	12,017	365,785	-	365,785	

FY 2007-08 &S FUNDING SUMMARY (P2)

	2007-2008 College Allocation	2007-2008 DHH Distribution	FUNDS from PADS Account	ss to nt & Electronic Information	Sub-Total	2007-2008 Mid-Year Re-Allocation / Reduction (PADS, DSP&S, DHH)	2007-2008 College Total Funding	07-2008 trict Total Funding
SOLANO								865,304
Solano	735,958	95,730	-	16,511	848,199	17,105	865,304	
SONOMA								3,138,270
Santa Rosa Junior	2,735,804	374,879	-	27,587	3,138,270	-	3,138,270	
SOUTH ORANGE COUNTY								2,219,606
Irvine Valley	609,770	31,311	-	17,980	659,061	(10,000)	649,061	
Saddleback	1,536,439	11,617	-	22,489	1,570,545	-	1,570,545	
SOUTHWESTERN								1,361,761
Southwestern	1,240,363	100,000	-	21,398	1,361,761	-	1,361,761	
STATE CENTER								2,310,710
Fresno City	1,467,109	160,433	-	21,511	1,649,053	-	1,649,053	
Reedley	627,906	-	-	16,646	644,552	17,105	661,657	
VENTURA								2,881,193
Moorpark	916,995	-	-	18,168	935,163	-	935,163	
Oxnard	618,992	138,992	-	13,831	771,815	-	771,815	
Ventura	1,085,666	71,235	-	17,314	1,174,215	-	1,174,215	
VICTOR VALLEY								833,151
Victor Valley	770,746	25,887	-	16,249	812,882	20,269	833,151	
WEST HILLS								737,884
West Hills Coalinga	356,963	-	-	11,607	368,570	-	368,570	
West Hills Lemoore	356,962	-	-	12,352	369,314	-	369,314	
WEST KERN								364,890
Taft	332,614	13,964	-	18,312	364,890	-	364,890	
WEST VALLEY								1,442,977
Mission	481,615	-	-	17,030	498,645	-	498,645	
West Valley	915,572	11,617	-	17,143	944,332	-	944,332	
YOSEMITE								1,207,537
Columbia	232,890	-	-	11,908	244,798	-	244,798	
Modesto Junior	928,094	-	-	19,645	947,739	15,000	962,739	
YUBA								757,517
Yuba	645,242	83,819	-	15,292	744,353	13,164	757,517	
Subtotal CCCs	$ 97,474,271	$ 9,599,992	$ -	$ 2,060,980	$ 109,135,243	$ 247,354	$ 109,382,597	$ 109,382,597
Coast CCD								884,819
Coastline DDL Center	884,819	-	-	-	884,819	0	884,819	
Kern CCD								513,403
Porterville DDL Center	513,403	-	-	-	513,403	0	513,403	
West Valley CCD								303,778
Mission DDL Center	303,778	-	-	-	303,778	0	303,778	
Subtotal DDL Centers	$ 1,702,000	$ -	$ -	$ -	$ 1,702,000	$ -	$ 1,702,000	$ 1,702,000
TOTAL CCCs + DDLs	$ 99,176,271	$ 9,599,992	$ -	$ 2,060,980	$ 110,837,243	$ 247,354	$ 111,084,597	$ 111,084,597

DECLARATION OF SERVICE

Re: Test Claim 02-TC-22
West Kern Community College District
Disabled Student Programs and Services

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimants. I am 18 years of age or older and not a party to the entitled matter. My business address is 3841 North Freeway Blvd, Suite 170, Sacramento, CA 95834.

On the date indicated below, I served the attached letter dated June 242, 2008, to Paula Higashi, Executive Director, Commission on State Mandates, to the Commission mailing list dated 05/20/08 for this test claim, and to:

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

☑ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 24, 2008, at Sacramento, California.

Kristin M. Smith

Commission on State Mandates

Original List Date: 6/18/2003
Updated: 4/26/2007
List Print Date: 05/20/2008
Claim Number: 02-TC-22
Issue: Disabled Student Programs and Services

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT I

AUTHORITIES AND SUPPORTING DOCUMENTATION

FEDERAL CASE LAW

Alexander v. Choate
U.S.Tenn.,1985.

Supreme Court of the United States
ALEXANDER, Governor of Tennessee, et al.
v.
CHOATE et al.
No. 83-727.

Argued Oct. 1, 1984.
Decided Jan. 9, 1985.

Medicaid recipients brought class action for declaratory and injunctive relief against state's reduction from 20 to 14 of the number of inpatient hospital days that state medicaid would pay hospitals on behalf of a medicaid recipient in each year. The United States District Court for the Middle District of Tennessee, 518 F.Supp. 877, denied relief and medicaid recipients appealed. The Court of Appeals for the Sixth Circuit, 715 F.2d 1036, reversed and remanded. Upon granting certiorari, the Supreme Court, Justice Marshall, held that: (1) not all disparate impact showings constitute a prima facie case under the Rehabilitation Act; (2) for purposes of Rehabilitation Act analysis, benefit provided for medicaid is not "adequate health care" but, rather, a particular package of health care services; (3) reduction of inpatient coverage did not violate the Rehabilitation Act; and (4) not all annual durational limits on medicaid patient hospital usage violate the Rehabilitation Act.

Reversed.

West Headnotes

[1] Health 198H ⚷462

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk462 k. State Participation in Federal Programs. Most Cited Cases
(Formerly 356Ak241.60)
Once a state voluntarily chooses to participate in medicaid, state must comply with requirements of the act and applicable regulations. Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[2] Civil Rights 78 ⚷1417

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1417 k. In General. Most Cited Cases
(Formerly 78k242(1), 78k13.13(3))
Not all disparate impact showings constitute a prima facie case under the Rehabilitation Act. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[3] Civil Rights 78 ⚷1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k107(1), 78k9.16)
Otherwise qualified handicapped individual must be provided with meaningful access to the benefit which the governmental grantee offers; the benefit itself cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to insure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[4] Civil Rights 78 ⚷1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1), 78k9.16)
Action of state of Tennessee in reducing from 20 to 14 the number of annual inpatient hospital days that

state medicaid would pay hospitals on behalf of a medicaid recipient did not violate the Rehabilitation Act as it did not deny the handicapped meaningful access to medicaid services or exclude them from those services and was neutral on its face. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[5] **Health 198H ⚷473**

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk472 Benefits and Services Covered
198Hk473 k. In General. Most Cited Cases
(Formerly 356Ak241.55)
Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs; benefit provided through medicaid is a particular package of health care services. Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[6] **Health 198H ⚷473**

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk472 Benefits and Services Covered
198Hk473 k. In General. Most Cited Cases
(Formerly 356Ak241.60)
For purposes of determining whether state medicaid regulations violate the Rehabilitation Act, the benefit provided through the program is not "adequate health care" but, rather, a package of health care services. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[7] **Civil Rights 78 ⚷1053**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1), 78k9.16)
Regulations of the Department of Health and Human Services do not preclude state from setting limit on number of annual inpatient hospital days that it will pay hospitals for care provided to each medicaid recipient on theory that such a limitation discriminates against the handicapped. Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[8] **Civil Rights 78 ⚷1053**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1), 78k9.16)
Rehabilitation Act does not bar all annual durational limitations on inpatient coverage in state medicaid plans. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1936 et seq.

****713** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

***287** Faced with Medicaid costs beyond its budget, Tennessee proposed to reduce from 20 to 14 the number of annual inpatient hospital days that state Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the reduction took effect, respondent Medicaid recipients brought a class action in Federal District Court for declaratory and injunctive relief. Respondents alleged that the proposed 14-day limitation would have a disproportionate effect on the handicapped and hence was discriminatory in violation of § 504 of the Rehabilitation Act of 1973-which provides that no

otherwise qualified handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance-and its implementing regulations, and moreover that any annual limitation on inpatient coverage would disadvantage the handicapped disproportionately in violation of § 504. The District Court dismissed the complaint on the ground that the 14-day limitation was not the type of discrimination that § 504 was intended to proscribe. The Court of Appeals held that respondent had established a prima facie case of a § 504 violation, because both the 14-day and any annual limitation on inpatient coverage would disproportionately affect the handicapped.

Held: Assuming that § 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them. Pp. 716-725.

(a) The 14-day limitation is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped meaningful access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit equally accessible to both handicapped and nonhandicapped persons, and is not required to assure the handicapped "adequate health care" by providing them with more coverage than the non-handicapped. Nothing in the Rehabilitation Act's legislative history supports the conclusion that the Act requires the States to view certain illnesses, *i.e.,* those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Section 504 does not require the State to alter its definition of the benefit ***288** it will be providing as 14 days of inpatient coverage simply to meet the reality that the handicapped have greater medical needs. While § 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal financial assistance, the Act does not guarantee the handicapped equal results from the provision of state Medicaid. Pp. 721-723.

(b) In addition, the State is not obligated to modify its Medicaid program by abandoning reliance on annual durational limitations on inpatient coverage. Section 504 does not require the State to redefine its Medicaid program, and nothing in its legislative history suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and durational limitations on services covered by Medicaid. Moreover, § 504 does not require that federal grantees make a broad-based distributive decision always in the way most favorable, or least disadvantageous, to the handicapped. To do so would impose a virtually ****714** unworkable requirement on state Medicaid administrators. Pp. 723-725.

715 F.2d 1036 (CA6 1983), reversed.

W.J. Michael Cody, Attorney General of Tennessee, argued the cause for petitioners. With him on the briefs were *William M. Leech, Jr.,* former Attorney General, *William B. Hubbard,* Chief Deputy Attorney General, and *Frank J. Scanlon,* Deputy Attorney General.
Deputy Solicitor General Bator argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, John H. Garvey,* and *Brian K. Landsberg.*
Gordon Bonnyman argued the cause for respondents. With him on the brief were *Brian Paddock, Arlene Mayerson, J. LeVonne Chambers,* and *Eric Schnapper.**
* *Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.
Briefs of *amici curiae* urging affirmance were filed for the Center for Independent Living--San Gabriel/Pomona Valleys et al. by *Marilyn Holle* and *Timothy Cook;* and for United Cerebral Palsy of New York City, Inc., by *Michael A. Rebell.*

Justice MARSHALL delivered the opinion of the Court.
***289** In 1980, Tennessee proposed reducing the number of annual days of inpatient hospital care covered by its state Medicaid program. The question presented is whether the effect upon the handicapped that this reduction will have is cognizable under § 504 of the Rehabilitation Act of 1973 or its implementing regulations. We hold that it is not.

I

[1] Faced in 1980-1981 with projected state Medicaid [FN1] costs of $42 million more than the State's Medicaid budget of $388 million, the directors of the Tennessee Medicaid program decided to institute a variety of cost-saving measures. Among these changes was a reduction from 20 to 14 in the number of inpatient hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the new measures took effect, respondents, Tennessee Medicaid recipients, brought a class action for declaratory and injunctive relief in which they alleged, *inter alia,* that the proposed 14-day limitation on inpatient coverage would have a discriminatory effect on the handicapped.[FN2] Statistical evidence, which petitioners do not ***290** dispute, indicated that in the 1979-1980 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care.

FN1. Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U.S.C. § 1396*et seq.* Medicaid is a joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations. *Harris v. McRae,* 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed.2d 784 (1980).

FN2. The State proposed an array of other changes in its Medicaid program. Although respondents challenged many of these other changes, settlement was reached on all the proposed changes other than the reduction in the number of inpatient days covered. Thus none of the other changes is before this Court. Respondents also asserted a number of causes of action other than their § 504 claim in their original and amended complaints. These additional legal theories are similarly not before the Court.

Since the District Court's decision, the State has amended its Medicaid program in two minor ways not materially significant to the issues presented on certiorari.

Based on this evidence, respondents asserted that the reduction would violate § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794, and its implementing regulations. Section 504 provides:

"No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." 29 U.S.C. § 794.

Respondents' position was twofold. First, they argued that the change from 20 to 14 days of coverage would have a disproportionate effect on the handicapped and hence was discriminatory.[FN3] The second, and major, thrust of respondents' attack ****715** was directed at the use of *any* annual limitation on the number of inpatient days covered, for respondents acknowledged that, given the special needs of the handicapped for medical care, any such limitation was likely to disadvantage the handicapped disproportionately. Respondents noted, however, that federal law does not require States to impose any annual durational limitation on inpatient coverage,***291** and that the Medicaid programs of only 10 States impose such restrictions.[FN4] Respondents therefore suggested that Tennessee follow these other States and do away with any limitation on the number of annual inpatient days covered. Instead, argued respondents, the State could limit the number of days of hospital coverage on a per-stay basis, with the number of covered days to vary depending on the recipient's illness (for example, fixing the number of days covered for an appendectomy); the period to be covered for each illness could then be set at a level that would keep Tennessee's Medicaid program as a whole within its budget.[FN5] The State's refusal to adopt this plan was said to result in the imposition of gratuitous costs on the handicapped and thus to constitute discrimination under § 504.

FN3. The evidence indicated that, if 19 days of coverage were provided, 16.9% of the handicapped, as compared to 4.2% of the nonhandicapped, would not have their needs for inpatient care met.

FN4. As of 1980 the average ceiling in those States was 37.6 days. Six States also limit the number of reimbursable days per admission, per spell of illness, or per benefit period. See App. B to Brief for United States as *Amicus Curiae*.

FN5. See *Jennings v. Alexander*, 518 F.Supp. 877, 883, n. 7 (MD Tenn.1981). Respondents' diagnosis-related reimbursement proposal is supported by a committee of the Tennessee Legislature, which has recommended that the State adopt such a plan. The Medicaid System of the Tennessee Department of Public Health, A Report of the Special Joint Committee to the Ninety-Third General Assembly 24, 26 (1983). The Court of Appeals seems to have mischaracterized this proposal of respondents as an attempt to limit "the total number of visits per annum rather than the number of days." *Jennings v. Alexander*, 715 F.2d 1036, 1044 (CA6 1983).

A divided panel of the Court of Appeals for the Sixth Circuit held that respondents had indeed established a prima facie case of a § 504 violation. *Jennings v. Alexander*, 715 F.2d 1036 (1983). The majority apparently concluded that any action by a federal grantee that disparately affects the handicapped states a cause of action under § 504 and its implementing regulations. Because both the 14-day rule and any annual limitation on inpatient coverage disparately ***292** affected the handicapped, the panel found that a prima facie case had been made out, and the case was remanded [FN6] to give Tennessee an opportunity for rebuttal. According to the panel majority, the State on remand could either demonstrate the unavailability of alternative plans that would achieve the State's legitimate cost-saving goals with a less disproportionate impact on the handicapped, or the State could offer "a substantial justification for the adoption of the plan with the greater discriminatory impact." *Id.*, at 1045. We granted certiorari to consider whether the type of impact at issue in this case is cognizable under § 504 or its implementing regulations, 465 U.S. 1021, 104 S.Ct. 1271, 79 L.Ed.2d 677 (1984), and we now reverse.

FN6. The District Court had dismissed respondents' complaint under Federal Rule of Civil Procedure 12(b)(6) on the basis, *inter alia*, that the effect on the handicapped of the plan that included the 14-day limitation was "not the type of discrimination that § 504 was intended to proscribe." 518 F.Supp., at 881.

II

The first question the parties urge on the Court is whether proof of discriminatory animus is always required to establish a violation of § 504 and its implementing regulations, or whether federal law also reaches action by a recipient of federal funding that discriminates against the handicapped by effect rather than by design. The State of Tennessee argues that § 504 reaches only purposeful discrimination against the handicapped. As support for this position, the State relies heavily on our recent decision in *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983).

****716** In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d*et seq.*, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both ***293** intentional and disparate-impact discrimination.[FN7] No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination.[FN8] Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.[FN9] In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily ***294** enough remediable, to warrant altering the practices

of the federal grantees that had produced those impacts.

FN7. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The premise of the State's reliance on *Guardians* is that § 504 was modeled in part on Title VI, and that the evolution of Title VI regulatory and judicial law is therefore relevant to ascertaining the intended scope of § 504. We agree with this basic premise. See S.Rep. No. 93-1297, p. 39 (1974) U.S.Code Cong. & Admin.News 1974, pp. 6373, 6390-91 ("Section 504 was patterned after and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin) and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex)"). Nonetheless, as we point out *infra*, at 718-719, and n. 13, too facile an assimilation of Title VI law to § 504 must be resisted.

FN8. 463 U.S., at 607-608, 103 S.Ct., at 3235-3236 (opinion of POWELL, J., in which BURGER, C.J., and REHNQUIST, J., joined); *id.*, at 612, 103 S.Ct., at 3237 (opinion of O'CONNOR, J.); *id.*, at 634, 103 S.Ct., at 3249 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

FN9. *Id.*, at 584, 103 S.Ct., at 3223 (WHITE, J., announcing the judgment of the Court); *id.*, at 623, n. 15, 103 S.Ct., at 3244, n. 15 (opinion of MARSHALL, J.); *id.*, at 634, 103 S.Ct., at 3249 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

Guardians, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.[FN10] Moreover, there are reasons to pause before too quickly extending even the first prong of *Guardians* to § 504. Cf. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-633, n. 13, 104 S.Ct. 1248, 1253-1254, n. 13, 79 L.Ed.2d 568 (1984) (recognizing distinctions between Title VI and § 504).[FN11]

FN10. See also *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974) (Stewart, J., concurring). We conclude *infra*, at 722-723, and n. 24, that in this case the regulations do not in fact support respondents' action.

FN11. In addition to the nature of the problems with which the § 504 Congress was concerned, see *infra*, at 718-719, at least two other considerations counsel hesitation before reading Title VI and § 504 *in pari materia* with respect to the effect/intent issue. First, for seven Justices, the outcome in the first prong of *Guardians* was settled by their view that a majority of the Court in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), had already concluded that Title VI reached only intentional discrimination. See 463 U.S., at 607, 103 S.Ct., at 3235 (opinion of POWELL, J., in which BURGER, C.J., and REHNQUIST, J., joined); *id.*, at 612, 103 S.Ct., at 3237 (opinion of O'CONNOR, J.); *id.*, at 634, and 641, n. 12, 103 S.Ct., at 3249 and 3253, n. 12 (STEVENS, J., joined by BRENNAN and BLACKMUN, JJ., dissenting). Although two of the five Justices who were said to have reached such a conclusion in *Bakke* wrote in *Guardians* to reject this interpretation of *Bakke*, see 463 U.S., at 590-591 and 590, n. 11, 103 S.Ct., at 3226-3227 and 3226, n. 11 (WHITE, J.,

announcing the judgment of the Court); *id.*, at 616-618, 103 S.Ct., at 3240-3241 (MARSHALL, J., dissenting), in the view of the seven Justices *Bakke* controlled as a matter of *stare decisis*. Had these Justices not felt the force of this constraint, it is unclear whether they would have read an intent requirement into Title VI. See 463 U.S., at 626, 103 S.Ct., at 3245 (O'CONNOR, J., concurring in judgment) ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination") (citation omitted). For that reason, the conclusion that, in response to factors peculiar to Title VI, *Bakke* locked in a certain construction of Title VI would not seem to have any obvious or direct applicability to § 504.

Second, by the time Congress enacted the Rehabilitation Act in 1973, nearly a decade of experience had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII. By this time, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, and every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. See *Guardians*, 463 U.S., at 629-630, 103 S.Ct., at 3247 (MARSHALL, J., dissenting). These regulations provoked some controversy in Congress, and in 1966 the House of Representatives rejected a proposed amendment that would have limited Title VI to only intentional discrimination. *Id.*, at 630-631, 103 S.Ct., at 3247-3248. Thus, when Congress in 1973 adopted virtually the same language for § 504 that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination. In refusing expressly to limit § 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for § 504. See *United States v. Rutherford*, 442 U.S. 544, 554, 99 S.Ct. 2470, 2476, 61 L.Ed.2d 68 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 698-699, 99 S.Ct. 1946, 1958-1959, 60 L.Ed.2d 560 (1979).

717 *295 Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect.[FN12] Thus, Representative Vanik, introducing the predecessor to § 504 in the House,[FN13] described the treatment*296 of the handicapped as one of the country's "shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored." 117 Cong.Rec. 45974 (1971). Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted that "we can no longer tolerate the invisibility of the handicapped in America ...." 118 Cong.Rec. 525-526 (1972). And Senator Cranston, the Acting Chairman of the Subcommittee that drafted § 504,[FN14] described the Act as a response to "previous societal neglect." 119 Cong.Rec. 5880, 5883 (1973). See also 118 Cong.Rec. 526 (1972) (statement of cosponsor Sen. Percy) (describing the legislation leading to the 1973 Act as a national commitment to eliminate the "glaring neglect" of the handicapped).718 [FN15]] Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.[FN16]

FN12. To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist. See, *e.g.*, United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Ch. 2 (1983); Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 Cornell L.Rev. 401, 403, n. 2 (1984).

FN13. Although § 504 ultimately was passed as part of the Rehabilitation Act of 1973, the nondiscrimination principle later

codified in § 504 was initially proposed as an amendment to Title VI. This proposal was first introduced by Representative Vanik in the House. See H.R. 14033, 92d Cong., 2d Sess., 118 Cong.Rec. 9712 (1972); H.R. 12154, 92d Cong., 1st Sess., 117 Cong.Rec. 45945 (1971). A companion measure was introduced in the Senate by Senators Humphrey and Percy. See S. 3044, 92d Cong., 2d Sess., 118 Cong.Rec. 525-526 (1972). The principle underlying these bills was reshaped in the next Congress and inserted as § 504 into major vocational-rehabilitation legislation then pending. Senator Humphrey and Representative Vanik indicated that the intent of the original bill had been carried forward into § 504. See 119 Cong.Rec. 6145 (1973) (statement of Sen. Humphrey); 118 Cong.Rec. 32310 (1972) (same); 119 Cong.Rec. 7114 (1973) (statement of Rep. Vanik). Given the lack of debate devoted to § 504 in either the House or Senate when the Rehabilitation Act was passed in 1973, see R. Cappalli, Federal Grants and Cooperative Agencies § 20:03 (1982), the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to § 504 is a primary signpost on the road toward interpreting the legislative history of § 504.

FN14. 118 Cong.Rec. 30680 (1972) (statement of Sen. Randolph describing origins of § 504).

FN15. Senator Percy was both a cosponsor of the predecessor to § 504 and of the Senate version of the Rehabilitation Act of 1973.

FN16. See, *e.g.*, United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 17 (1983); Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U.L.Rev. 881, 883 (1980).

In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if ***297** not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act, see, *e.g.*, S.Rep. No. 93-318, p. 4 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2076, 2080, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. Similarly, Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out § 504, asserted that the handicapped were the victims of "[d]iscrimination in access to public transportation" and "[d]iscrimination because they do not have the simplest forms of special educational and rehabilitation services they need ...." 118 Cong.Rec. 3320 (1972). And Senator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of "transportation and architectural barriers," the "discriminatory effect of job qualification ... procedures," and the denial of "special educational assistance" for handicapped children. *Id.*, at 525-526. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.[FN17]

FN17. All the Courts of Appeals that have addressed the issue have agreed that, at least under some circumstances, § 504 reaches disparate-impact discrimination. See, *e.g.*, *New Mexico Assn. for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (CA10 1982); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1384-1385 (CA10 1981); *Dopico v. Goldschmidt*, 687 F.2d 644, 652-653 (CA2 1982); *NAACP v. Wilmington Medical Center*, 657 F.2d 1322, 1331 (CA3 1981) (en banc); *Majors v. Housing Authority of County of DeKalb, Georgia*, 652 F.2d 454, 457-458 (CA5 1981); *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724 (CA7 1982); *Stutts v. Freeman*, 694 F.2d 666 (CA11 1983); *Georgia Assn. of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1578-1580 (CA11 1983), vacated for further consideration in light of *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1984); cf. *Joyner by Lowry v. Dumpson*, 712 F.2d 770, 775-776, and n. 7 (CA2 1983) (rejecting use of "adverse

impact" theory as grounds for challenging state statute that requires parents who desire special state-subsidized residential child-care services for handicapped children to transfer temporary custody of their children to State, but reserving question of whether that test might be used in employment discrimination actions).

At least 24 federal agencies have reached the same conclusion. See 5 CFR § 900.704(b)(3) (OPM) (1984); 7 CFR § 15b.4(b)(4)(DOA) (1984); 10 CFR § 4.121(b)(4) (NRC) (1984); 10 CFR § 1040.63(b)(4) (DOE) (1984); 14 CFR § 1251.103(b)(5) (NASA) (1984); 15 CFR § 8b.4(b)(4) (DOC) (1984); 18 CFR § 1307.4(b)(3) (TVA) (1984); 22 CFR § 142.4(b)(4) (DOS) (1984); 22 CFR § 217.4(b)(4) (AID/IDCA) (1984); 28 CFR §§ 41.51(b)(3), 42.503(b)(3) (DOJ) (1984); 29 CFR § 32.4(b)(4)(DOL) (1984); 31 CFR §§ 51.52(b)(1)(vi), 51.55(b)(1)(viii) (Dept. of Treas. (OST)) (1984); 32 CFR § 56.8(a)(6) (DOD) (1984); 34 CFR § 104.4(b)(4) (Dept. of Ed.) (1984); 38 CFR § 18.404(b)(4) (VA) (1984); 49 Fed.Reg. 1656 (EPA) (1984) (to be codified at 40 CFR pt. 7); 41 CFR § 101-8.303(d) (GSA) (1984); 43 CFR § 17.203(b)(4) (DOI) (1984); 45 CFR § 84.4(b)(4) (HHS) (1984); 45 CFR § 605.4(b)(4) (NSF) (1984); 45 CFR § 1151.17(c) (NEA) (1984); 45 CFR § 1170.12(c) (NEH) (1984); 45 CFR § 1232.4(b)(3) (ACTION) (1984); 49 CFR § 27.7(b)(4) (DOT) (1984). We are unaware of any case challenging the facial validity of these regulations.

*298 At the same time, the position urged by respondents-that we interpret § 504 to reach all action disparately affecting the handicapped-is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents'**719 position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden. See Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv.L.Rev. 997, 1008 (1984) (describing problems with pure disparate-impact model in context of employment discrimination against the handicapped). Had Congress intended § 504 to be a National Environmental Policy Act [FN18] for the handicapped, requiring the preparation of "Handicapped Impact *299 Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose. Thus, just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination.

FN18. 42 U.S.C. § 4321*et seq.*

[2] Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations-the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds. Given the legitimacy of both of these goals and the tension between them, we decline the parties' invitation to decide today that one of these goals so overshadows the other as to eclipse it. While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped. On that assumption, we must then determine whether the disparate effect of which respondents complain is the sort of disparate impact that federal law might recognize.

III

To determine which disparate impacts § 504 might make actionable, the proper starting point is *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), our major previous attempt to define the scope of § 504.[FN19] *Davis* involved a plaintiff with a major hearing

disability who sought admission ***300** to a college to be trained as a registered nurse, but who would not be capable of safely performing as a registered nurse even with full-time personal supervision. We stated that, under some circumstances, a "refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW." *Id.*, at 413, 99 S.Ct., at 2370. We held that the college was not required to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, *id.*, at 409, 99 S.Ct., at 2368, and because the further modifications Davis sought-full-time, personal supervision whenever she attended patients and elimination of all clinical courses-would have compromised the essential nature of the college's nursing program, *id.*, at 413-414, 99 S.Ct., at 2370-2371. Such a "fundamental alteration in ****720** the nature of a program" was far more than the reasonable modifications the statute or regulations required. *Id.*, at 410, 99 S.Ct., at 2369. *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. Compare *ibid.* with *id.*, at 412-413, 99 S.Ct., at 2370.[FN20]

FN19. *Davis* addressed that portion of § 504 which requires that a handicapped individual be "otherwise qualified" before the nondiscrimination principle of § 504 becomes relevant. However, the question of who is "otherwise qualified" and what actions constitute "discrimination" under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.

FN20. In *Davis*, we stated that § 504 does not impose an "affirmative-action obligation on all recipients of federal funds." 442 U.S., at 411, 99 S.Ct., at 2369-2370. Our use of the term "affirmative action" in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped. See Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U.L.Rev. 881, 885-886 (1980); Note, Accommodating the Handicapped: Rehabilitating Section 504 After *Southeastern*, 80 Colum.L.Rev. 171, 185-186 (1980); see also *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (CA2 1982) ("Use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."). Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," 442 U.S., at 410, 411, n. 10, 413, 99 S.Ct., at 2369, 2369-2370, n. 10, 2370, or that would constitute "fundamental alteration[s] in the nature of a program ...,"*id.*, at 410, 99 S.Ct., at 2369, rather than to those changes that would be reasonable accommodations.

***301** [3] The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.[FN21] In this ***302** case, respondents argue that the 14-day rule, or any annual durational limitation, denies meaningful access to Medicaid services in Tennessee. We examine each of these arguments in turn.

FN21. As the Government states:

"Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit." Brief for United States as *Amicus Curiae* 29, n. 36. At oral argument, the Government also acknowledged that "special measures for the handicapped, as the *Lau* case shows, may sometimes be necessary ...." Tr. of Oral Arg. 14-15 (referring to *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974)).

The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access. See, *e.g.*, 45 CFR § 84.12(a) (1984) (requiring an employer to make "reasonable accommodation to the known physical or mental limitations" of a handicapped individual); 45 CFR § 84.22 and § 84.23 (1984) (requiring that new buildings be readily accessible, building alterations be accessible "to the maximum extent feasible," and existing facilities eventually be operated so that a program or activity inside is, "when viewed in its entirety," readily accessible); 45 CFR § 84.44(a) (1984) (requiring certain modifications to the regular academic programs of secondary education institutions, such as changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted).

A

[4] The 14-day limitation will not deny respondents meaningful access to Tennessee Medicaid services or exclude them from those services. The new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of **721 having. Moreover, it cannot be argued that "meaningful access" to state Medicaid services will be denied by the 14-day limitation on inpatient coverage; nothing in the record suggests that the handicapped in Tennessee will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule.[FN22] The reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation. The 14-day limitation, therefore, does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide. Cf. *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972).

FN22. The record does not contain any suggestion that the illnesses uniquely associated with the handicapped or occurring with greater frequency among them cannot be effectively treated, at least in part, with fewer than 14 days' coverage. In addition, the durational limitation does not apply to only particular handicapped conditions and takes effect regardless of the particular cause of hospitalization.

[5][6] To the extent respondents further suggest that their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, Tennessee must single out the handicapped for *more* than 14 days of *303 coverage, the suggestion is simply unsound. At base, such a suggestion must rest on the notion that the benefit provided through state Medicaid programs is the amorphous objective of "adequate health care." But Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered-not "adequate health care."

The federal Medicaid Act makes this point clear. The

Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in "the best interests of the recipients." 42 U.S.C. § 1396a(a)(19). The District Court found that the 14-day limitation would fully serve 95% of even handicapped individuals eligible for Tennessee Medicaid, and both lower courts concluded that Tennessee's proposed Medicaid plan would meet the "best interests" standard. That unchallenged conclusion [FN23] indicates that Tennessee is free, as a matter of the Medicaid Act, to choose to define the benefit it will be providing as 14 days of inpatient coverage.

FN23. Because that conclusion is unchallenged, we express no opinion on whether annual limits on hospital care are in fact consistent with the Medicaid Act. See, *e.g.*, *Charleston Memorial Hospital v. Conrad*, 693 F.2d 324, 329-330 (CA4 1982) (upholding 12-day-a-year limitation on inpatient hospital coverage); *Virginia Hospital Assn. v. Kenley*, 427 F.Supp. 781 (ED Va.1977) (upholding 21-day limitation).

Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, *i.e.*, those ***304** particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Nothing in the legislative history of the Act supports such a conclusion. Cf. *Doe v. Colautti*, 592 F.2d 704 (CA3 1979) (State may limit covered-private-inpatient-psychiatric care to 60 days even though State sets no limit on duration of coverage for physical illnesses). Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. ****722***Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed. *Ibid.*

[7] Regulations promulgated by the Department of Health and Human Services (HHS) pursuant to the Act further support this conclusion.[FN24] These regulations state that recipients of federal funds who provide health services cannot "provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others." 45 CFR § 84.52(a)(3) (1984). The regulations also prohibit a recipient of federal funding from adopting "criteria or methods of administration that ***305** have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped." 45 CFR § 84.4(b)(4)(ii) (1984).[FN25]

FN24. We have previously recognized these regulations as an important source of guidance on the meaning of § 504. See *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984) (holding that 1978 Amendments to the Act were intended to codify the regulations enforcing § 504); *Southeastern Community College v. Davis*, 442 U.S., at 413, 99 S.Ct., at 2370 ("Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped person continues to be an important responsibility of HEW"); see generally *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983). 1974 Amendments to the Act clarified the scope of § 504 by making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination. See, *e.g.*, S.Rep. No. 93-1297, pp. 40-41, 56 (1974).

FN25. Respondents also rely on a variety of other regulations. See, *e.g.*, 45 CFR § 84.52(a)(2) (1984) (stating that a recipient who provides health services cannot "[a]fford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered

nonhandicapped persons"); § 84.4(b)(1)(iii) (prohibiting a recipient of federal funds from providing "a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others"); § 84.4(b)(1)(ii) (stating that a recipient cannot "[a]fford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others").

While these regulations, read in isolation, could be taken to suggest that a state Medicaid program must make the handicapped as healthy as the nonhandicapped, other regulations reveal that HHS does not contemplate imposing such a requirement. Title 45 CFR § 84.4(b)(2) (1984), referred to in the regulations quoted above, makes clear that

"[f]or purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement ...."

This regulation, while indicating that adjustments to existing programs are contemplated,[FN26] also makes clear that *306 Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users. Thus, to the extent respondents are seeking a distinct durational limitation for the handicapped, Tennessee is entitled to respond by asserting that the relevant benefit is 14 days of coverage. Because the handicapped have meaningful and equal access to that benefit, Tennessee is not obligated to reinstate its 20-day rule or to provide the handicapped with more than 14 days of inpatient coverage.

FN26. The interpretive analysis accompanying these regulations states:

"[T]he term 'equally effective,' defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary." 45 CFR, pt. 84, App. A, ¶ 6 (1984).

**723 B

[8] We turn next to respondents' alternative contention, a contention directed not at the 14-day rule itself but rather at Tennessee's Medicaid *plan* as a whole. Respondents argue that the inclusion of any annual durational limitation on inpatient coverage in a state Medicaid plan violates § 504. The thrust of this challenge is that all annual durational limitations discriminate against the handicapped because (1) the effect of such limitations falls most heavily on the handicapped and because (2) this harm could be avoided by the choice of other Medicaid plans that would meet the State's budgetary constraints without disproportionately disadvantaging the handicapped. Viewed in this light, Tennessee's current plan is said to inflict a gratuitous harm on the handicapped that denies them meaningful access to Medicaid services.

Whatever the merits of this conception of meaningful access, it is clear that § 504 does not require the changes respondents seek. In enacting the Rehabilitation Act and in subsequent amendments,[FN27] Congress did focus on several *307 substantive areas-employment,[FN28] education, [FN29] and the elimination of physical barriers to access [FN30]- in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high.[FN31] But nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid, see *Beal v. Doe*, 432 U.S. 438, 444, 97 S.Ct. 2366, 2370, 53 L.Ed.2d 464 (1977). And, more generally, we have already stated, *supra*, at 719-720, that § 504 does not impose a general NEPA-like requirement on federal grantees.[FN32]

FN27. The year after the Rehabilitation Act was passed, Congress returned to it with important amendments that clarified the scope of § 504. See Pub.L. 93-516, 88 Stat. 1617. While these amendments and their

history cannot substitute for a clear expression of legislative intent at the time of enactment, *Davis, supra,* 442 U.S., at 411, n. 11, 99 S.Ct., at 2370, n. 11, as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed significant light on the intent with which § 504 was enacted. See, *e.g.,* *Andrus v. Shell Oil Co.,* 446 U.S. 657, 666-671, 100 S.Ct. 1932, 1938-1941, 64 L.Ed.2d 593 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.,* 444 U.S. 572, 596, 100 S.Ct. 800, 813, 63 L.Ed.2d 36 (1980). Congress again amended Title V of the Rehabilitation Act in 1978, in the process incorporating the enforcement mechanisms available under Title VI of the Civil Rights Act of 1964. See Pub.L. 95-602, 92 Stat. 2982, § 505(a)(2), 29 U.S.C. § 794a (1982). We have previously relied on the post-1973 legislative actions to interpret § 504. *Consolidated Rail Corporation v. Darrone,* 465 U.S., at 632-633, 104 S.Ct., at 1253-1254.

FN28. "The primary goal of the Act is to increase employment." *Consolidated Rail Corporation v. Darrone, supra,* at 633, n. 13, 104 S.Ct., at 1254, n. 13. See also 29 U.S.C. § 701(11) (1976 ed.).

FN29. See, *e.g.,*117 Cong.Rec. 45974 (1971) (statement of Rep. Vanik); 118 Cong.Rec. 525-526 (1972) (statement of Sen. Humphrey); 119 Cong.Rec. 5882-5883 (1973) (statement of Sen. Cranston); 118 Cong.Rec. 3320-3322 (1972) (statement of Sen. Williams).

FN30. See, *e.g.,*29 U.S.C. § 701(11) (1976 ed.); S.Rep. No. 93-318, p. 4 (1973); S.Rep. No. 93-1297, p. 50 (1974), U.S.Code Cong. & Admin.News 1974, pp. 6373, 6400.

FN31. Rehabilitation training, of course, was also central to the purposes of the 1973 Act, and such training might involve issues concerning specific health care benefits. In this case, however, respondents have never asserted that the 14-day rule has any effect at all on rehabilitation programs.

FN32. Assuming, *arguendo,* that agency regulations may impose such a requirement in specific areas to further the purposes of § 504, see *Guardians Assn. v. Civil Service Comm'n of New York City,* 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the current regulations are drafted in far too broad terms to permit the conclusion that state Medicaid programs must always choose, from among various otherwise legitimate benefit and service options, the particular option most favorable, or least disadvantageous, to the handicapped. Before we would find that these generally worded regulations were intended to limit a State's longstanding discretion to set otherwise reasonable Medicaid coverage rules, that intent would have to be indicated with greater specificity in the regulations themselves or through other agency action.

The Government agrees that the current regulations are not intended to impose a NEPA-like requirement on state Medicaid administrators.

****724 *308** The costs of such a requirement would be far from minimal, and thus Tennessee's refusal to pursue this course does not, as respondents suggest, inflict a "gratuitous" harm on the handicapped. On the contrary, to require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually unworkable requirement on state Medicaid administrators. Before taking any across-the-board action affecting Medicaid recipients, an analysis of the effect of the proposed change on the handicapped would have to be prepared. Presumably, that analysis would have to be further broken down by class of handicap-the change at issue here, for example, might be significantly less harmful to the blind, who use inpatient services only minimally, than to other subclasses of handicapped Medicaid recipients; the

State would then have to balance the harms and benefits to various groups to determine, on balance, the extent to which the action disparately impacts the handicapped. In addition, respondents offer no reason that similar treatment would not have to be accorded other groups protected by statute or regulation from disparate-impact discrimination.

It should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*. As a result, Tennessee need not redefine its Medicaid program to eliminate ***309** durational limitations on inpatient coverage, even if in doing so the State could achieve its immediate fiscal objectives in a way less harmful to the handicapped.

IV

The 14-day rule challenged in this case is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit-14 days of coverage-equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped. In addition, the State is not obligated to modify its Medicaid program by abandoning reliance on annual durational limitations on inpatient coverage. Assuming, then, that § 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient coverage is not among them. For that reason, the Court of Appeals erred in holding that respondents had established a prima facie violation of § 504. The judgment below is accordingly reversed.

It is so ordered.

U.S.Tenn.,1985.
Alexander v. Choate
469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661, 53 USLW 4072, 8 Soc.Sec.Rep.Serv. 6, Med & Med GD (CCH) P 34,439, 1 A.D.D. 204

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Cohen v. Brown University
C.A.1 (R.I.),1996.

United States Court of Appeals,First Circuit.
Amy COHEN, et al., Plaintiffs-Appellees,
v.
BROWN UNIVERSITY, et al., Defendants-Appellants.
No. 95-2205.

Heard April 1, 1996.
Decided Nov. 21, 1996.

Student members of women's gymnastics and volleyball teams which had been demoted from university-funded varsity status to donor-funded varsity status by private university brought class action against university and its president and athletic director, alleging Title IX violations. Preliminary injunction issued, restoring teams to varsity status pending trial on merits, 809 F.Supp. 978, and was upheld on appeal by a panel of the Court of Appeals, 991 F.2d 888. On remand, the District Court for the District of Rhode Island, Raymond J. Pettine, Senior District Judge, found violations, 879 F.Supp. 185. University moved for additional findings of fact and to amend judgment, and, on denial of such motion by trial court, appealed. The Court of Appeals, Bownes, Senior Circuit Judge, held that: (1) doctrine of "law of the case" precluded Court of Appeals from undertaking plenary review of issues decided by panel thereof in previous appeal; (2) suit was antidiscrimination claim rather than affirmative action claim; (3) regulations under Title IX were entitled to controlling weight and policy interpretation issued by Office for Civil Rights (OCR) of Department of Health, Education and Welfare (HEW) interpreting such regulations was entitled to substantial deference; (4) donor-funded varsity teams were properly excluded from District Court's calculation of participation opportunities offered by university; (5) District Court's interpretation of three-part test of institutional compliance with participation opportunity requirements of Title IX was not requirement of numerical proportionality or imposition of gender-based quota system; (6) Title VII gender discrimination standards were inapplicable; (7) university's "relative interests" approach to allocation of athletic resources was not reasonable interpretation of three-part test; (8) university's allocation of athletic resources between men's and women's programs based upon "relative interests" approach failed to accommodate fully and effectively interests and abilities of underrepresented gender; (9) Court would review constitutionality of District Court's order requiring university to comply with Title IX by accommodating fully and effectively athletics interests and abilities of its female students under intermediate scrutiny test; (10) such order satisfied equal protection requirements; and (11) District Court was not entitled to reject remedial plan offered by university and substitute its own specific plan for relief.

Affirmed in part, reversed in part, and remanded for further proceedings.

Torruella, C.J., dissented with opinion.

West Headnotes

[1] Federal Courts 170B ⚷917

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)8 Subsequent Appeals
170Bk917 k. Former Decision as Law of the Case. Most Cited Cases
Court of Appeals would not undertake plenary review of issues decided by panel thereof in previous appeal from District Court's ruling on motion for preliminary injunction, in class action by student members of women's gymnastics and volleyball teams which had been demoted from university-funded varsity status to donor-funded varsity status against private university and its president and athletic director, alleging Title IX violations; under "law of the case" doctrine, Court of Appeals was bound on appeal by its prior panel's rulings of law, no exception to "law of the case" doctrine applied, and decision rendered by prior panel in first appeal was not legally defective. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[2] **Courts 106 ⚷99(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(1) k. In General. Most Cited Cases

Federal Courts 170B ⚷950

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk949 Mandate and Effect of Decision in Lower Court
170Bk950 k. Law of the Case; Changes in Law or Facts. Most Cited Cases
"Law of the case doctrine" precludes relitigation of legal issues presented in successive stages of single case once those issues have been decided; doctrine directs that decision of appellate court on issue of law, unless vacated or set aside, governs issue during all subsequent stages of litigation in *nisi prius* court and thereafter on any further appeal.

[3] **Federal Courts 170B ⚷950**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk949 Mandate and Effect of Decision in Lower Court
170Bk950 k. Law of the Case; Changes in Law or Facts. Most Cited Cases
Under "law of the case doctrine," reviewing court's mandate constitutes law of case on such issues of law as were actually considered and decided by appellate court, or as were necessarily inferred from disposition on appeal.

[4] **Federal Courts 170B ⚷950**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk949 Mandate and Effect of Decision in Lower Court
170Bk950 k. Law of the Case; Changes in Law or Facts. Most Cited Cases
"Law of the case doctrine" requires trial court on remand to dispose of case in accordance with appellate court's mandate by implementing both letter and spirit of mandate, taking into account appellate court's opinion and circumstances it embraces, and binds newly constituted panels to prior panel decisions on point.

[5] **Federal Courts 170B ⚷917**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)8 Subsequent Appeals
170Bk917 k. Former Decision as Law of the Case. Most Cited Cases
Circumstances in which exceptions to "law of the case" doctrine apply are rare; issues decided on appeal should not be reopened unless evidence on subsequent trial was substantially different, controlling authority has since made contrary decision of law applicable to such issues, or decision was clearly erroneous and would work manifest injustice.

[6] **Courts 106 ⚷99(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(1) k. In General. Most Cited Cases
"Law of the case" doctrine is prudential rule of policy and practice, rather than absolute bar to reconsideration or limitation on federal court's power; nevertheless, doctrine serves important goals and must be treated respectfully and, in absence of exceptional circumstances, applied according to its tenor.

[7] **Federal Courts 170B ⚷760**

170B Federal Courts

170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk759 Theory and Grounds of Decision of Lower Court
170Bk760 k. Rulings as Law of Case. Most Cited Cases
In ruling on propriety of District Court's grant of preliminary injunction or other issuance of preliminary ruling without benefit of full argument and well-developed record, Court of Appeals generally understands District Court's conclusions and holdings regarding merits of issues presented on appeal as statements as to probable outcomes rather than as comprising ultimate law of case.

[8] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Suit brought by female student athletes against university under Title IX was antidiscrimination claim rather than affirmative action claim, despite fact that Title IX permitted both affirmative action and inference that substantial gender disproportionality might indicate existence of discrimination, and despite gender-conscious nature of available remedy, Title IX did not mandate gender-based preferences or quotas, or specific timetables for implementing numerical goals, substantial proportionality test was only one aspect of inquiry into university's compliance with Title IX and was applied in fact-specific manner, Title IX neither mandated finding of discrimination based solely upon gender-based statistical disparity nor prohibited gender-conscious remedial measures, and available remedies did not raise fact concerns underlying requirement of particularized factual predicate. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[9] Civil Rights 78 ⚷1237

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1237 k. In General. Most Cited Cases
(Formerly 78k154)
"Affirmative action" involves voluntary undertaking to remedy discrimination by means of specific group-based preferences or numerical goals and specific timetable for achieving those goals.

[10] Civil Rights 78 ⚷1238

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1238 k. Race, Color, Ethnicity, or National Origin. Most Cited Cases
(Formerly 78k154)

Civil Rights 78 ⚷1239

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1239 k. Sex. Most Cited Cases
(Formerly 78k154)
Voluntary affirmative action plans cannot be constitutionally justified absent particularized factual predicate demonstrating existence of identified discrimination; societal discrimination, without more, is too amorphous a basis for imposing racially classified remedy, and government cannot be permitted to reach out to implement race or gender-conscious remedial measures that are ageless in their reach into past and timeless in their ability to affect future, on basis of facts insufficient to support prima facie case of constitutional or statutory violation, to benefit of unidentified victims of past discrimination.

[11] Civil Rights 78 ⚷1239

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1239 k. Sex. Most Cited Cases
(Formerly 78k154)
Remedy flowing from judicial determination of discrimination does not necessarily constitute

affirmative action merely because such remedy is gender-conscious, nor does reverse discrimination claim arise every time antidiscrimination statute is enforced; while some gender-conscious relief may adversely impact one gender, that alone would not make such relief affirmative action or consequence of that relief reverse discrimination.

[12] Civil Rights 78 ⚷1238

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1238 k. Race, Color, Ethnicity, or National Origin. Most Cited Cases
(Formerly 78k154)

Civil Rights 78 ⚷1239

78 Civil Rights
78II Employment Practices
78k1236 Affirmative Action; Remedial Measures
78k1239 k. Sex. Most Cited Cases
(Formerly 78k154)

Constitutional Law 92 ⚷3252

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3252 k. Affirmative Action in General. Most Cited Cases
(Formerly 92k224(1), 92k215)

Constitutional Law 92 ⚷3381

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3381 k. Affirmative Action in General. Most Cited Cases
(Formerly 92k224(1))
Race and gender-conscious remedies are both appropriate and constitutionally permissible under federal antidiscrimination regime, although such remedial measures are still subject to equal protection review. U.S.C.A. Const.Amends. 5, 14.

[13] Administrative Law and Procedure 15A ⚷416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect
15Ak416.1 k. In General. Most Cited Cases
Regulations resulting from express congressional delegation to agency of power to elucidate specific provision of statute by regulation should be accorded controlling weight unless such regulations are arbitrary, capricious, or manifestly contrary to statute.

[14] Administrative Law and Procedure 15A ⚷413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases
Agency's construction of its own regulations is entitled to substantial deference.

[15] Administrative Law and Procedure 15A ⚷413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases
Agency's power authoritatively to interpret its own regulations is presumed to be component of agency's delegated lawmaking powers, as applying agency's regulation to complex or changing circumstances calls upon agency's unique expertise and policymaking prerogatives.

[16] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Regulations implementing intercollegiate athletics provisions of Title IX were entitled to controlling weight, and Policy Interpretation issued by Office for Civil Rights (OCR) of Department of Health, Education and Welfare (HEW) interpreting such regulations was entitled to substantial deference, in class action under Title IX brought by student members of university's women's gymnastics and volleyball teams against university and its president and athletic director; Congress expressly delegated to agency power to elucidate statute by regulation, and policy interpretation stood upon plausible, if not inevitable, reading of Title IX. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688; 34 C.F.R. §§ 106.1-106.71.

[17] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
For purposes of three-part test of institutional compliance with participation opportunity requirements of Title IX, intercollegiate athletics participation opportunities offered by institution are properly measured by counting number of actual participants on intercollegiate teams; teams not sponsored by university, designated "club" teams, are not considered to be intercollegiate teams except in those instances in which they regularly participate in varsity competition. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[18] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
District Court properly excluded club varsity teams from definition of intercollegiate teams and, therefore, from its calculation of participation opportunities offered by university sued by female student athletes under Title IX, where evidence was inadequate to show that club teams regularly participated in varsity competition. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688; 34 C.F.R. §§ 106.1-106.71.

[19] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Statement by District Court that university would fail test of institutional compliance with requirements of Title IX if there was sufficient interest and ability among members of statistically underrepresented gender not slaked by existing programs was not requirement of numerical proportionality or imposition of gender-based quota system in contravention of Title IX; legislative history of section of Title IX governing consideration of gender parity strongly suggested that section of Title IX at issue defined conduct proscribed in context of admissions and hiring in geographical area outside university and did not refer to imbalances existing within university itself with respect to gender representation in athletics, and District Court's interpretation of test did not in any event require preferential or disparate treatment for either gender but rather created presumption of compliance in presence of statistical balance. Education Amendments of 1972, § 901(b), as amended, 20 U.S.C.A. § 1681(b).

[20] Civil Rights 78 ⚷1067(2)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Court assessing Title IX compliance may not find violation solely because there is disparity between gender composition of educational institution's student constituency and its athletic programs. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[21] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Title IX plaintiff is required to show not only disparity between gender composition of institution's student body and its athletic program, thereby proving that one gender is underrepresented, but also that element of unmet interest is present, meaning that underrepresented gender has not been fully and effectively accommodated by institution's present athletic program; only if plaintiff meets burden of proof on these elements and institution fails to show as affirmative defense history and continuing practice of program expansion responsive to interests and abilities of underrepresented gender will Title IX liability be established. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[22] Civil Rights 78 ⚷1067(1)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(1) k. In General. Most Cited Cases
(Formerly 78k128)
In assessing institutional compliance with participation opportunity requirements of Title IX, fact that overrepresented gender is less than fully accommodated will not, in and of itself, excuse shortfall in provision of opportunities for underrepresented gender. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[23] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
In assessing institutional compliance with participation opportunity requirements of Title IX, absent demonstration of continuing program expansion for underrepresented gender, institution must either provide athletics opportunities in proportion to gender composition of student body or fully accommodate interests and abilities of athletes of underrepresented gender. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[24] Civil Rights 78 ⚷1067(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Title VII gender discrimination standards were inapplicable to class action brought by female student athletes against university, its president and athletic director under Title IX and based upon alleged inequities in intercollegiate athletic program; scope and purpose of Title IX were substantially different from those of Title VII, and athletics presented distinctly different situation from admissions and employment and required different analysis in order to determine existence *vel non* of discrimination. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688; Civil Rights

Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[25] **Civil Rights 78 ⚷1067(2)**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
Even if university sued by female student athletes under Title IX could have empirically demonstrated that female students had less interest in athletic participation than did male students, such evidence, standing alone, could not have justified university's providing fewer athletic opportunities for women than for men; such "relative interests" approach rested on stereotypical and thus suspect notions of women's interests and abilities, women's lower athletic participation rate reflected historical lack of opportunity and thus statistical evidence purporting to measure women's interest reflected past discrimination, and argument that women were less interested in sports for reasons unrelated to lack of opportunity was disproved by tremendous growth in women's participation in sports since enactment of Title IX. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[26] **Civil Rights 78 ⚷1067(2)**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(2) k. Extracurricular Activities; Athletics. Most Cited Cases
(Formerly 78k128)
University's allocation of athletic resources between men's and women's programs based upon "relative interests" approach failed to accommodate fully and effectively interests and abilities of underrepresented gender, as required by Title IX, where varsity women's teams demoted by university from university-funded status to donor-funded status were viable and successful until such demotion and student interest, ability and competitive opportunities still existed. Education Amendments of 1972, § 901(b), as amended, 20 U.S.C.A. § 1681(b).

[27] **Federal Courts 170B ⚷917**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)8 Subsequent Appeals
170Bk917 k. Former Decision as Law of the Case. Most Cited Cases
Prior panel decision citing case which was thereafter overruled in part remained "law of the case," where specific proposition for which case was cited was not overruled by intervening decision.

[28] **Constitutional Law 92 ⚷3047**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3047 k. Affirmative Action in General. Most Cited Cases
(Formerly 92k224(1))
Remedy ordered for violation of federal antidiscrimination statute is subject to equal protection review, even if violator's equal protection challenge to underlying statute is rejected, assuming that remedy ordered constitutes gender-conscious government action. U.S.C.A. Const.Amends. 5, 14.

[29] **Constitutional Law 92 ⚷3398**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3393 Education
92k3398 k. Athletics. Most Cited Cases
(Formerly 92k224(2))
Court of Appeals would review constitutionality of District Court's order requiring university to comply with Title IX by accommodating fully and effectively athletics interests and abilities of its women students under intermediate scrutiny test for determining equal protection violation, as such classification was gender-based. U.S.C.A. Const.Amends. 5, 14; Education Amendments of 1972, §§ 901-909, as

amended, 20 U.S.C.A. §§ 1681-1688.

[30] **Constitutional Law 92 ⚷3081**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3081 k. Sex or Gender. Most Cited Cases
(Formerly 92k224(1))
Under intermediate scrutiny test for determining equal protection violation, burden of demonstrating exceedingly persuasive justification for government-imposed, gender-conscious classification is met by showing that classification serves important governmental objectives, and that means employed are substantially related to achievement of those objectives. U.S.C.A. Const.Amends. 5, 14.

[31] **Civil Rights 78 ⚷1452**

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1452 k. Education. Most Cited Cases
(Formerly 78k267)

Constitutional Law 92 ⚷3398

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3393 Education
92k3398 k. Athletics. Most Cited Cases
(Formerly 92k224(2))
Order requiring university to comply with Title IX by accommodating fully and effectively athletic interests and abilities of its women students satisfied equal protection requirements, even though it was explicitly gender-conscious; governmental objectives of avoiding use of federal resources to support discriminatory practices, providing individual citizens effective protection against those practices, and judicial enforcement of federal antidiscrimination statutes were important governmental objectives, means employed by District Court in fashioning relief were clearly substantially related to statutory objectives, relief intentionally and directly assisted members of sex that was disproportionately burdened, and male students would not be disadvantaged by full and effective accommodation of athletic interests and abilities of female students. U.S.C.A. Const.Amends. 5, 14; Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[32] **Constitutional Law 92 ⚷3381**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3381 k. Affirmative Action in General. Most Cited Cases
(Formerly 92k224(1))
Gender-conscious remedial scheme satisfies constitutional equal protection requirements if it directly protects interests of disproportionately burdened gender. U.S.C.A. Const.Amends. 5, 14.

[33] **Federal Courts 170B ⚷823**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases
Court of Appeals reviews District Court's evidentiary rulings for abuse of discretion.

[34] **Witnesses 410 ⚷269(2.1)**

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k269 Limitation of Cross-Examination to Subjects of Direct Examination
410k269(2) Limitation as to Particular Subjects of Inquiry
410k269(2.1) k. In General. Most Cited Cases
Cross-examination of plaintiffs' witness, in Title IX action against university by female student athletes, on issue of why girls drop out of sports before reaching college was properly barred, where witness'

direct testimony did not reach such issue. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688; Fed.Rules Civ.Proc.Rule 611(b), 28 U.S.C.A.

[35] Federal Courts 170B ⚷901.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk901 Exclusion of Evidence
170Bk901.1 k. In General. Most Cited Cases

Any error in District Court's exclusion of reports proffered by university in support of its "relative interests" argument, in Title IX action against university by female student athletes, was harmless; District Court permitted university's expert witnesses to rely upon data in excluded reports in providing their opinions on issue of gender-based differential in student interest in athletics, such data was thus before trier of fact, and any error did not affect essential fairness of trial. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

[36] Action 13 ⚷34

13 Action
13II Nature and Form
13k33 Statutory Remedies
13k34 k. In General. Most Cited Cases

If no contrary legislative directive appears, federal judiciary possesses power to grant any appropriate relief on cause of action appropriately brought pursuant to federal statute.

[37] Civil Rights 78 ⚷1070

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1070 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k127.1)

Academic freedom of universities does not embrace freedom to discriminate.

[38] Civil Rights 78 ⚷1452

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1452 k. Education. Most Cited Cases
(Formerly 78k267)

District Court was not entitled to reject remedial plan offered by university accused of Title IX violations in its athletic program and substitute court's own specific plan for relief, even though such specific plan was within statutory margins and was constitutional; university's plan, entailing reduction in number of men's varsity positions and elevation of certain donor-funded women's teams to varsity or junior varsity status, while falling short of good faith effort to comply with requirements of Title IX, was nevertheless permissible means of effecting compliance, and university was entitled to as much freedom as possible in conducting its operations consonant with constitutional and statutory limits and was thus entitled to opportunity to submit another plan for compliance. Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688.

***160** Joan A. Lukey, Boston, MA, and Walter B. Connolly, Jr., Detroit, MI, with whom Hale and Dorr, Alison B. Marshall, Washington, DC, Miller, Canfield, Paddock & Stone, Beverly E. Ledbetter, General Counsel, Brown University, Julius C. Michaelson, Jeffrey S. Michaelson and Michaelson & Michaelson, Providence, RI, were on brief for appellants.

Martin Michaelson, with whom Amy Folsom Kett, Washington, DC, Suzanne M. Bonnet, Hogan & Hartson L.L.P., Denver, CO, and Sheldon E. Steinbach, Washington, DC, General Counsel, American Council on Education, were on brief for American Council on Education, Association of American Universities, National Association of Independent Colleges and Universities, and National Association of State Universities and Land-Grant Colleges, amici curiae.

George A. Davidson, Carla A. Kerr, Seth D. Rothman and Hughes Hubbard & Reed, on brief for Baylor University, Boston University, Colgate University, College of the Holy Cross, Colorado State University, Fairfield University, George Washington University, John Hopkins University, Lafayette College, New York University, Saint Peter's College, Southern Methodist University,

Tulane University, University of Arkansas, University of Nebraska, University of Notre Dame, and Wake Forest University, amici curiae.
Melinda Ledden Sidak, Washington, DC, and Anita K. Blair, Arlington, VA, on brief for The Independent Women's Forum, amicus curiae.
Stephen S. Ostrach, Todd S. Brilliant, New York City, and New England Legal Foundation, on brief for American Baseball Coaches Association, College Swim Coaches Association of America, National Wrestling Coaching Association and United States Water Polo, amici curiae.
Lynette Labinger, with whom Roney & Labinger, Amato A. DeLuca, DeLuca & Weizenbaum, Ltd., Raymond Marcaccio, Blish & Cavanagh, Providence, RI, Sandra L. Duggan, Sandra L. Duggan, Esq., P.C., Arthur H. Bryant, Leslie A. Brueckner, La Jolla, CA, and Trial Lawyers for Public Justice, P.C., were on brief for appellees.
Deborah L. Brake, with whom Marcia D. Greenberger, Judith C. Appelbaum and National***161** Women's Law Center were on brief for National Women's Law Center, American Association of University Women/AAUW Legal Advocacy Fund, American Civil Liberties Union Women's Rights Project, California Women's Law Center, Center For Women Policy Studies, Connecticut Women's Education and Legal Fund, Equal Rights Advocates, Feminist Majority Foundation, Girls Incorporated, National Association for Girls and Women in Sports, National Association for Women in Education, National Coalition for Sex Equity in Education, National Commission on Working Women, National Council of Administrative Women in Education, National Education Association, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Softball Coaches Association, Northwest Women's Law Center, Parents for Title IX, Rhode Island Affiliate American Civil Liberties Union, Women Employed, Women's Basketball Coaches Association, Women's Law Project, Women's Legal Defense Fund, Women's Sports Foundation, and YWCA of the USA, amici curiae.
Deval L. Patrick, Assistant Attorney General, Isabelle Katz Pinzler, Deputy Assistant Attorney General, Dennis J. Dimsey and Lisa W. Edwards, Attorneys, Department of Justice, on brief for the United States, amicus curiae.

Before TORRUELLA, Chief Judge, BOWNES, Senior Circuit Judge, and Stahl, Circuit Judge.

BOWNES, Senior Circuit Judge.
This is a class action lawsuit charging Brown University, its president, and its athletics director (collectively "Brown") with discrimination against women in the operation of its intercollegiate athletics program, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), and its implementing regulations, 34 C.F.R. §§ 106.1-106.71. The plaintiff class comprises all present, future, and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

This suit was initiated in response to the demotion in May 1991 of Brown's women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status. Contemporaneously, Brown demoted two men's teams, water polo and golf, from university-funded to donor-funded varsity status. As a consequence of these demotions, all four teams lost, not only their university funding, but most of the support and privileges that accompany university-funded varsity status at Brown.

Prior to the trial on the merits that gave rise to this appeal, the district court granted plaintiffs' motion for class certification and denied defendants' motion to dismiss. Subsequently, after hearing fourteen days of testimony, the district court granted plaintiffs' motion for a preliminary injunction, ordering, *inter alia*, that the women's gymnastics and volleyball teams be reinstated to university-funded varsity status, and prohibiting Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. *Cohen v. Brown Univ.*, 809 F.Supp. 978, 1001 (D.R.I.1992) ("*Cohen I* "). A panel of this court affirmed the district court's decision granting a preliminary injunction to the plaintiffs. *Cohen v. Brown Univ.*, 991 F.2d 888, 907 (1st Cir.1993) ("*Cohen II* "). In so doing, we upheld the district court's analysis and ruled that an institution violates Title IX if it ineffectively accommodates its students' interests and abilities in athletics under 34 C.F.R. § 106.41(c)(1) (1995), regardless of its performance with respect to other Title IX areas. *Id.* at 897.

On remand, the district court determined after a lengthy bench trial that Brown's intercollegiate athletics program violates Title IX and its supporting regulations. Cohen v. Brown Univ., 879 F.Supp. 185, 214 (D.R.I.1995) ("*Cohen III* "). The district court ordered Brown to submit within 120 days a comprehensive plan for complying with Title IX, but stayed that portion of the order pending appeal. *Id.* The district court subsequently issued a modified order, requiring Brown to submit a compliance plan within 60 days. Modified Order of May 4, 1995. This action was taken to ensure that the Order ***162** was "final" for purposes of this court's jurisdiction, and to expedite the appeal process. *Id.* Finding that Brown's proposed compliance plan was not comprehensive and that it failed to comply with the opinion and order of *Cohen III,* the district court rejected the plan and ordered in its place specific relief consistent with Brown's stated objectives in formulating the plan. Order of August 17, 1995 at 11. The court's remedial order required Brown to elevate and maintain at university-funded varsity status the women's gymnastics, fencing, skiing, and water polo teams. *Id.* at 12. The district court's decision to fashion specific relief was made, in part, to avoid protracted litigation over the compliance plan and to expedite the appeal on the issue of liability. *Id.* at 11. The district court entered final judgment on September 1, 1995, and on September 27, 1995, denied Brown's motion for additional findings of fact and to amend the judgment. This appeal followed.

Brown claims error in certain evidentiary rulings made during the trial and in the district court's order of specific relief in place of Brown's proposed compliance plan. In addition, and as in the previous appeal, Brown challenges on constitutional and statutory grounds the test employed by the district court in determining whether Brown's intercollegiate athletics program complies with Title IX. In the first appeal, a panel of this court elucidated the applicable legal framework, upholding the substance of the district court's interpretation and application of the law in granting plaintiffs' motion for a preliminary injunction,[FN1] and rejecting essentially the same legal arguments Brown makes here.

FN1. The prior panel upheld the district court's rulings in all respects save one. We held that the district court erred in placing upon Brown the burden of proof under prong three of the three-part test used to determine whether an intercollegiate athletics program complies with Title IX, discussed *infra.* Cohen II, 991 F.2d at 903.

Brown contends that we are free to disregard the prior panel's explication of the law in *Cohen II.* Brown's efforts to circumvent the controlling effect of *Cohen II* are unavailing, however, because, under the law of the case doctrine, we are bound in this appeal, as was the district court on remand, by the prior panel's rulings of law. While we acknowledge that the law of the case doctrine is subject to exceptions, we conclude that none applies here, and that the decision rendered by the prior panel in the first appeal is not, as Brown claims, "legally defective." Accordingly, we decline Brown's invitation to undertake plenary review of issues decided in the previous appeal and treat *Cohen II* as controlling authority, dispositive of the core issues raised here.

We find no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability. We do, however, find error in the district court's award of specific relief and therefore remand the case to the district court for reconsideration of the remedy in light of this opinion.

I.

The relevant facts, legal principles, and procedural history of this case have been set forth in exhaustive detail in the previous opinions issued in this case. Thus, we recite the facts as supportably found by the district court in the course of the bench trial on the merits in a somewhat abbreviated fashion.

As a Division I institution within the National Collegiate Athletic Association ("NCAA") with respect to all sports but football, Brown participates at the highest level of NCAA competition.[FN2] Cohen III, 879 F.Supp. at 188. Brown operates a two-tiered intercollegiate athletics program with respect to funding: although Brown provides the financial resources required to maintain its university-funded varsity teams, donor-funded varsity athletes must

themselves raise the funds necessary to support their teams ***163** through private donations. *Id.* at 189. The district court noted that the four demoted teams were eligible for NCAA competition, provided that they were able to raise the funds necessary to maintain a sufficient level of competitiveness, and provided that they continued to comply with NCAA requirements. *Id.* at 189 n. 6. The court found, however, that it is difficult for donor-funded varsity athletes to maintain a level of competitiveness commensurate with their abilities and that these athletes operate at a competitive disadvantage in comparison to university-funded varsity athletes. *Id.* at 189. For example, the district court found that some schools are reluctant to include donor-funded teams in their varsity schedules [FN3] and that donor-funded teams are unable to obtain varsity-level coaching, recruits, and funds for travel, equipment, and post-season competition. *Id.* at 189-90.

FN2. Brown's football team competes in Division I-AA, the second highest level of NCAA competition. *Cohen III*, 879 F.Supp. at 188 n. 4.

FN3. Two schools declined to include Brown in future varsity schedules when women's volleyball was demoted to donor-funded status. *Cohen II*, 991 F.2d at 892 n. 2; *Cohen I*, 809 F.Supp. at 993.

Brown's decision to demote the women's volleyball and gymnastics teams and the men's water polo and golf teams from university-funded varsity status was apparently made in response to a university-wide cost-cutting directive. *Cohen I*, 809 F.Supp. at 981. The district court found that Brown saved $62,028 by demoting the women's teams and $15,795 by demoting the men's teams, but that the demotions "did not appreciably affect the athletic participation gender ratio." *Cohen III* at 187 n. 2.

Plaintiffs alleged that, at the time of the demotions, the men students at Brown already enjoyed the benefits of a disproportionately large share of both the university resources allocated to athletics and the intercollegiate participation opportunities afforded to student athletes. Thus, plaintiffs contended, what appeared to be the even-handed demotions of two men's and two women's teams, in fact, perpetuated Brown's discriminatory treatment of women in the administration of its intercollegiate athletics program.

In the course of the preliminary injunction hearing, the district court found that, in the academic year 1990-91, Brown funded 31 intercollegiate varsity teams, 16 men's teams and 15 women's teams, *Cohen I*, 809 F.Supp. at 980, and that, of the 894 undergraduate students competing on these teams, 63.3% (566) were men and 36.7% (328) were women, *id.* at 981. During the same academic year, Brown's undergraduate enrollment comprised 52.4% (2,951) men and 47.6% (2,683) women. *Id.* The district court also summarized the history of athletics at Brown, finding, *inter alia*, that, while nearly all of the men's varsity teams were established before 1927, virtually all of the women's varsity teams were created between 1971 and 1977, after Brown's merger with Pembroke College. *Id.* The only women's varsity team created after this period was winter track, in 1982. *Id.*

In the course of the trial on the merits, the district court found that, in 1993-94, there were 897 students participating in intercollegiate varsity athletics, of which 61.87% (555) were men and 38.13% (342) were women. *Cohen III*, 879 F.Supp. at 192. During the same period, Brown's undergraduate enrollment comprised 5,722 students, of which 48.86% (2,796) were men and 51.14% (2,926) were women. *Id.* The district court found that, in 1993-94, Brown's intercollegiate athletics program consisted of 32 teams, 16 men's teams and 16 women's teams. *Id.* Of the university-funded teams, 12 were men's teams and 13 were women's teams; of the donor-funded teams, three were women's teams and four were men's teams. *Id.* At the time of trial, Brown offered 479 university-funded varsity positions for men, as compared to 312 for women; and 76 donor-funded varsity positions for men, as compared to 30 for women. *Id.* at 211. In 1993-94, then, Brown's varsity program-including both university- and donor-funded sports-afforded over 200 more positions for men than for women. *Id.* at 192. Accordingly, the district court found that Brown maintained a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, *id.* at 211, and that "[a]lthough the number of varsity sports ***164** offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes," *id.* at 189.

In computing these figures, the district court counted as participants in intercollegiate athletics for purposes of Title IX analysis those athletes who were members of varsity teams for the majority of the last complete season. *Id.* at 192. Brown argued at trial that "there is no consistent measure of actual participation rates because team size varies throughout the athletic season," and that "there is no consistent measure of actual participation rates because there are alternative definitions of 'participant' that yield very different participation totals."*Id.* Reasoning that "[w]here both the athlete and coach determine that there is a place on the team for a student, it is not for this Court to second-guess their judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience," the district court concluded that "[e]very varsity team member is therefore a varsity 'participant.' " *Id.* (original emphasis omitted). Thus, the district court held that

> the "participation opportunities" offered by an institution are measured by counting the *actual participants* on intercollegiate teams. The number of participants in Brown's varsity athletic program accurately reflects the number of participation opportunities Brown offers because the University, through its practices "predetermines" the number of athletic positions available to each gender.

Id. at 202-03.

The district court found from extensive testimony that the donor-funded women's gymnastics, women's fencing and women's ski teams, as well as at least one women's club team, the water polo team, had demonstrated the interest and ability to compete at the top varsity level and would benefit from university funding.[FN4] *Id.* at 190.

> FN4. The district court noted that "there may be other women's club sports with sufficient interest and ability to warrant elevation to varsity status," but that plaintiffs did not introduce at trial substantial evidence demonstrating the existence of other women's club teams meeting the criteria. *Cohen III,* 879 F.Supp. at 190 n. 14.

The district court did *not* find that full and effective accommodation of the athletics interests and abilities of Brown's female students would disadvantage Brown's male students.

II.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a) (West 1990). As a private institution that receives federal financial assistance, Brown is required to comply with Title IX.

Title IX also specifies that its prohibition against gender discrimination shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist" between the total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C.A. § 1681(b) (West 1990). Subsection (b) also provides, however, that it "shall not be construed to prevent the consideration in any ... proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

Applying § 1681(b), the prior panel held that Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." *Cohen II,* 991 F.2d at 894. The panel explained that, while evidence of a gender-based disparity in an institution's athletics program is relevant to a determination of noncompliance, "a court assessing Title IX compliance may not find a violation *solely* because there is a disparity ***165** between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." *Id.* at 895.

Congress enacted Title IX in response to its finding-after extensive hearings held in 1970 by the House Special Subcommittee on Education-of pervasive

discrimination against women with respect to educational opportunities. 118 Cong.Rec. 5804 (1972) (remarks of Sen. Bayh); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n. 13, 102 S.Ct. 1912, 1919 n. 13, 72 L.Ed.2d 299 (1982).

Title IX was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." Cannon v. University of Chicago, 441 U.S. 677, 704, 99 S.Ct. 1946, 1961, 60 L.Ed.2d 560 (1979). To accomplish these objectives, Congress directed all agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violate Title IX. 20 U.S.C. § 1682.

The agency responsible for administering Title IX is the United States Department of Education ("DED"), through its Office for Civil Rights ("OCR").[FN5] Congress expressly delegated to DED the authority to promulgate regulations for determining whether an athletics program complies with Title IX. Pub.L. No. 93-380, 88 Stat. 612 (1974).[FN6] The regulations specifically address athletics at 34 C.F.R. §§ 106.37(c) and 106.41. The regulation at issue in this case, 34 C.F.R. § 106.41 (1995), provides:

FN5. Agency responsibility for administration of Title IX shifted from the Department of Health, Education and Welfare ("HEW") to DED when HEW split into two agencies, DED and the Department of Health and Human Services. The regulations and agency documents discussed herein were originally promulgated by HEW, the administering agency at the time, and later adopted by the present administering agency, DED. *See* Cohen II, 991 F.2d at 895; Cohen III, 879 F.Supp. at 194-95 n. 23. For simplicity, we treat DED as the promulgating agency.

FN6. HEW apparently received an unprecedented 9,700 comments on the proposed Title IX athletics regulations, *see* Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ., 524 F.Supp. 531, 536 n. 9 (1981) (citing Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 Geo.Wash.L.Rev. 34, 40 (1977) ("Cox")), prompting former HEW Secretary Caspar Weinberger to remark, "I had not realized until the comment period that athletics is the single most important thing in the United States," *id.* (citing Cox at 34, quoting N.Y.Times, June 27, 1975, at 16, col. 4).

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

*166 (3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation for coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

In the first appeal, this court held that an institution's failure effectively to accommodate both genders under § 106.41(c)(1) is sufficient to establish a violation of Title IX. *Cohen II*, 991 F.2d at 897.

In 1978, several years after the promulgation of the regulations, OCR published a proposed "Policy Interpretation," the purpose of which was to clarify the obligations of federal aid recipients under Title IX to provide equal opportunities in athletics programs. "In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)]." 44 Fed.Reg. at 71,415. After considering a large number of public comments, OCR published the final Policy Interpretation. 44 Fed.Reg. 71,413-71,423 (1979). While the Policy Interpretation covers other areas, this litigation focuses on the "Effective Accommodation" section, which interprets 34 C.F.R. § 106.41(c)(1), the first of the non-exhaustive list of ten factors to be considered in determining whether equal athletics opportunities are available to both genders. The Policy Interpretation establishes a three-part test, a two-part test, and factors to be considered in determining compliance under 34 C.F.R. § 106.41(c)(1). At issue in this appeal is the proper interpretation of the first of these, the so-called three-part test,[FN7] which inquires as follows:

FN7. For clarification, we note that the cases refer to each part of this three-part test as a "prong" or a "benchmark." Prong one is also called the "substantial proportionality test."

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed.Reg. at 71,418.

The district court held that, "because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one." *Cohen III*, 879 F.Supp. at 211. Nor did Brown satisfy prong two. While acknowledging that Brown "has an impressive *history* of program expansion," the district court found that Brown failed to demonstrate that it has "maintained a *continuing practice* of intercollegiate program expansion for women, the underrepresented sex." *Id.* The court noted further that, because merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender, the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women. *Id.* As to prong three, the district court found that Brown had not "*fully* and effectively accommodated the interest and ability of the underrepresented sex 'to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of

both *167 sexes.' " *Id.* (quoting the Policy Interpretation, 44 Fed.Reg. at 71,417).

On January 16, 1996, DED released a "Clarification Memorandum," which does not change the existing standards for compliance, but which does provide further information and guidelines for assessing compliance under the three-part test. The Clarification Memorandum contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX.

The district court found that Brown predetermines the approximate number of varsity positions available to men and women, and, thus, that "the concept of any measure of unfilled but available athletic slots does not comport with reality." *Cohen III,* 879 F.Supp. at 203 n. 36. The district court concluded that intercollegiate athletics opportunities "means real opportunities, not illusory ones, and therefore should be measured by counting *actual participants.*" *Id.* at 204 (internal quotation marks and citations omitted).

Title IX is an anti-discrimination statute, modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI").[FN8] *See Cannon,* 441 U.S. at 696, 99 S.Ct. at 1957 ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."). Thus, Title IX and Title VI share the same constitutional underpinnings. *See* Jeffrey H. Orleans, *An End To The Odyssey: Equal Athletic Opportunities For Women,* 3 Duke J.Gender L. & Pol'y 131, 133-34 (1996).

FN8. Title VI prohibits discrimination on the basis of race, color, or national origin in institutions benefitting from federal funds.

Although the statute itself provides for no remedies beyond the termination of federal funding, the Supreme Court has determined that Title IX is enforceable through an implied private right of action, *Cannon,* 441 U.S. at 703, 99 S.Ct. at 1961, and that damages are available for an action brought under Title IX, *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 76, 112 S.Ct. 1028, 1038, 117 L.Ed.2d 208 (1992). The right to injunctive relief under Title IX appears to have been impliedly accepted by the Supreme Court in *Franklin.* *Id.* at 64-66, 71-73, 112 S.Ct. at 1031-33, 1035-37. In addition, a majority of the Court in *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), agreed that injunctive relief and other equitable remedies are appropriate for violations of Title VI.

According to the statute's senate sponsor, Title IX was intended to

provide for the women of America something that is rightfully theirs-an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

118 Cong.Rec. 5808 (1972) (remarks of Sen. Bayh) (*quoted in Haffer,* 524 F.Supp. at 541).

III.

[1] In *Cohen II,* a panel of this court squarely rejected Brown's constitutional and statutory challenges to the Policy Interpretation's three-part test, upholding the district court's interpretation of the Title IX framework applicable to intercollegiate athletics, *Cohen II,* 991 F.2d at 899-902, as well as its grant of a preliminary injunction in favor of the plaintiffs, *id.* at 906-07. Despite the fact that it presents substantially the same legal arguments in this appeal as were raised and decided in the prior appeal, Brown asserts that there is "no impediment" to this court's plenary review of these decided issues. We disagree.

[2][3][4] The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided. *See* 1B James W. Moore et al., Moore's Federal Practice ¶ 0.404 [1] (2d ed. 1993) (hereinafter "Moore"). "The doctrine of the law of the case directs that a decision of an appellate court on an issue of law, unless vacated or set aside, governs the issue during all subsequent*168 stages of litigation in the *nisi prius* court and thereafter on any further appeal." *Commercial Union Ins. Co. v. Walbrook Ins. Co.,* 41 F.3d 764, 769 (1st. Cir.1994) (citing *United States v. Rivera-Martinez,* 931 F.2d 148 (1st Cir.), *cert. denied,* 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991)). The reviewing court's mandate "constitutes the law of the case on such

issues of law as were actually considered and decided by the appellate court, or as were necessarily inferred from the disposition on appeal." Commercial Union Ins. Co., 41 F.3d at 770 (citing 1B Moore at ¶ 0.404[10]). The doctrine requires a trial court on remand to dispose of the case in accordance with the appellate court's mandate by implementing " 'both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces,' "United States v. Connell, 6 F.3d 27, 30 (1st Cir.1993) (quoting United States v. Kikumura, 947 F.2d 72, 76 (3d Cir.1991)), and binds newly constituted panels to prior panel decisions on point, *e.g.*, Irving v. United States, 49 F.3d 830, 833-34 (1st Cir.1995); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 939 n. 3 (1st Cir.1993).

[5] While we have acknowledged that there are exceptions to the law of the case doctrine, we have emphasized that the circumstances in which they apply are rare. As have a number of other circuits, we have determined that issues decided on appeal should not be reopened " 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.' " Rivera-Martinez, 931 F.2d at 151 (quoting White v. Murtha, 377 F.2d 428, 432 (5th Cir.1967)) (other citations omitted).

Brown's argument that the Supreme Court's recent decision in Adarand Constr., Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("*Adarand* "), controls this case necessarily presumes that *Adarand* constitutes a contrary intervening decision by controlling authority on point that (i) undermines the validity of *Cohen II;* (ii) compels us to depart from the law of the case doctrine; and (iii) therefore mandates that we reexamine Brown's equal protection claim.

We have narrowly confined the "intervening controlling authority exception" to Supreme Court opinions, *en banc* opinions of this court, or statutory overrulings. Irving, 49 F.3d at 834. We have also recognized that this exception may apply "in those rare situations where newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course." *Id.* (internal quotation marks and citation omitted).

[6] The law of the case doctrine is a prudential rule of policy and practice, rather than "an absolute bar to reconsideration [ ] or a limitation on a federal court's power." Rivera-Martinez, 931 F.2d at 150-51. Thus, we have not construed the doctrine as "an inflexible straitjacket that invariably requires rigid compliance." Northeast Utils. Serv. Co. v. Federal Energy Regulatory Comm'n, 55 F.3d 686, 688 (1st Cir.1995). Nevertheless, the doctrine serves important goals and must be "treated respectfully and, in the absence of exceptional circumstances, applied according to its tenor." Rivera-Martinez, 931 F.2d at 151. Accordingly, we have held that only a few exceptional circumstances can overcome the interests served by adherence to the doctrine and these exceptions are narrowly circumscribed. *See id.; see also* United States v. Reveron Martinez, 836 F.2d 684, 687 n. 2 (1st Cir.1988) ("To be sure, there may be occasions when courts can-and should-loosen the iron grip of *stare decisis.* But any such departure 'demands special justification.' ") (quoting Arizona v. Rumsey, 467 U.S. 203, 212, 104 S.Ct. 2305, 2310-11, 81 L.Ed.2d 164 (1984)).[FN9]

FN9. The law of the case doctrine is "akin to the doctrines of *collateral estoppel, res judicata,* and *stare decisis,*" Joan Steinman, Law Of The Case: A Judicial Puzzle In Consolidated And Transferred Cases And In MultiDistrict Litigation, 135 U.Penn.L.Rev. 595, 598-99 (1987) (footnotes omitted), and "has been said to lie half way between *stare decisis* and *res judicata,*" 1B Moore at ¶ 0.404[1] n. 3 (internal quotation marks and citation omitted). As applied in the federal courts today, the law of the case doctrine more closely resembles the doctrine of *stare decisis.* 1B Moore at ¶ 0.404[1]. Both doctrines reflect concerns that have long been recognized as fundamentally important to the rule of law-e.g., stability, predictability, and respect for judicial authority-and both doctrines are applied "with more or less rigidity depending on which interest is served." *Id.* at II-2.

*169 For the reasons that follow, we conclude that no

exception to the law of the case doctrine applies here and, therefore, that *Cohen II* 's rulings of law control the disposition of this appeal.

Brown contends that *stare decisis* does not bind this panel "to the previous preliminary ruling of this Court because it lacks the element of finality," Reply Br. at 24, and that the law of the case doctrine does not prevent a court from "changing its mind," *id.* at n. 47.

[7] We acknowledge that we have repeatedly emphasized that conclusions and holdings regarding the merits of issues presented on appeal from a grant of a preliminary injunction are to be understood as statements as to probable outcomes. *E.g.*, *A.M. Capen's Co. v. American Trading and Prod. Corp.*, 74 F.3d 317, 322 (1st Cir.1996); *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir.1991). The concern informing this caveat arises when we are asked to rule on the propriety of a district court's grant of a preliminary injunction (or otherwise issue a preliminary ruling) without benefit of full argument and a well-developed record. In this case, however, the record before the prior panel was "sufficiently developed and the facts necessary to shape the proper legal matrix [we]re sufficiently clear,"*Cohen II*, 991 F.2d at 904, and nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine the validity of the prior panel's rulings of law. In considering plaintiffs' motion for a preliminary injunction in *Cohen I*, the district court (i) "paid meticulous attention to the parties' prospects for success over the long haul;" (ii) "plainly visualized both the factual intricacies and legal complexities that characterize Title IX litigation;" (iii) "held a lengthy adversary hearing and reviewed voluminous written submissions;" and (iv) "correctly focused on the three-part accommodation test." *Cohen II*, 991 F.2d at 903. Further, as the district court noted in its opinion after the trial on the merits, "[n]othing in the record before me, now fully developed, undermines the considered legal framework established by the First Circuit at the preliminary injunction stage." *Cohen III*, 879 F.Supp. at 194.

Brown offers remarkably little in the way of analysis or authority to support its blithe contention that we are free to disregard *Cohen II* in disposing of this appeal. Indeed, Brown argues as if the prior panel had not decided the precise statutory interpretation questions presented (which it clearly did) and as if the district court's liability analysis were contrary to the law enunciated in *Cohen II* (which it clearly is not). Finding Brown's bare assertions to be unpersuasive, we decline the invitation to this court to "change its mind." The precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit.

IV.

Brown contends that the district court misconstrued and misapplied the three-part test. Specifically, Brown argues that the district court's interpretation and application of the test is irreconcilable with the statute, the regulation, and the agency's interpretation of the law, and effectively renders Title IX an "affirmative action statute" that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics. Brown asserts, in the alternative, that if the district court properly construed the test, then the test itself violates Title IX and the United States Constitution.

We emphasize two points at the outset. First, notwithstanding Brown's persistent invocation of the inflammatory terms "affirmative action," "preference," and "quota," this is not an affirmative action case. Second, Brown's efforts to evade the controlling authority of *Cohen II* by recasting its core legal arguments as challenges to the "district court's interpretation" of the law are unavailing; the primary arguments raised here have *170 already been litigated and decided adversely to Brown in the prior appeal.

A.

[8][9] Brown's talismanic incantation of "affirmative action" has no legal application to this case and is not helpful to Brown's cause. While "affirmative action" may have different connotations as a matter of politics, as a matter of law, its meaning is more circumscribed. True affirmative action cases have historically involved a voluntary [FN10] undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals. *See Adarand*,

515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (remanding for review under strict scrutiny a challenge to a federal statute establishing a government-wide goal for awarding to minority businesses not less than 5% of the total value of all prime contracts and subcontracts for each fiscal year); *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (upholding a federal program requiring race-based preferences); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (striking down a municipal set-aside program requiring that 30% of the city's construction dollars be paid to racial minority subcontractors on an annual basis); *Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1986) (upholding a temporary program authorizing a county agency to consider sex and race as factors in making promotions in order to achieve a statistically measurable improvement in the representation of women and minorities in major job classifications in which they had been historically underrepresented); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (striking down a collective-bargaining faculty lay-off provision requiring preferential treatment for certain racial minorities); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (upholding a federal program requiring state and local recipients of federal public works grants to set aside 10% of funds for procuring goods and services from minority business enterprises); *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (upholding a collective bargaining agreement that set aside for blacks half the places in a new training program until the percentage of blacks among skilled workers at the plant was commensurate with the percentage of blacks in the local labor force); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (striking down a state medical school's admissions policy that set aside 16 of its places for racial minorities).

FN10. Cases and commentators sometimes treat cases involving involuntarily implemented plans-e.g., plans adopted pursuant to a consent decree or a contempt order-as affirmative action cases. *See, e.g., United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (upholding a "one-black-for-one-white" promotion requirement ordered by a district court as an interim measure in response to proven discrimination by a state employer); *Local 28 ofSheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (upholding a federal district court's imposition on the union a goal for racial minority membership as a remedy for the union's contempt of the court's earlier orders to cease racially discriminatory admissions practices).

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case-inclusive of the statute, the relevant regulation, and the pertinent agency documents-mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action.[FN11] In addition, Title IX, like *171 other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971). In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX.

FN11. As previously noted, Title IX itself specifies only that the statute shall not be interpreted to *require* gender-based preferential or disparate treatment. 20 U.S.C. § 1681(b). However, although Congress could easily have done so, it did not ban affirmative action or gender-conscious remedies under Title IX. *See also Weber*, 443 U.S. at 201-02, 99 S.Ct. at 2726-27 (construing the prohibition against race discrimination contained in §§ 703(a) and (d) of Title VII, and concluding that "an interpretation of the sections that forbade all

race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected") (internal quotation marks and citations omitted); *id.* at 205-06, 99 S.Ct. at 2728-29 (construing § 703(j) of Title VII, upon which § 1681(b) of Title IX was based, and concluding that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action").

In addition, remedial action and voluntary affirmative action to overcome the effects of gender discrimination are permitted under the Title IX regulations, 34 C.F.R. § 106.3, and by the Policy Interpretation, 44 Fed.Reg. at 71,416.

Also consistent with the school desegregation cases, the substantial proportionality test of prong one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-specific manner. As with other anti-discrimination regimes, Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity, *see* *Cohen II*, 991 F.2d at 895, nor prohibits gender-conscious remedial measures. *See* *Missouri v. Jenkins*, 515 U.S. 70, ----, 115 S.Ct. 2038, 2048, 132 L.Ed.2d 63 (1995) (acknowledging the constitutional permissibility of court-ordered, race-conscious remedial plans designed to restore victims of discrimination to the positions they would have occupied in the absence of such conduct); *Fullilove*, 448 U.S. at 483, 100 S.Ct. at 2777 (recognizing that the authority of a federal court to incorporate racial criteria into a remedial decree also extends to statutory violations and that, where federal anti-discrimination laws have been violated, race-conscious remedies may be appropriate); *Weber*, 443 U.S. at 197, 99 S.Ct. at 2724 (holding that Title VII does not prohibit private employers from voluntarily implementing race-conscious measures to eliminate "manifest racial imbalances in traditionally segregated job categories"); *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 1288-89, 28 L.Ed.2d 582 (1971) (recognizing that measures required to remedy race discrimination "will almost invariably require" race-conscious classifications, and that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes").

[10] Another important distinction between this case and affirmative action cases is that the district court's remedy requiring Brown to accommodate fully and effectively the athletics interests and abilities of its women students does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans. In reviewing equal protection challenges to such plans, the Court is concerned that government bodies are reaching out to implement race- or gender-conscious remedial measures that are "ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848, on the basis of facts insufficient to support a prima facie case of a constitutional or statutory violation, *Croson*, 488 U.S. at 500, 109 S.Ct. at 725, to the benefit of unidentified victims of past discrimination, *see id.* at 469, 109 S.Ct. at 706; *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848. Accordingly, the Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of "identified discrimination," *see* *Croson*, 488 U.S. at 500-06, 109 S.Ct. at 725-28, because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848.

From a constitutional standpoint, the case before us is altogether different. Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise *172 the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the Federal Rules of Evidence. The factual problem presented in affirmative action cases is, "Does the evidence support a finding of discrimination such that race- or gender-conscious remedial measures are appropriate?" We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

[11][12] From the mere fact that a remedy flowing from a judicial determination of discrimination is

gender-conscious, it does not follow that the remedy constitutes "affirmative action." Nor does a "reverse discrimination" claim arise every time an anti-discrimination statute is enforced. While some gender-conscious relief may adversely impact one gender-a fact that has not been demonstrated in this case-that alone would not make the relief "affirmative action" or the consequence of that relief "reverse discrimination." To the contrary, race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review. *See* Miller v. Johnson, 515 U.S. 900, ----, 115 S.Ct. 2475, 2491, 132 L.Ed.2d 762 (1995) ("compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws") (citing Shaw v. Reno, 509 U.S. 630, 653-54, 113 S.Ct. 2816, 2830-31, 125 L.Ed.2d 511 (1993)).

B.

Cohen II squarely rejected Brown's interpretation of the three-part test and carefully delineated its own, which is now the law of this circuit as well as the law of this case. On remand, the district court's liability analysis explicitly and faithfully adhered to *Cohen II* 's mandate, and we are bound to do the same at this stage of the litigation, absent one of the exceptional circumstances discussed *supra*. Because the precise questions presented regarding the proper interpretation of the Title IX framework were considered and decided by a panel of this court in the prior appeal, and because no exception to the law of the case doctrine is presented, we have no occasion to reopen the issue here. Brown's rehashed statutory challenge is foreclosed by the law of the case doctrine and we are therefore bound by the prior panel's interpretation of the statute, the regulation, and the relevant agency pronouncements.

In its liability analysis, the district court expressly accepted *Cohen II* ' s elucidation of the applicable law, Cohen III, 879 F.Supp. at 194, and applied the law in accordance with its mandate, *id.* at 210-13. Indeed, every circuit court to have reviewed a Title IX claim of discrimination in athletics since *Cohen II* was decided is in accord with its explication of the Title IX regime as it applies to athletics. *See* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir.1994); Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir.1994), *cert. denied*, 513 U.S. 1128, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995); Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir.1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993).

Cohen II held that the Policy Interpretation is entitled to substantial deference because it is the enforcing agency's "considered interpretation of the regulation." 991 F.2d at 896-97. Brown argues that the district court erred in concluding that it was obligated to give substantial deference to the Policy Interpretation, on the ground that "the interpretation is not a worthy candidate for deference," Reply Br. at 15, because "the urged interpretation is illogical, conflicts with the Constitution, the Statute, the Regulation, other Agency materials and practices, existing analogous caselaw and, in addition, is bad policy," *id.* We reject Brown's kitchen-sink characterization of the Policy Interpretation and its challenge to the substantial deference accorded that document by the district court.

***173** [13][14][15] The Policy Interpretation represents the responsible agency's interpretation of the intercollegiate athletics provisions of Title IX and its implementing regulations. 44 Fed.Reg. at 71,413. It is well settled that, where, as here, Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). It is also well established " 'that an agency's construction of its own regulations is entitled to substantial deference.' " Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150, 111 S.Ct. 1171, 1175-76, 113 L.Ed.2d 117 (1991) (quoting Lyng v. Payne, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341-42, 90 L.Ed.2d 921 (1986)) (other citation omitted). As the Supreme Court has explained, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own

regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151, 111 S.Ct. at 1176 (citation omitted).

[16] Applying these principles, *Cohen II* held that the applicable regulation, 34 C.F.R. § 106.41, deserves controlling weight, 991 F.2d at 895; that the Policy Interpretation warrants substantial deference, *id.* at 896-97; and that, "[b]ecause the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor,"*id.* at 899 (citations omitted). *Accord Horner*, 43 F.3d at 274-75; *Kelley*, 35 F.3d at 270; *Favia v. Indiana Univ. of Pa.*, 812 F.Supp. 578, 584 (W.D.Pa.), *aff'd*,7 F.3d 332 (3d Cir.1993). On remand, the district court properly applied the legal framework elucidated in *Cohen II* and explicitly followed this court's mandate in according controlling weight to the regulation and substantial deference to the Policy Interpretation. *Cohen III*, 879 F.Supp. at 197-99; *accord Kelley*, 35 F.3d at 272 (holding that "neither the regulation nor the policy interpretation run afoul of the dictates of Title IX"). We hold that the district court did not err in the degree of deference it accorded the regulation and the relevant agency pronouncements.

C.

[17][18] As previously noted, the district court held that, for purposes of the three-part test, the intercollegiate athletics participation opportunities offered by an institution are properly measured by counting the number of actual participants on intercollegiate teams. *Cohen III*, 879 F.Supp. at 202. The Policy Interpretation was designed specifically for intercollegiate athletics.[FN12] 44 Fed.Reg. at 71,413. Because the athletics regulation distinguishes between club sports and intercollegiate sports, under the Policy Interpretation, "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." *Id.* at n. 1. Accordingly, the district court excluded club varsity teams from the definition of "intercollegiate teams" and, therefore, from the calculation of participation opportunities, because the evidence was inadequate to show that the club teams regularly participated in varsity competition. *Cohen III*, 879 F.Supp. at 200.

FN12. Application of the Policy Interpretation is not limited to intercollegiate athletics, however. The Policy Interpretation states that "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the regulation." 44 Fed.Reg. at 71,413.

The district court's definition of athletics participation opportunities comports with the agency's own definition. *See* Clarification Memorandum at 2 ("In determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program."). We find no error in the district court's definition and calculation of the intercollegiate athletics participation opportunities afforded to Brown students, and no error in the court's finding of a 13.01% disparity between the percentage of women participating in intercollegiate varsity athletics*174 at Brown and the percentage of women in Brown's undergraduate student body.

D.

Brown contends that an athletics program equally accommodates both genders and complies with Title IX if it accommodates the *relative* interests and abilities of its male and female students. This "relative interests" approach posits that an institution satisfies prong three of the three-part test by meeting the interests and abilities of the underrepresented gender only to the extent that it meets the interests and abilities of the overrepresented gender.[FN13] *See Cohen II*, 991 F.2d at 899.

FN13. We note that Brown presses its relative interests argument under both prong one and prong three. At trial, Brown argued that, "in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women among *students interested in participating in varsity athletics*." *Cohen III*, 879 F.Supp. at 205. At the preliminary injunction stage, Brown propounded the same relative interests argument under prong three. *Id.* at n. 41.

Brown maintains that the district court's decision imposes upon universities the obligation to engage in preferential treatment for women by requiring quotas

in excess of women's relative interests and abilities. With respect to prong three, Brown asserts that the district court's interpretation of the word "fully" "requires universities to favor women's teams and treat them better than men's [teams] .... forces them to eliminate or cap men's teams .... [and] forces universities to impose athletic quotas in excess of relative interests and abilities." Appellant's Br. at 55.

The prior panel considered and rejected Brown's approach, observing that "Brown reads the 'full' out of the duty to accommodate 'fully and effectively.' " *Cohen II*, 991 F.2d at 899. Under *Cohen II* 's controlling interpretation, prong three "demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.* at 898.

Brown's interpretation of full and effective accommodation is "simply not the law." *Cohen III*, 879 F.Supp. at 208. We agree with the prior panel and the district court that Brown's relative interests approach "cannot withstand scrutiny on either legal or policy grounds,"*Cohen II*, 991 F.2d at 900, because it "disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests,"*Cohen III*, 879 F.Supp. at 209. After *Cohen II*, it cannot be maintained that the relative interests approach is compatible with Title IX's equal accommodation principle as it has been interpreted by this circuit.

[19] Brown argues that the district court's interpretation of the three-part test *requires* numerical proportionality, thus imposing a gender-based quota scheme in contravention of the statute. This argument rests, in part, upon Brown's reading of 20 U.S.C. § 1681(b) as a categorical proscription against consideration of gender parity. Section 1681(b) provides:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex *in any community, State, section or other area....*

20 U.S.C.A. § 1681(b) (West 1990) (emphasis added).

The prior panel, like Brown, assumed without analysis that § 1681(b) applies unequivocally to intercollegiate athletics programs. We do not question *Cohen II* 's application of § 1681(b). We think it important to bear in mind, however, the congressional concerns that inform the proper interpretation of this provision. Section 1681(b) was patterned after*175 § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and was specifically designed to prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community. *See*H.R.Rep. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2590-92 (Additional Views); 117 Cong.Rec. 39,261-62 (1971) (remarks of Rep. Quie); 117 Cong.Rec. 30,406, 30,409 (remarks of Sen. Bayh); 117 Cong.Rec. 39,251-52 (remarks of Rep. Mink and Rep. Green). Thus, the legislative history strongly suggests that the underscored language defines what is proscribed (in the contexts of admissions and hiring) in terms of a geographical area, *beyond the institution,* and does not refer to an imbalance *within the university,* with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body.

In any event, the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not *require* preferential or disparate treatment for either gender. Neither the Policy Interpretation's three-part test, nor the district court's interpretation of it, *mandates* statistical balancing; "[r]ather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance." *Kelley*, 35 F.3d at 271.

[20][21] The test is also entirely consistent with § 1681(b) as applied by the prior panel and by the district court. As previously noted, *Cohen II* expressly held that "a court assessing Title IX

compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." 991 F.2d at 895. The panel then carefully delineated the burden of proof, which requires a Title IX plaintiff to show, not only "disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender,"*id.* at 901, but also "that a second element-unmet interest-is present,"*id.*, meaning that the underrepresented gender has not been fully and effectively accommodated by the institution's present athletic program, *id.* at 902 (citing 44 Fed.Reg. at 71,418). Only where the plaintiff meets the burden of proof on these elements *and* the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender-based quota.

Brown simply ignores the fact that it is required to accommodate fully the interests and abilities of the underrepresented gender, not because the three-part test mandates preferential treatment for women *ab initio,* but because Brown has been found (under prong one) to have allocated its athletics participation opportunities so as to create a significant gender-based disparity with respect to these opportunities, and has failed (under prong two) to show a history and continuing practice of expansion of opportunities for the underrepresented gender. Brown's interpretation conflates prongs one and three and distorts the three-part test by reducing it to an abstract, mechanical determination of strict numerical proportionality. In short, Brown treats the three-part test for compliance as a one-part test for strict liability.

Brown also fails to recognize that Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women. Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted. *See Cannon,* 441 U.S. at 694, 99 S.Ct. at 1956. It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide. *See Williams v. School Dist. of Bethlehem, Pa.,* 998 F.2d 168, 175 (1993) (observing that, although Title IX and its regulations apply equally to boys and girls, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges"*176), *cert. denied,*510 U.S. 1043, 114 S.Ct. 689, 126 L.Ed.2d 656 (1994).

[22][23] The prior panel held that "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Cohen II,* 991 F.2d at 899. Instead, the law requires that, absent a demonstration of continuing program expansion for the underrepresented gender under prong two of the three-part test, an institution must either provide athletics opportunities in proportion to the gender composition of the student body so as to satisfy prong one, or fully accommodate the interests and abilities of athletes of the underrepresented gender under prong three. *Id.* In other words,

If a school, like Brown, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie.

Id. at 906.

We think it clear that neither the Title IX framework nor the district court's interpretation of it mandates a gender-based quota scheme. In our view, it is Brown's relative interests approach to the three-part test, rather than the district court's interpretation, that contravenes the language and purpose of the test and of the statute itself. To adopt the relative interests approach would be, not only to overrule *Cohen II,* but to rewrite the enforcing agency's interpretation of its own regulation so as to incorporate an entirely different standard for Title IX compliance. This

relative interests standard would entrench and fix by law the significant gender-based disparity in athletics opportunities found by the district court to exist at Brown, a finding we have held to be not clearly erroneous. According to Brown's relative interests interpretation of the equal accommodation principle, the gender-based disparity in athletics participation opportunities at Brown is due to a lack of interest on the part of its female students, rather than to discrimination, and any attempt to remedy the disparity is, by definition, an unlawful quota. This approach is entirely contrary to "Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination,"*id.* at 907, and makes it virtually impossible to effectuate Congress's intent to eliminate sex discrimination in intercollegiate athletics.

E.

Brown also claims error in the district court's failure to apply Title VII standards to its analysis of whether Brown's intercollegiate athletics program complies with Title IX. The district court rejected the analogy to Title VII, noting that, while Title VII "seeks to determine whether gender-neutral job openings have been filled without regard to gender[,] Title IX... was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII." *Cohen III,* 879 F.Supp. at 205.

[24] It does not follow from the fact that § 1681(b) was patterned after a Title VII provision that Title VII standards should be applied to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders, as Brown contends. While this court has approved the importation of Title VII standards into Title IX analysis, we have explicitly limited the crossover to the employment context. *See Cohen II,* 991 F.2d at 902 (citing *Lipsett v. University of P.R.,* 864 F.2d 881, 897 (1st Cir.1988)); *but see Brown v. Hot, Sexy and Safer Prods., Inc.,* 68 F.3d 525, 540 (1st Cir.1995) (Title VII sexual harassment standards applied to Title IX sexual harassment case in non-employment context), *cert. denied,* 516 U.S. 1159, 116 S.Ct. 1044, 134 L.Ed.2d 191 (1996).

As *Cohen II* recognized, "[t]he scope and purpose of Title IX, which merely conditions ***177** government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards." 991 F.2d at 902 (citation omitted). "[W]hereas Title VII is largely peremptory,"Title IX is "largely aspirational," and thus, a "loosely laced buskin." *Id.; see also North Haven,* 456 U.S. at 521, 102 S.Ct. at 1917-18 (directing that Title IX must be accorded "a sweep as broad as its language").

It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence *vel non* of discrimination. While the Title IX regime *permits* institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender-segregated teams; nor does the law require that institutions provide completely gender-integrated athletics programs.[FN14] To the extent that Title IX allows institutions to maintain single-sex teams and gender-segregated athletics programs, men and women do not compete against each other for places on team rosters. Accordingly, and notwithstanding Brown's protestations to the contrary, the Title VII concept of the "qualified pool" has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not "qualified" to compete for positions on men's teams, and vice-versa. In addition, the concept of "preference" does not have the same meaning, or raise the same equality concerns, as it does in the employment and admissions contexts.

FN14. *See*34 C.F.R. § 106.41(b) (1995) ("[A] recipient *may* operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.") (emphasis added). Nor do the regulations *require* institutions to field gender-integrated teams:

> However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for

> members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.
>
> *Id.*
>
> Whether or not the institution maintains gender-segregated teams, it must provide "gender-blind equality of opportunity to its student body." Cohen II, 991 F.2d at 896. While this case presents only the example of members of the underrepresented gender seeking the opportunity to participate on single-sex teams, the same analysis would apply where members of the underrepresented gender sought opportunities to play on co-ed teams.

Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs *necessarily* allocate opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination *must* compare the athletics participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under represents women, and that the smaller size of the women's program will have the effect of discouraging women's participation.

In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. As the Seventh Circuit observed, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." Kelley, 35 F.3d at 270 (citing *Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor,* 94th Cong., 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong.Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong.Rec. 30,407 (1971) (same)).

***178** In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders. As the *Kelley* Court pointed out (in the context of analyzing the deference due the relevant athletics regulation and the Policy Interpretation):

> Undoubtedly the agency responsible for enforcement of the statute could have required schools to sponsor a women's program for every men's program offered and vice versa.... It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.

Kelley, 35 F.3d at 271 (footnotes omitted).

Each prong of the Policy Interpretation's three-part test determines compliance in this manner.

Measuring compliance through an evaluation of a school's allocation of its athletic resources allows schools flexibility in meeting the athletic interests of their students and increases the chance that the actual interests of those students will be met. And if compliance with Title IX is to be measured through this sort of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1

merely establishes such a safe harbor.

Id. (citations omitted).

We find no error in the district court's refusal to apply Title VII standards in its inquiry into whether Brown's intercollegiate athletics program complies with Title IX. *See Cohen II*, 991 F.2d at 901 ("[T]here is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear."). We conclude that the district court's application of the three-part test does not create a gender-based quota and is consistent with Title IX, 34 C.F.R. § 106.41, the Policy Interpretation, and the mandate of *Cohen II*.

F.

Brown has contended throughout this litigation that the significant disparity in athletics opportunities for men and women at Brown is the result of a gender-based differential in the level of interest in sports and that the district court's application of the three-part test requires universities to provide athletics opportunities for women to an extent that exceeds their relative interests and abilities in sports. Thus, at the heart of this litigation is the question whether Title IX permits Brown to deny its female students equal opportunity to participate in sports, based upon its unproven assertion that the district court's finding of a significant disparity in athletics opportunities for male and female students reflects, not discrimination in Brown's intercollegiate athletics program, but a lack of interest on the part of its female students that is unrelated to a lack of opportunities.

[25] We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are ***179** less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports. *See* 44 Fed.Reg. at 71,419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").

Moreover, the Supreme Court has repeatedly condemned gender-based discrimination based upon "archaic and overbroad generalizations" about women. *Schlesinger v. Ballard*, 419 U.S. 498, 508, 95 S.Ct. 572, 577-78, 42 L.Ed.2d 610 (1975). *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336-37, 73 L.Ed.2d 1090 (1982); *Califano v. Webster*, 430 U.S. 313, 317, 97 S.Ct. 1192, 1194-95, 51 L.Ed.2d 360 (1977); *Frontiero v. Richardson*, 411 U.S. 677, 684-86, 93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583 (1973). The Court has been especially critical of the use of statistical evidence offered to prove generalized, stereotypical notions about men and women. For example, in holding that Oklahoma's 3.2% beer statute invidiously discriminated against males 18-20 years of age, the Court in *Craig v. Boren*, 429 U.S. 190, 208-209, 97 S.Ct. 451, 462-463, 50 L.Ed.2d 397 (1976), stressed that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities." *See also id.* at 202, 97 S.Ct. at 463 ("statistics exhibit a variety of ... shortcomings that seriously impugn their value to equal protection analysis"); *id.* at 204, 97 S.Ct. at 460-61 ("proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause"); *Cannon*, 441 U.S. at 681 n. 2, 99 S.Ct. at 1949 n. 2 (observing with respect to the relevance of the University of Chicago's statistical evidence regarding the small number of female applicants to its medical school, in comparison to male applicants, that "the dampening impact of a discriminatory rule may undermine the relevance of figures relating to *actual* applicants").

Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect

women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports.[FN15] Nevertheless, to allow a numbers-***180** based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated.

FN15. Under the Policy Interpretation,

> Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:
>
> a. The processes take into account the nationally increasing levels of women's interests and abilities;
>
> b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
>
> c. The methods of determining ability take into account team performance records; and
>
> d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

44 Fed.Reg. at 71,417.

The 1990 version of the Title IX Athletics Investigator's Manual, an internal agency document, instructs investigating officials to consider, *inter alia,* the following: (i) any institutional surveys or assessments of students' athletics interests and abilities, *see* Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual at 22 (1990); (ii) the "expressed interests" of the underrepresented gender, *id.* at 25; (iii) other programs indicative of interests and abilities, such as club and intramural sports, sports programs at "feeder" schools, community and regional sports programs, and physical education classes, *id.*

As the district court noted, however, the agency characterizes surveys as a "simple way to identify which additional sports might appropriately be created to achieve compliance.... Thus, a survey of interests would *follow* a determination that an institution does not satisfy prong three; it would not be utilized to make that determination in the first instance." *Cohen III,* 879 F.Supp. at 210 n. 51; *see* 1990 Investigator's Manual at 27 (explaining that a survey or assessment of interests and abilities is not required by the Title IX regulation or the Policy Interpretation but may be required as part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students). (We note that the text of the 1990 Investigator's Manual cited herein at page 25 was apparently at page 27 of the copy of the Manual before the district court.)

We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no consequence. As the prior panel recognized, while the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed at the varsity level, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.[FN16] *Cohen II,* 991 F.2d at 904; *see also Cohen I,* 809 F.Supp. at 992 ("Brown is cutting off varsity opportunities where

there is great interest and talent, *and* where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments.").

FN16. The district court found that the women's gymnastics team had won the Ivy League championship in 1989-90 and was a "thriving university-funded varsity team prior to the 1991 demotion;" that the donor-funded women's fencing team had been successful for many years and that its request to be upgraded to varsity status had been supported by the athletics director at the time; that the donor-funded women's ski team had been consistently competitive despite a meager budget; and that the club-status women's water polo team had demonstrated the interest and ability to compete at full varsity status. *Cohen III*, 879 F.Supp. at 190.

[26] On these facts, Brown's failure to accommodate fully and effectively the interests and abilities of the underrepresented gender is clearly established. *See* Clarification Memorandum at 8 ("If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability or available competition no longer exists."); *id.* at 8-9 n. 2 ("While [other] indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia[,] an institution is expected to meet the actual interests and abilities of its students and admitted students."). Under these circumstances, the district court's finding that there are interested women able to compete at the university-funded varsity level, *Cohen III*, 879 F.Supp. at 212, is clearly correct.

Finally, the tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity. *See, e.g.*, Mike Tharp et al., *Sports crazy! Ready, set, go. Why we love our games*, U.S. News & World Report, July 15, 1996, at 33-34 (attributing to Title IX the explosive growth of women's participation in sports and the debunking of "the traditional myth that women aren't interested in sports").

Brown's relative interests approach is not a reasonable interpretation of the three-part test. This approach contravenes the purpose of the statute and the regulation because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes that disparity by law, thereby disadvantaging further the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo-with its historical emphasis on men's participation opportunities to the detriment of women's opportunities-it need not ***181** have gone to all the trouble of enacting Title IX.

V.

In the first appeal, this court rejected Brown's Fifth Amendment equal protection challenge to the statutory scheme. *Cohen II*, 991 F.2d at 900-901. Here, Brown argues that its challenge is to the decision of the district court. As Brown puts it, "[t]he [equal protection] violation arises from the court's holding that Title IX requires the imposition of quotas, preferential treatment, and disparate treatment in the absence of a compelling state interest and a determination that the remedial measure is 'narrowly tailored' to serve that interest." Reply Br. at 18 (citing *Adarand*, 515U.S. at ----, 115 S.Ct. at 2117).

A.

[27] To the extent that Brown challenges the constitutionality of the statutory scheme itself, the challenge rests upon at least two erroneous assumptions: first, that *Adarand* is controlling authority on point that compels us, not only to consider Brown's constitutional challenge anew, but also to apply strict scrutiny to the analysis; second, that the district court's application of the law in its liability analysis on remand is inconsistent with the interpretation expounded in the prior appeal. We reject both premises.[FN17] Brown's implicit reliance on *Adarand* as contrary intervening controlling authority that warrants a departure from the law of the case doctrine is misplaced because, while *Adarand* does make new law, the law it makes is

wholly irrelevant to the disposition of this appeal, and, even if *Adarand* did apply, it does not mandate the level of scrutiny to be applied to gender-conscious government action.

FN17. We assume, without deciding, that Brown has not waived its equal protection claim and has standing to raise it. Appellees argue that this claim is waived because Brown did not raise it in the district court. Appellee's Br. at 55 (citing *Desjardins v. Van Buren Community Hosp.*, 969 F.2d 1280, 1282 (1st Cir.1992)). Appellees also argue that, to the extent that the equal protection claim is viable, Brown lacks standing to raise it. Appellee's Br. at 56 (citing *Powers v. Ohio*, 499 U.S. 400, 409-11, 111 S.Ct. 1364, 1370-71, 113 L.Ed.2d 411 (1991)). Given our disposition of this claim, we do not address these arguments.

In rejecting Brown's equal protection claim, the *Cohen II* panel stated, "It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination." 991 F.2d at 901. The panel cited as authority *Metro Broadcasting*, 497 U.S. at 565-66, 110 S.Ct. at 3008-10 (for the proposition that "Congress need not make specific findings of discrimination to grant race-conscious relief"), and *Califano v. Webster*, 430 U.S. at 317, 97 S.Ct. at 1194-95 (noting that *Webster* upheld a social security wage law that benefitted women "in part because its purpose was 'the permissible one of redressing our society's longstanding disparate treatment of women' "). *Cohen II*, 991 F.2d at 901. The panel also noted that, in spite of the scant legislative history regarding Title IX as it applies to athletics, Congress heard a great deal of testimony regarding discrimination against women in higher education and acted to reverse the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 573-74, 104 S.Ct. 1211, 1221-22, 79 L.Ed.2d 516 (1984) (holding that Title IX was "program-specific" and thus applied only to those university programs that actually receive federal funds and not to the rest of the university), with athletics prominently in mind. *Cohen II*, 991 F.2d at 901.

In *Metro Broadcasting*, the Court upheld two federally mandated race-based preference policies under intermediate scrutiny. 497 U.S. at 564-65, 110 S.Ct. at 3008-09 (holding that benign race-conscious measures mandated by Congress "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"). The *Metro Broadcasting* Court applied intermediate scrutiny, notwithstanding that the previous year, in *Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the Court applied strict scrutiny in striking down a municipal minority set-aside program for city construction contracts. The *Metro Broadcasting* Court distinguished *Croson*, noting that "[i]n ***182** fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* [FN18] that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting*, 497 U.S. at 565, 110 S.Ct. at 3008.

FN18. In *Fullilove*, a plurality of the Court applied a standard subsequently acknowledged to be intermediate scrutiny, *see Metro Broadcasting*, 497 U.S. at 564, 110 S.Ct. at 3008, in upholding against a Fifth Amendment equal protection challenge a benign race-based affirmative action program that was adopted by an agency at the explicit direction of Congress. The *Fullilove* plurality inquired "whether the *objectives* of th[e] legislation are within the power of Congress [ ]" and "whether the limited use of racial and ethnic criteria ... is a constitutionally permissible *means* for achieving the congressional objectives." 448 U.S. at 473, 100 S.Ct. at 2772.

Adarand overruled *Metro Broadcasting* to the extent that *Metro Broadcasting* is inconsistent with *Adarand* 's holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515U.S. at ----, 115 S.Ct. at 2113. Brown impliedly assumes that *Adarand* ' s partial overruling of *Metro Broadcasting* invalidates the prior panel's disposition of Brown's equal protection challenge by virtue of its passing citation to *Metro Broadcasting*. This assumption is erroneous because the proposition for which *Cohen II* cited *Metro Broadcasting* as authority has not been

vitiated by *Adarand*, is of no consequence to our disposition of the issues raised in this litigation, and is, in any event, unchallenged here.[FN19]

FN19. *Cohen II* cited *Metro Broadcasting* for a general principle regarding Congress's broad powers to remedy discrimination, a proposition that was not reached by *Adarand*. Moreover, *Webster*, which *Cohen II* cited along with *Metro Broadcasting*, was not overruled or in any way rendered suspect by *Adarand*.

B.

[28][29] The prior panel rejected Brown's Fifth Amendment equal protection [FN20] and "affirmative action" challenges to the statutory scheme. *Cohen II*, 991 F.2d at 901 (finding no constitutional infirmity, assuming *arguendo*, that the regulation creates a classification somewhat in favor of women). Thus, to the extent that Brown challenges the statutory scheme itself, that challenge is foreclosed under the law of the case doctrine. Nevertheless, the remedy ordered for a violation of a federal anti-discrimination statute is still subject to equal protection review, assuming that it constitutes gender-conscious government action. *See Miller*, 515 U.S. at ----, 115 S.Ct. at 2491. Therefore, we review the constitutionality of the district court's order requiring Brown to comply with Title IX by accommodating fully and effectively the athletics interests and abilities of its women students. Because the challenged classification is gender-based, it must be analyzed under the intermediate scrutiny test. Before proceeding to the analysis, however, we must first address Brown's challenge to the standard of review.

FN20. It is well settled that the reach of the equal protection guarantee of the Fifth Amendment Due Process Clause-the basis for Brown's equal protection claim-is coextensive with that of the Fourteenth Amendment Equal Protection Clause. *E.g.*, *United States v. Paradise*, 480 U.S. at 166 n. 16, 107 S.Ct. at 1064 n. 16; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975).

Brown concedes that *Adarand* "does not, in partially overruling *Metro Broadcasting*, set forth the proper standard of review for this case." Appellant's Br. at 29. Nevertheless, Brown asserts that "[w]hile *Adarand* is a case involving racial classification, its analysis clearly applies to gender classification as well." *Id.* at 27. Further, inappropriately relying on *Frontiero*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, and *Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, Brown concludes that strict scrutiny applies to gender-based classifications.[FN21] Appellant's Br. ***183** at 29; Reply Br. at 19-20. These conclusory assertions do not comport with the law in this circuit.

FN21. In *Frontiero*, a plurality of the Court concluded that gender-based classifications, "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688, 93 S.Ct. at 1771. In the 23 years that have since elapsed, this position has never commanded a majority of the Court, and has never been adopted by this court. Whatever may be the merits of adopting strict scrutiny as the standard to be applied to gender-based classifications, it is inappropriate to suggest, as Brown does, that *Frontiero* compels its application here.

Brown's assertion that *Adarand* obligates this court to apply *Croson* to its equal protection claim is also incorrect. As noted previously, *Croson* is an affirmative action case and does not control review of a judicial determination that a federal anti-discrimination statute has been violated. To the extent that Brown assumes that *Croson* governs the issue of the sufficiency of the factual predicate required to uphold a federally mandated, benign race- or gender-based classification, that assumption is also unfounded. As we have explained, *Croson* 's factual concerns are not raised by a district court's determination-predicated upon duly adjudicated factual findings bearing multiple indicia of reliability and specificity-of gender discrimination in violation of a federal statute. We also point out that *Adarand* did not reach the question of the sufficiency of the factual

> predicate required to satisfy strict scrutiny review of a congressionally mandated race-based classification.

First, as explained earlier, *Adarand* and *Croson* apply to review of legislative affirmative action schemes. This case presents the issue of the legality of a federal district court's determination, based upon adjudicated findings of fact, that a federal anti-discrimination statute has been violated, and of the statutory and constitutional propriety of the judicial remedy ordered to provide redress to plaintiffs with standing who have been injured by the violation.

Second, *Adarand* does not even discuss gender discrimination, and its holding is limited to explicitly race-based classifications. 515 U.S. at ----, 115 S.Ct. at 2113. It can hardly be *assumed* that the Court intended to include gender-based classifications within *Adarand* 's precedential scope or to elevate, *sub silentio,* the level of scrutiny to be applied by a reviewing court to such classifications.

Third, even if *Adarand* did apply, it does not dictate the level of scrutiny to be applied in this case, as Brown concedes. For the last twenty years, the Supreme Court has applied intermediate scrutiny to all cases raising equal protection challenges to gender-based classifications, including the Supreme Court's most recent gender discrimination case, *United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("*Virginia* "); *see id.* at ----, 116 S.Ct. at 2288 (Rehnquist, C.J., concurring in the judgment) (collecting cases).[FN22]

> FN22. We point out that *Virginia* adds nothing to the analysis of equal protection challenges to gender-based classifications that has not been part of that analysis since 1979, long before *Cohen II* was decided. While the *Virginia* Court made liberal use of the phrase "exceedingly persuasive justification," and sparse use of the formulation "substantially related to an important governmental objective," the Court nevertheless struck down the gender-based admissions policy at issue in that case under intermediate scrutiny, 518 U.S. at ----, ----, 116 S.Ct. at 2271, 2275; *id.* at ----, 116 S.Ct. at 2288 (Rehnquist, C.J., concurring in the judgment), the standard applied to gender-based classifications since 1976, when it was first announced in *Craig v. Boren,* 429 U.S. at 197, 97 S.Ct. at 456, and the test applied in both *Metro Broadcasting* and *Webster.*
>
> The phrase "exceedingly persuasive justification" has been employed routinely by the Supreme Court in applying intermediate scrutiny to gender discrimination claims and is, in effect, a short-hand expression of the well-established test. *See Personnel Adm'r v. Feeney,* 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979); *Kirchberg v. Feenstra,* 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981); *Hogan,* 458 U.S. at 724, 102 S.Ct. at 3336; *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 136-37, 114 S.Ct. 1419, ---- - ----, 128 L.Ed.2d 89 (1994).

Fourth, it is important to recognize that controlling authority does not distinguish between invidious and benign discrimination in the context of gender-based classifications, as it has in the context of racial classifications. Neither this court nor the Supreme Court has drawn this distinction in the context of gender discrimination claims or held that a less stringent standard applies in cases involving benign, rather than invidious, gender discrimination. *See Hogan,* 458 U.S. at 724 & n. 9, 102 S.Ct. at 3336 & n. 9 (reviewing benign gender-conscious admissions policy under intermediate scrutiny and recognizing that the analysis does not change with the objective of the classification); *accord Wygant,* 476 U.S. at 273, 106 S.Ct. at 1846-47. Thus, the analytical result would be same, even if this were an affirmative action case.

[30][31] Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive*184 justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives. *E.g., Hogan,* 458 U.S. at 724, 102 S.Ct. at 3336. Applying that test, it is clear that the district court's remedial order passes constitutional muster.

We find that the first part of the test is satisfied. The governmental objectives of "avoid[ing] the use of federal resources to support discriminatory practices," and "provid[ing] individual citizens effective protection against those practices,"*Cannon*, 441 U.S. at 704, 99 S.Ct. at 1961, are clearly important objectives. We also find that judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective.

Applying the second prong of the intermediate scrutiny test, we find that the means employed by the district court in fashioning relief for the statutory violation are clearly substantially related to these important objectives. Intermediate scrutiny does not require that there be no other way to accomplish the objectives, but even if that were the standard, it would be satisfied in the unique context presented by the application of Title IX to athletics.

[32] As explained previously, Title IX as it applies to athletics is distinct from other anti-discrimination regimes in that it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind. Even under the individual rights theory of equal protection, reaffirmed in *Adarand*, 515 U.S. at ----, 115 S.Ct. at 2112 (the equal protection guarantee "protect[s] persons, not groups"), the only way to determine whether the rights of an individual athlete have been violated and what relief is necessary to remedy the violation is to engage in an explicitly gender-conscious comparison. Accordingly, even assuming that the three-part test creates a gender classification that favors women, allowing consideration of gender in determining the remedy for a Title IX violation serves the important objective of "ensur[ing] that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not." *Kelley*, 35 F.3d at 272. In addition, a gender-conscious remedial scheme is constitutionally permissible if it directly protects the interests of the disproportionately burdened gender. *See Hogan*, 458 U.S. at 728, 102 S.Ct. at 3338 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

Under Brown's interpretation of the three-part test, there can never be a remedy for a violation of Title IX's equal opportunity mandate. In concluding that the district court's interpretation and application of the three-part test creates a quota, Brown errs, in part, because it fails to recognize that (i) the substantial proportionality test of prong one is only the starting point, and not the conclusion, of the analysis; and (ii) prong three is not implicated unless a gender-based disparity with respect to athletics participation opportunities has been shown to exist. Where such a disparity has been established, the inquiry under prong three is whether the athletics interests and abilities of the underrepresented gender are fully and effectively accommodated, such that the institution may be found to comply with Title IX, notwithstanding the disparity.[FN23]

FN23. Under the three-part test, the institution may also excuse the disparity under prong two, by showing a "history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented gender],"44 Fed.Reg. at 71,418, in which case the compliance inquiry ends without reaching prong three. It has been determined that Brown cannot avail itself of this defense. *See Cohen III*, 879 F.Supp. at 211.

Of course, a remedy that requires an institution to cut, add, or elevate the status of athletes or entire teams may impact the genders differently, but this will be so only if there is a gender-based disparity with respect to athletics opportunities to begin with, which is the only circumstance in which prong three comes into play. Here, however, it has not been shown that Brown's men students will be disadvantaged by the full ***185** and effective accommodation of the athletics interests and abilities of its women students.

VI.

[33] Brown assigns error to the district court's exclusion of certain evidence pertaining to the relative athletics interests of men and women. Reviewing the district court's evidentiary rulings for abuse of discretion, *see Sinai v. New England Tel. and Tel. Co.*, 3 F.3d 471, 475 (1st Cir.1993), *cert. denied*,513 U.S. 1025, 115 S.Ct. 597, 130 L.Ed.2d 509 (1994), we find none.

[34] Brown first contends that the court erred in barring cross-examination of plaintiffs' expert Dr. Sabor on the issue of why girls drop out of sports before reaching college. Because Dr. Sabor's direct testimony did not address this issue, it was within the district court's discretion to limit cross-examination "to the subject matter of the direct examination." Fed.R.Evid. 611(b); *see* *Ferragamo v. Chubb Life Ins. Co. of Am.*, 94 F.3d 26, 28 (1st Cir.1996).

[35] Brown also suggests that the district court's exclusion of statistical and survey data offered in support of its relative interests argument constitutes error. Although the district court excluded as full exhibits two studies, the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics, it nevertheless permitted Brown's experts to rely on the data contained in these two reports as a basis for their expert opinions.[FN24] Because Brown's experts relied upon the excluded data in providing their opinions on the issue of a gender-based differential in student interest in athletics, the evidence was before the trier of fact and any error was, therefore, harmless. *See* *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 848-49, 78 L.Ed.2d 663 (1984) (instructing appellate courts to "ignore errors that do not affect the essential fairness of the trial").

FN24. Brown also contends that the district court erred in excluding the NCAA Annual Report. Appellant's Br. at 56-57. Brown merely asserts, however, that the "study was admissible under Rule 803,"*id.* at 57, and offers no explanation as to how it was prejudiced by the exclusion. Accordingly, we deem the argument waived. *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 734 (1st Cir.1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.") (citations omitted).

VII.

It does not follow from our statutory and constitutional analyses that we endorse the district court's remedial order. Although we decline Brown's invitation to find that the district court's remedy was an abuse of discretion, we do find that the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved.

[36][37] In *Cohen II* we stated that it is "established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant *any* appropriate relief on a cause of action appropriately brought pursuant to a federal statute." 991 F.2d at 901 (citing *Franklin*, 503 U.S. at 70-71, 112 S.Ct. at 1035-36). We also observed, however, that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations." 991 F.2d at 906 (citing *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir.1992), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993); *Lamphere v. Brown Univ.*, 875 F.2d 916, 922 (1st Cir.1989)). Nevertheless, we have recognized that academic freedom does not embrace the freedom to discriminate. *Villanueva v. Wellesley College*, 930 F.2d 124, 129 (1st Cir.1991) (citations omitted).

The district court itself pointed out that Brown may achieve compliance with Title IX in a number of ways:

It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide ***186** how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Cohen III, 879 F.Supp. at 214; *see also* *Cohen II*, 991 F.2d at 898 n. 15 (noting that a school may achieve compliance with Title IX by "reducing opportunities for the overrepresented gender").

[38] With these precepts in mind, we first examine the compliance plan Brown submitted to the district court in response to its order. We then consider the

district court's order rejecting Brown's plan and the specific relief ordered by the court in its place.

Brown's proposed compliance plan stated its goal as follows:

The plan has one goal: to make the gender ratio among University-funded teams at Brown substantially proportionate to the gender ratio of the undergraduate student body. To do so, the University must disregard the expressed athletic interests of one gender while providing advantages for others. *The plan focuses only on University-funded sports, ignoring the long history of successful donor-funded student teams.*

Brown's Plan at 1 (emphasis added).

In its introduction, Brown makes clear that it "would prefer to maintain its current program" and that the plan submitted

is inconsistent with Brown's philosophy to the extent that it grants advantages and enforces disadvantages upon student athletes solely because of their gender and curbs the historic role of coaches in determining the number of athletes which can be provided an opportunity to participate. Nevertheless, the University wishes to act in good faith with the order of the Court, notwithstanding issues of fact and law which are currently in dispute.

Id. at 2.

Brown states that it "seeks to address the issue of proportionality while minimizing additional undue stress on already strained physical and fiscal resources." *Id.*

The general provisions of the plan may be summarized as follows: (i) Maximum squad sizes for men's teams will be set and enforced. (ii) Head coaches of all teams must field squads that meet minimum size requirements. (iii) No additional discretionary funds will be used for athletics. (iv) Four new women's junior varsity teams-basketball, lacrosse, soccer, and tennis-will be university-funded. (v) Brown will make explicit a *de facto* junior varsity team for women's field hockey. *Id.* at 3-4.

The plan sets forth nine steps for its implementation, *id.* at 4-5, and concludes that "if the Court determines that this plan is not sufficient to reach proportionality, phase two will be the elimination of one or more men's teams,"*id.* at 5.

The district court found Brown's plan to be "fatally flawed" for two reasons. First, despite the fact that 76 men and 30 women participated on donor-funded varsity teams, Brown's proposed plan disregarded donor-funded varsity teams. District Court Order at 5-6. Second, Brown's plan "artificially boosts women's varsity numbers by adding junior varsity positions on four women's teams." *Id.* at 6. As to the propriety of Brown's proposal to come into compliance by the addition of junior varsity positions, the district court held:

Positions on distinct junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in Cohen, 879 F.Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." *See*44 Fed.Reg. at 71,413 n. 1. Junior varsity squads, by definition, do not meet this criterion. Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.

District Court Order at 6 (footnote omitted).

The district court found that these two flaws in the proposed plan were sufficient to show that Brown had "not made a good faith ***187** effort to comply with this Court's mandate." *Id.* at 8.

In criticizing another facet of Brown's plan, the district court pointed out that

[a]n institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons. A university does not treat its men's and women's teams equally if it allows the coaches of men's teams to set their own maximum capacity limits but overrides the judgment of coaches of women's teams on the same

matter.

Id. at 8-9.

After rejecting Brown's proposed plan, but bearing in mind Brown's stated objectives, the district court fashioned its own remedy:

I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.

It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, *no* increase in women's opportunities and a *large* decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

Id. at 11-12.

The district court ordered Brown to "elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status." *Id.* at 12. The court stayed this part of the order pending appeal and further ordered that, in the interim, the preliminary injunction prohibiting Brown from eliminating or demoting any existing women's varsity team would remain in effect. *Id.*

We agree with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand. Indeed, the plan is replete with argumentative statements more appropriate for an appellate brief. It is obvious that Brown's plan was addressed to this court, rather than to offering a workable solution to a difficult problem.

It is clear, nevertheless, that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute. Thus, although we understand the district court's reasons for substituting its own specific relief under the circumstances at the time, and although the district court's remedy is within the statutory margins and constitutional, we think that the district court was wrong to reject out-of-hand Brown's alternative plan to reduce the number of men's varsity teams. After all, the district court itself stated that one of the compliance options available to Brown under Title IX is to "demote or eliminate the requisite number of men's positions." *Cohen III*, 879 F.Supp. at 214. Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with ***188** constitutional and statutory limits. *Cohen II*, 991 F.2d at 906; *Villanueva*, 930 F.2d at 129.

Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. The context of the case has changed in two significant respects since Brown presented its original plan. First, the substantive issues have been decided adversely to Brown. Brown is no longer an appellant seeking a favorable result in the Court of Appeals. Second, the district court is not under time constraints to consider a new plan and fashion a remedy so as to expedite appeal. Accordingly, we remand the case to the district court so that Brown can submit a further plan for its consideration. In all other respects the judgment of the district court is affirmed. The preliminary injunction issued by the district court in *Cohen I*, 809 F.Supp. at 1001, will remain in effect pending a final remedial order.

VIII.

There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. *See, e.g.,* Frank DeFord, *The Women of Atlanta,* Newsweek, June 10, 1996, at 62-71; Tharp, *supra,* at 33; Robert Kuttner, *Vicious Circle of Exclusion,* Washington Post, September 4, 1996, at A15. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern. *See* DeFord, *supra,* at 66.

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports. Kuttner, *supra,* at A15.

Affirmed in part, reversed in part, and remanded for further proceedings. No costs on appeal to either party.

TORRUELLA, Chief Judge (dissenting).
Because I am not persuaded that the majority's view represents the state of the law today, I respectfully dissent.

I. THE LAW OF THE CASE

Under the doctrine of the "law of the case," a decision on an issue of law made by the court at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation except in unusual circumstances. *See Abbadessa v. Moore Business Forms, Inc.,* 987 F.2d 18, 22 (1st Cir.1993); *EEOC v. Trabucco,* 791 F.2d 1, 2 (1st Cir.1986). It is well established, however, that a decision of the Supreme Court, that is rendered between two appeals and is irreconcilable with the decision on the first appeal, must be followed on the second appeal. *See Linkletter v. Walker,* 381 U.S. 618, 627, 85 S.Ct. 1731, 1736-37, 14 L.Ed.2d 601 (1965); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.,* 945 F.2d 10, 12 (1st Cir.1991), *rev'd on other grounds,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993); *Young v. Herring,* 917 F.2d 858 (5th Cir.1990); *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir.1981), *cert. denied,* 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). I believe that we face such a situation in the instant case.

A. *Adarand* and *Metro Broadcasting*

At the time of *Cohen v. Brown University,* 991 F.2d 888 (1st Cir.1993)(*Cohen II*), the standard intermediate scrutiny test for discriminatory classifications based on sex required that "a statutory classification must be substantially related to an important government objective." *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988); *see also* ***189***Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 723-24, and n. 9, 102 S.Ct. 3331, 3335-36 and n. 9, 73 L.Ed.2d 1090 (1982); *Mills v. Habluetzel,* 456 U.S. 91, 99, 102 S.Ct. 1549, 1554-55, 71 L.Ed.2d 770 (1982); *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456-57, 50 L.Ed.2d 397 (1976); *Mathews v. Lucas,* 427 U.S. 495, 505-06, 96 S.Ct. 2755, 2762-63, 49 L.Ed.2d 651 (1976). As was also the case under strict scrutiny review prior to *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), however, courts applying intermediate scrutiny sometimes allowed "benign" gender classifications on the grounds that they were a "reasonable means of compensating women as a class for past ... discrimination." Ronald D. Rotunda & John E. Novack, 3 *Treatise on Constitutional Law* § 18.23, at 277; *see Califano v. Webster,* 430 U.S. 313, 317, 97 S.Ct. 1192, 1194-95, 51 L.Ed.2d 360 (1977) (allowing women to compute certain social security benefits with a more favorable formula than could be used by men); *Lewis v. Cowen,* 435 U.S. 948, 98 S.Ct. 1572, 55 L.Ed.2d 797 (1978) (summary affirmance of a district court decision upholding a provision of the Railroad Retirement Act that allowed

women to retire at age 60 while men could not retire until age 65).

In *Cohen II,* we applied precisely this type of benign-classification analysis to what we viewed to be benign gender discrimination by the federal government. Although *Cohen II,* in its brief discussion of the equal protection issue, does not specify the precise standard it used, the court stated that "even if we were to assume ... that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity." Cohen II, 991 F.2d at 901. Note that the focus is on the government's ability to favor women in this context, rather than on an "important government objective," suggesting that the court considered the issue to be one of benign discrimination. Indeed, no governmental interest is even identified in *Cohen II.* Furthermore, both of the cases cited by the court in *Cohen II* are cases in which a suspect classification was allowed because it was judged benign, *see* id. at 901 (citing Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (race); Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (sex)).

Cohen II 's assumption that a regulation slanted in favor of women would be permissible, Cohen II 991 F.2d at 901, and by implication that the same regulation would be impermissible if it favored men, was based on *Metro Broadcasting,* which held that benign race-based action by the federal government was subject to a lower standard than non-remedial race-based action. *See* Metro Broadcasting, 497 U.S. at 564, 110 S.Ct. at 3008. Specifically, the Supreme Court announced that

benign race-conscious measures mandated by Congress are constitutionally permissible *to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.*

Id. at 565, 110 S.Ct. at 3026 (emphasis added). Although *Metro Broadcasting* explicitly discussed race-conscious rather than gender-conscious classifications, we applied its standard in *Cohen II. See* Cohen II, 991 F.2d at 901.

Since *Cohen II,* however, *Metro Broadcasting* has been overruled, at least in part. *See* Adarand Constr. Inc. v. Pena, 515 U.S. 200, ----, 115 S.Ct. 2097, 2111-12, 132 L.Ed.2d 158 (1995). In *Adarand,* the Supreme Court held that "all racial classifications ... must be analyzed under strict scrutiny." Adarand, 515 U.S. at ----, 115 S.Ct. at 2113. The Court in *Adarand* singled out *Metro Broadcasting* as a "significant departure" from much of the Equal Protection jurisprudence that had come before it, in part because it suggested that "benign" government race-conscious classifications should be treated less skeptically than others. *See* Adarand, 515 U.S. at ----, 115 S.Ct. at 2112.

In *Adarand,* the Supreme Court reasoned that " 'it may not always be clear that a so-called preference is in fact benign.' " *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)). Additionally, the Supreme Court endorsed the view that

***190** [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

Id. at ----,115 S.Ct. at 2112; *see also* Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 721-22, 102 L.Ed.2d 854 (1989).

It is not necessary to equate race and gender to see that the logic of *Adarand*-counseling that we focus on the categories and justifications proffered rather than the labels attached-applies in the context of gender. While cognizant of differences between race-focused and gender-focused Equal Protection precedent, I nevertheless think that *Adarand* compels us to view so-called "benign" gender-conscious governmental actions under the same lens as any other gender-conscious governmental actions. *See* Adarand, 515 U.S. at ----, 115 S.Ct. at 2112; *see also United States v.* Virginia, 518U.S. 515, ----, ----, 116 S.Ct. 2264, 2274, 2277, 135 L.Ed.2d 735 (1996) (viewing Virginia's benign justification for a gender classification skeptically); Shuford v. Alabama State Bd. of Educ., 897 F.Supp. 1535, 1557 (D.Ala.1995) (stating that courts "must look behind the recitation

of a benign purpose to ensure that sex-based classifications redress past discrimination"). Rather than conduct an inquiry into whether Title IX and its resulting interpretations are "benign" or "remedial," and conscious of the fact that labels can be used to hide illegitimate notions of inferiority or simple politics just as easily in the context of gender as in the context of race, we should now follow *Adarand*'s lead and subject all gender-conscious government action to the same inquiry.[FN25]

FN25. Our discussion in *Cohen II* also cited *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977), which has not been explicitly overruled. That case concerned Congress' provision, under the Social Security Act, for a lower retirement age for women than for men, with the result that, as between similarly situated male and female wage-earners, the female wage-earner would be awarded higher monthly social security payments, *id.* at 314-16, 97 S.Ct. at 1193-94. In that case, Congress specifically found that more frequent and lower age limits were being applied to women than to men in the labor market. *Id.* at 319, 97 S.Ct. at 1195-96. This led the Supreme Court to characterize the provision at issue as remedial rather than benign, noting that the provision had been repealed in 1972, roughly contemporaneously with "congressional [anti-discrimination] reforms [that] ... have lessened the economic justification for the more favorable benefit computation" for women. *Id.* at 320, 97 S.Ct. at 1196. The instant case should be distinguished from *Califano* for two reasons. First, *Califano* did not necessarily rule on benign classifications, as *Metro Broadcasting* and *Adarand* clearly did. Second, *Califano*, unlike the instant case, contained an "exceedingly persuasive justification" for its gender-conscious state action.

B. *United States v. Virginia*

A second Supreme Court case has also made it necessary to review our decision in *Cohen II*. In *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), the Court faced an Equal Protection challenge to Virginia's practice of maintaining the Virginia Military Institute as an all male institution. Rather than simply apply the traditional test requiring that gender classifications be "substantially related to an important government objective,"*Clark v. Jeter* 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988), the Supreme Court applied a more searching "skeptical scrutiny of official action denying rights or opportunities based on sex,"*id.*, at ----,116 S.Ct. at 2274, which requires that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action,"*id.* In its discussion, the Court stated that, in order to prevail in a gender case, "the State must show *at least* that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at ----, 116 S.Ct. at 2275 (internal quotations omitted) (emphasis added). Being "substantially related to an important government objective," therefore, is considered a necessary but not sufficient condition. The Court also requires a focus on "whether the proffered justification is 'exceedingly persuasive.' " *Id.*

*191 *Virginia*"drastically revise[d] our established standards for reviewing sex-based classifications." *Id.* at ----, 116 S.Ct. at 2291 (Scalia, J. dissenting). "Although the Court in two places ... asks whether the State has demonstrated that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives ... the Court never answers the question presented in anything resembling that form." *Id.* at ----, 116 S.Ct. at 2294 (citations omitted). "[T]he Court proceeds to interpret 'exceedingly persuasive justification' in a fashion that contradicts the reasoning of *Hogan* and our other precedents." *Id.*

What is important for our purposes is that the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an "exceedingly persuasive justification." This is evident from the language of both the majority opinion and the dissent in *Virginia*.

This is not just a matter of semantics. *Metro Broadcasting*, and our application of its intermediate

scrutiny standard in *Cohen II,* omitted the additional "skeptical scrutiny" requirement of an "exceedingly persuasive justification" for gender-based government action. *Compare* Virginia, 518U.S. at ----, 116 S.Ct. at 2274 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37, and n. 6, 114 S.Ct. 1419, ---- - ---- and n. 6, 128 L.Ed.2d 89 (1994)), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), *with* Metro Broadcasting, 497 U.S. at 564-65, 110 S.Ct. at 3008-09.

I conclude, therefore, that *Adarand* and *Virginia* are irreconcilable with the analysis in *Cohen II* and, accordingly, we must follow the guidance of the Supreme Court in this appeal. Under the new standards established in those cases, *Cohen II* is flawed both because it applies a lenient version of intermediate scrutiny that is impermissible following *Adarand* and because it did not apply the "exceedingly persuasive justification" test of *Virginia.* We must, as Brown urges, reexamine the Equal Protection challenge to the three-prong test as interpreted by the district court.

C. Preliminary Injunction

In addition to the above reasons for considering the merits of this appeal, it is important to note that *Cohen II* was an appeal from a preliminary injunction. "When an appeal comes to us in that posture, the appellate court's conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes, rather than as comprising the ultimate law of the case." *A.M. Capen's Co. v. American Trading and Prod. Co.*, 74 F.3d 317, 322 (1st Cir.1996) (internal quotations omitted); *see also* Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir.1991).

The binding authority of *Cohen II,* therefore, is lessened by the fact that it was an appeal from a preliminary injunction. First, we now have a full record before us and a set of well-defined legal questions presented by the appellant. Trial on the merits has served to focus these questions and to provide background that allows us to consider these questions in the proper context and in detail. In its decision in *Cohen II,* this court recognized and, indeed, emphasized the fact that its holding was only preliminary. *Cohen II,* 991 F.2d at 902 ("a party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial"). Rather than turning that ruling into a permanent one, we should review the question in light of the full set of facts now available.

Second, the standard of review has changed. The *Cohen II* court stated that it was adopting a deferential standard of review, and that "if ... the district court made no clear error of law or fact, we will overturn its calibration ... only for manifest abuse of discretion." *Id.* at 902. The test applied by the court was based on "(1) the movant's probability of victory on the merits; (2) the potential for irreparable harm if the injunction is refused; (3) the balance of interests as between the parties ... and (4) the public interest." *Id.* The case is now before us on appeal from the merits and we must review it accordingly. For the purposes of this appeal,***192** we must review findings of fact under a clearly erroneous standard, *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1069 (1st Cir.1995) and findings of law *de novo*, *Portsmouth v. Schlesinger*, 57 F.3d 12, 14 (1st Cir.1995). Because the standard has changed, it is conceivable that the result of the analysis will change, making review appropriate.

II. BROWN'S EQUAL PROTECTION CHALLENGE

Appellees have argued that the three-prong test does not create a gender classification because the classification applies to both women and men. Although I agree that by its words, the test would apply to men at institutions where they are proportionately underrepresented in intercollegiate athletics, I cannot accept the argument that, via this provision, the Government does not classify its citizens by gender. *See United States v. Virginia*, 518U.S. 515, ---- - ----, 116 S.Ct. 2264, 2274-76, 135 L.Ed.2d 735 (1996) (applying Equal Protection review to "gender-based government action" where Commonwealth of Virginia attempted to maintain two purportedly equal single-sex institutions). *Cf. Loving v. Virginia*, 388 U.S. 1, 8-9, 87 S.Ct. 1817, 1821-22, 18 L.Ed.2d 1010 (1967) (stating that even though the statute at issue applied equally to members of different racial classifications, it still implicated race-related Equal Protection concerns, since the statute itself contained race-conscious

classifications). The fact of gender-conscious classification, even with equal enforcement with respect to both genders, requires the application of a higher level of scrutiny than rational basis review. We cannot pretend that an interpretation of a statute that contains explicit categorization according to gender and that has intentional gender-conscious effect does not represent gender-based government action. Equal Protection is implicated where the claim is made that a classification made by the government intentionally subjects an individual to treatment different from similarly situated individuals based on an impermissible characteristic, such as race, national origin, or gender. Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* § 18.2, at 7-8 (2d ed. 1992).

A. The District Court's Construction of the Three-Prong Test

1. Prong One

A central issue in this case is the manner in which athletic "participation opportunities" are counted. During the 1990-91 academic year, Brown fielded 16 men's and 15 women's varsity teams on which 566 men and 328 women participated. By the 1993-94 year, there were 12 university-funded men's teams and 13 university funded women's teams. These teams included 479 men and 312 women. Based on an analysis of membership in varsity teams, the district court concluded that there existed a disparity between female participation in intercollegiate athletics and female student enrollment.

Even assuming that membership numbers in varsity sports is a reasonable proxy for participation opportunities-a view with which I do not concur-contact sports should be eliminated from the calculus. The regulation at 34 C.F.R. § 106.41(b)(1995) provides that an academic institution may operate separate teams for members of each sex "where selection of such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). When a team is sponsored only for one sex, however, and where "athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered *unless the sport involved is a contact sport,*" *id.*(emphasis added). The regulation, therefore, allows schools to operate single-sex teams in contact sports. In counting participation opportunities, therefore, it does not make sense to include in the calculus athletes participating in contact sports that include only men's teams. For example, if a university chooses to sponsor a football team, it is permitted to sponsor only a men's team. Not all sports are the same and the university should be given the flexibility to determine which activities are most beneficial to its student body. By including in its accounting a contact sport that requires very large numbers of participants, e.g., football, the district court skews the number of athletic participants***193** - making it impossible for the university to provide both men's and women's teams in other sports.

If the athletes competing in sports for which the university is permitted to field single-sex teams are excluded from the calculation of participation rates, the proportion of women participants would increase dramatically and prong one might be satisfied. If so, the inquiry ends and Brown should be judged to be in compliance.

2. Prong Two

The district court concluded, and the majority appears to agree, that Brown failed to satisfy prong two because "merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender." Majority Opinion at 166. This is a curious result because the entire three-prong test is based on *relative* participation rates. Prong one, for example, requires that participation opportunities be provided proportionately to enrollment, but does not mandate any absolute number of such opportunities. The district court's conclusion with respect to prong two, however, implies that a school must not only demonstrate that the proportion of women in their program is growing over time, it must also show that the *absolute* number of women participating is increasing.[FN26]

FN26. This requirement presents a dilemma for a school in which women are less interested in athletics, as Brown contends is the case. Under such conditions, a school may be unable to succeed under the second prong because there may not be enough interested female students to achieve a

continuing increase in the number of female participants.

Under the district court's interpretation, a school facing budgetary constraints must, in order to comply with prong two, *increase* the opportunities available to the underrepresented gender, even if it cannot afford to do so. Rather than respecting the school's right to determine the role athletics will play in the future-including reducing the opportunities available to the formerly overrepresented gender to ensure proportionate opportunities-the district court and the majority demand that the *absolute* number of opportunities provided to the underrepresented gender be increased. I see no possible justification for this interpretation-the regulation is intended to protect against discrimination, not to promote athletics on college campuses. A school is not required to sponsor an athletic program of any particular size. It is not for the courts, or the legislature, for that matter, to mandate programs of a given size. The most that can be demanded is that athletics be provided in a non-discriminatory manner.

Furthermore, the claim that a reduction in the opportunities given to the overrepresented gender is an unacceptable method of coming into compliance with the three prong test is contrary to both *Cohen II* and comments of the majority opinion. The majority quotes approvingly from Cohen v. Brown Univ., 879 F.Supp. 185 (D.R.I.1995)(*Cohen III*), to demonstrate the many ways in which a university might achieve compliance:

It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies.

Majority Opinion at 185 (quoting *Cohen III*). This conclusion is consistent with *Cohen II,* which states that a school may achieve compliance by reducing opportunities for the overrepresented gender. *See* Cohen II, 991 F.2d at 898 n. 15. I fail to see how these statements can be reconciled with the claim that Brown cannot satisfy prong two by reducing the number of participation opportunities for men.

3. Prong Three

Prong three of the three-prong test states that, where an institution does not comply with prongs one or two, compliance will be assessed on the basis of

whether it can be demonstrated that the interests and abilities of the members of th[e] [proportionately underrepresented] sex have been fully and effectively accommodated by the present program.

44 Fed.Reg. 71,413, 71,418 (December 11, 1979).

***194** According to the district court, Brown's athletics program violates prong three because members of the proportionately underrepresented sex have demonstrated interest sufficient for a university-funded varsity team that is not in fact being funded. The district court asserts that this is not a quota. Brown, on the other hand, argues that prong three is satisfied when (1) the interests and abilities of members of the proportionately underrepresented gender (2) are accommodated to the same degree as the proportionately overrepresented gender.

The district court's narrow, literal interpretation should be rejected because prong three cannot be read in isolation. First, as Brown points out, the Regulation that includes prong three provides that, in assessing compliance under the regulation, "the governing principle in this area is that the *athletic interests and abilities of male and female students be equally effectively accommodated.*" *Policy Interpretation,* 44 Fed.Reg. 71,413, 71,414. Thus, Brown contends, to meet "fully"-in an absolute sense-the interests and abilities of an underrepresented gender, while unmet interest among the overrepresented gender continues, would contravene the governing principle of "equally effective accommodat[ion]" of the interests and abilities of students of both genders.

It is also worthwhile to note that to "fully" accommodate the interests and abilities of the underrepresented sex is an extraordinarily high-perhaps impossibly so-requirement. How could an academic institution with a large and diverse student body ever "fully" accommodate the athletic interests of its students? Under even the largest athletic program, it would be surprising to find that there is not a single student who would prefer to participate in athletics but does not do so because the school does not offer a program in the particular sport that

interests the student. To read fully in an absolute sense would make the third prong virtually impossible to satisfy and, therefore, an irrelevant addition to the test.

This difficulty was recognized in *Cohen II,* which stated that "the mere fact that there are some female students interested in a sport does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark." Cohen II 991 F.2d at 898. The balance that *Cohen II* advocates would require the institution to ensure "participatory opportunities ... when, and to the extent that, there is sufficient interest and ability among the members of the excluded sex to sustain a viable team." *Id.* (internal citations omitted). This standard may be practical for certain sports that require large teams, but what of individual sports? A "viable" tennis team may require only a single player. The same could be said of any individual sport, including golf, track and field, cycling, fencing, archery, and so on. Therefore, we still have the problem that to "fully accommodate" the interests of the underrepresented sex may be impossible under the district court's interpretation.

In light of the above, Brown argues that prong three is in fact ambiguous with respect to whether "fully" means (1) an institution must meet 100% of the underrepresented gender's unmet reasonable interest and ability, or (2) an institution must meet the underrepresented gender's unmet reasonable interest and ability as fully as it meets those of the overrepresented gender. I agree with Brown that, in the context of OCR's Policy Interpretation, prong three is susceptible to at least these two plausible interpretations.

Additionally, section 1681(a), a provision enacted by Congress as part of Title IX itself, casts doubt on the district court's reading of prong three. 20 U.S.C. § 1681(a) (1988). As Brown points out, Title IX, of which the Policy Interpretation is an administrative interpretation, contains language that prohibits the ordering of preferential treatment on the basis of gender due to a failure of a program to substantially mirror the gender ratio of an institution. Specifically, with respect to Title IX's guarantee that no person shall be excluded on the basis of sex from "participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance,"20 U.S.C. § 1681(a),

[n]othing contained [therein] shall be interpreted to require any educational institution to grant preferential or disparate ***195** treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of the sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community.

Id. § 1681(b). Section 1681(b) provides yet another reason why the district court's reading of prong three is troublesome and why Brown's reading is a reasonable alternative.

Since the applicable regulation, 34 C.F.R. § 106.41, and policy interpretation, 44 Fed.Reg. 71,418, are not manifestly contrary to the objectives of Title IX, and Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). That notwithstanding, where-as here-the resulting regulation is susceptible to more than one reasonable interpretation, we owe no such deference to the interpretation chosen where the choice is made not by the agency but by the district court. Therefore, like other cases of statutory interpretation, we should review the district court's reading *de novo.*

B. The District Court's Interpretation and the Resulting Equal Protection Problem

The district court's interpretation of prongs one and three creates an Equal Protection problem, which I analyze in two steps. First, the district court's interpretation creates a quota scheme. Second, even assuming such a quota scheme is otherwise constitutional, appellees have not pointed to an "exceedingly persuasive justification," *see Virginia,* 518 U.S. at ----, 116 S.Ct. at 2274, for this particular quota scheme.

1. The Quota

I believe that the three prong test, as the district court interprets it, is a quota. I am in square disagreement with the majority, who believe that "[n]o aspect of the Title IX regime at issue in this case ... mandates gender-based preferences or quotas." Majority Opinion at 170. Put another way, I agree that "Title IX is not an affirmative action statute,"*id.*, but I believe that is exactly what the district court has made of it. As interpreted by the district court, the test constitutes an affirmative action, quota-based scheme.

I am less interested in the actual term "quota" than the legally cognizable characteristics that render a quota scheme impermissible. And those characteristics are present here in spades. I am not persuaded by the majority's argument that the three-part test does not constitute a quota because it does not permit an agency or court to find a violation solely on the basis of prong one of the test; instead, an institution must also fail prongs two and three. As Brown rightly argues, the district court's application of the three-prong test requires Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex. To the extent that the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require that such an institution treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, *by law*, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty. "The injury in cases of this kind is that a 'discriminatory classification prevent [s] ... competition on an equal footing.' " *Adarand*, 515 U.S. at ----, 115 S.Ct. at 2104 (quoting *Northeastern Fla. Chapter, Assoc'd Gen'l Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993)). As a result, individual male and female students would be precluded from competing against each other for scarce resources; they would instead compete only against members of their own gender. *Cf.* *196*Hopwood v. Texas*, 78 F.3d 932, 943-46 (5th Cir.) (concluding that not only would government action precluding competition between individuals of different races for law school admissions be unconstitutional, but in fact even partial consideration of race among other factors would be unconstitutional), *cert. denied*,518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996).[FN27]

FN27. In response, appellees cite *Kelley v. Board of Trustees*, 35 F.3d 265 271 (1994), for the proposition that the three-prong test does not constitute a quota, because it does not "require any educational institution to grant preferential or disparate treatment" to the gender underrepresented in that institution's athletic program. *Id.* However, in *Kelley*, the Seventh Circuit, unlike the district court, did not use the three-prong test as a definitive test for liability. Rather, the Seventh Circuit endorsed the test as one for compliance, in *dismissing the plaintiff's* claims. The Seventh Circuit did not consider the question of whether, had the defendant University of Illinois *not* been in compliance, lack of compliance with the three-prong test *alone* would trigger automatic liability, nor did the Seventh Circuit spell out what steps would have been required of defendant. At any rate, *Kelley* pre-dates the Supreme Court's opinions in *Adarand* and *Virginia*, meaning that it suffers from the same defects as *Cohen II*.

The majority claims that "neither the Policy Interpretation nor the district court's interpretation of it, *mandates* statistical balancing." Majority Opinion at 175. The logic of this position escapes me. A school can satisfy the test in three ways. The first prong is met if the school provides participation opportunities for male and female students in numbers substantially proportionate to their enrollments. This prong surely requires statistical balancing. The second prong is satisfied if an institution that cannot meet prong one can show a "continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex." 44 Fed.Reg. at 71,418. It can hardly be denied that this prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that

demands statistical balancing can only be done by demonstrating an improvement in the statistical balance. In other words, the second prong also requires balancing. Finally, the third prong, interpreted as the majority advocates, dispenses with statistical balancing only because it choose to accord zero weight to one side of the balance. Even a single person with a reasonable unmet interest defeats compliance. This standard, in fact, goes farther than the straightforward quota test of prong one. According to the district court, the unmet interests of the underrepresented sex must be *completely* accommodated before *any* of the interest of the overrepresented gender can be accommodated.[FN28]

FN28. The problem with the majority's argument can be illustrated with a hypothetical college admissions policy that would require proportionality between the gender ratio of the local student aged population and that of admitted students. This policy is comparable to prong one of the three prong test and is, without a doubt, a quota. It is no less a quota if an exception exists for schools whose gender ratio differs from that of the local population but which admit every applicant of the underrepresented gender. It remains a quota because the school is forced to admit every female applicant until it reaches the requisite proportion. Similarly, the district court's interpretation requires the school to accommodate the interests of every female student until proportionality is reached.

A pragmatic overview of the effect of the three-prong test leads me to reject the majority's claim that the three-prong test does not amount to a quota because it involves multiple prongs. In my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists. Regardless of how many steps are involved, the fact remains that the test requires proportionate participation opportunities for both sexes (prong one) unless one sex is simply not interested in participating (prong three). It seems to me that a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota. All of the negative effects of a quota remain,[FN29] and the school can escape the quota ***197** under prong three only by offering preferential treatment to the group that has demonstrated less interest in athletics.

FN29. Nor does the second prong of the test change the analysis. That prong merely recognizes that a school may not be able to meet the quotas of the first or third prong immediately, and therefore deems it sufficient to show program expansion that is responsive to the interests of the underrepresented sex.

2. "Extremely Persuasive Justification" Test

In view of the quota scheme adopted by the district court, and Congress' specific disavowal of any intent to require quotas as part of Title IX, appellees have not met their burden of showing an "exceedingly persuasive justification" for this gender-conscious exercise of government authority. As recently set forth in *Virginia*,"[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Virginia*, 518 U.S. at ----, 116 S.Ct. at 2274. While the Supreme Court in *Virginia* acknowledged that "[p]hysical differences between men and women ... are enduring,"*id.* at ----, 116 S.Ct. at 2276, it went on to state that such " '[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for ... artificial constraints on an individual's opportunity." *Id.*

Neither appellees nor the district court have demonstrated an "exceedingly persuasive justification" for the government action that the district court has directed in this case. In fact, appellees have failed to point to *any* congressional statement or indication of intent regarding a proportional representation scheme as applied by the district court. While they point to Congress' decision to delegate authority to the relevant agencies, this does not amount to a genuine-that is, not hypothesized or invented in view of litigation, *id.* at ----, 116 S.Ct. at 2275-exceedingly persuasive justification in light of section 1681(b)'s "no quota" provision. We are left with the explanations discussed in *Cohen II* to the effect that Congress conducted hearings on the subject of discrimination against women in education. There is little more than that, because Congress adopted Title IX as a floor

amendment without committee hearings or reports. *See Cohen II*, 991 F.2d at 893.

I believe that the district court's interpretation of the Policy Interpretation's three-prong test poses serious constitutional difficulties. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [we] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507, 99 S.Ct. 1313, 1322, 59 L.Ed.2d 533 (1979). To the extent that Congress expressed a specific intent germane to the district court's interpretation, Congress, if anything, expressed an aversion to quotas as a method to enforce Title IX. As a result, I opt for Brown's construction of prong three, which, as we have discussed, *infra*, is also a reasonable reading.

Accordingly, I would reverse and remand for further proceedings.

III. EVIDENTIARY ISSUES

In disputes over the representation of women in athletic programs, it is inevitable that statistical evidence will be relevant. There is simply no other way to assess participation rates, interest levels, and abilities. The majority opinion, however, offers inconsistent guidance with respect to the role of statistics in Title IX claims. Early in the opinion, the majority approvingly cites to the statistical evaluations conducted in *Cohen I*, *Cohen II*, and *Cohen III*. Majority Opinion at 163. The figures in question demonstrate that women's participation in athletics is less than proportional to their enrollment. Later in the opinion, however, when the level of interest among women at Brown is at issue, the court adopts a much more critical attitude towards statistical evidence: "[T]here exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity." Majority Opinion at 179. In other words, evidence of differential levels of interest is not to be credited because it may ***198** simply reflect the result of past discrimination.

The refusal to accept surveys of interest levels as evidence of interest raises the question of what indicators might be used. The majority offers no guidance to a school seeking to assess the levels of interest of its students. Although the three-prong test, even as interpreted by the district court, appears to allow the school the opportunity to show a lack of interest, the majority rejects the best-and perhaps the only-mechanism for making such a showing.

Brown claims that the district court erred in excluding evidence pertaining to the relative athletic interests of men and women at the university. Brown sought to introduce the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics, but was not permitted to do so. The majority is unsympathetic to Brown's claim that the disparity between athletic opportunities for men and women reflect a gender-based difference in interest levels. Indeed, despite Brown's attempt to present evidence in support of its claim, the majority characterizes Brown's argument as an "unproven assertion." Majority Opinion at 178.[FN30]

FN30. Among the evidence submitted by Brown are: (i) admissions data showing greater athletic interest among male applicants than female applicants; (ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; (iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; (iv) an independent telephone survey of 500 randomly selected Brown undergraduates that reveals that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; (v) intramural and club participation rates that demonstrate higher participation rates among men than women; (vi) walk-on and try-out numbers that reflect a greater interest among men than women; (vii) high school participation rates that show a much lower rate of participation among females than among males; (viii) the

NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.

Furthermore, the majority recognizes that institutions are entitled to use any nondiscriminatory method of their choosing to determine athletic interests. Majority Opinion at 179 n. 15. If statistical evidence of interest levels is not to be considered by courts, however, there is no way for schools to determine whether they are in compliance. Any studies or surveys they might conduct in order to assess their own compliance would, in the event of litigation, be deemed irrelevant. Regardless of the efforts made by the academic institution, the specter of a lawsuit would be ever-present.

In addition, the majority has put the power to control athletics and the provision of athletic resources in the hands of the underrepresented gender. Virtually every other aspect of college life is entrusted to the institution, but athletics has now been carved out as an exception and the university is no longer in full control of its program. Unless the two genders participate equally in athletics, members of the underrepresented sex would have the ability to demand a varsity level team at any time if they can show sufficient interest. Apparently no weight is given to the sustainability of the interest, the cost of the sport, the university's view on the desirability of the sport, and so on.

IV. FIRST AMENDMENT ISSUE

Finally, it is important to remember that Brown University is a private institution with a constitutionally protected First Amendment right to choose its curriculum. Athletics are part of that curriculum. Although the protections of the First Amendment cannot be used to justify discrimination, this court should not forget that it has a duty to protect a private institution's right to mould its own educational environment.

The majority pays lip service to these concerns in the final pages of its long opinion, stating that " 'we are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations.' " Majority Opinion at 185 (quoting *Cohen II*, 991 F.2d at 906), and "[o]ur respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible." Majority Opinion at 185. Despite these statements, ***199** however, the majority in its opinion today, and the district court before it, have failed to give Brown University freedom to craft its own athletic program and to choose the priorities of that program. Instead, they have established a legal rule that straight-jackets college athletics programs by curtailing their freedom to choose the sports they offer.

C.A.1 (R.I.),1996.
Cohen v. Brown University
101 F.3d 155, 65 USLW 2396, 114 Ed. Law Rep. 394, 45 Fed. R. Evid. Serv. 1369

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Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn
C.A.2 (N.Y.),2001.

United States Court of Appeals,Second Circuit.
Francisco GARCIA, Plaintiff-Appellant,
v.
S.U.N.Y. HEALTH SCIENCES CENTER OF BROOKLYN; Stephen E. Fox, Ph.D., individually and in official capacity; Jacqueline S. Jakway, individually and in official capacity; Lorraine Terracina, Ph.D., individually and as Dean of Academic Affairs or her successor, Irwin M. Weiner, M.D., individually and as Dean of the College of Medicine or his successor; and Russell Miller, M.D., individually and as President of the State University of New York Health Sciences Center or his successor, Defendants-Appellees,
andUnited States of America, Intervenor.
Docket No. 00-9223.

Argued Jan. 25, 2001.
Decided Sept. 25, 2001.

Student who was dismissed from state university medical school brought action against the university and university administrators and professors, seeking damages for alleged violations of his rights under the First Amendment free speech clause, the Americans with Disabilities Act (ADA), and the Rehabilitation Act. The United States District Court for the Eastern District of New York, Reena Raggi, J., dismissed the complaint, and student appealed. The Court of Appeals, John M. Walker, Jr., Chief Circuit Judge, held that: (1) no causal connection existed between letter co-authored by the student to department chairman and his dismissal 13 months later as would support his First Amendment retaliation claim; (2) student could not sue state university medical school administrators and professors in their individual capacities under either ADA or the Rehabilitation Act; (3) as a whole, Title II of the ADA exceeded Congress's Fourteenth Amendment enforcement authority; (4) student could not maintain private suit for money damages under Title II of the ADA absent evidence that the alleged Title II violation was motivated by either discriminatory animus or ill will due to disability; and (5) state did not knowingly waive its sovereign immunity against suit under remedies provision of Rehabilitation Act when it accepted federal funds for state university.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚷1555

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1555 k. Matters of Public Concern. Most Cited Cases
(Formerly 92k90.1(1))
Under the "public concern doctrine," expression is not afforded First Amendment protection when it cannot be fairly considered as relating to any matter of political, social or other concern to the community, but is simply a personal matter. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⚷2010

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2009 Student Speech or Conduct
92k2010 k. In General. Most Cited Cases
(Formerly 92k90.1(1.4))
The "public concern doctrine" does not apply to student speech in the university setting, but is reserved for situations where the government is acting as an employer. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚷1934

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(P) Public Employees and Officials
92k1934 k. Efficiency of Public Services. Most Cited Cases
(Formerly 92k90.1(7.2))
The key to the First Amendment analysis of government employment decisions is that the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer; while the government cannot restrict the speech of the public at large just in the name of efficiency, where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚷2010

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2009 Student Speech or Conduct
92k2010 k. In General. Most Cited Cases
(Formerly 92k90.1(1.4))
University students are not employed by the government, so the government's interest in functioning efficiently is subordinate to the students' interest in free speech, and the need for the public concern doctrine to accommodate an elevated efficiency interest is therefore wholly absent. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚷2010

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2009 Student Speech or Conduct
92k2010 k. In General. Most Cited Cases
(Formerly 92k90.1(1.4))
University students' speech deserves the same degree of protection that is afforded generally to citizens in the community, not the curtailed protection afforded government employees. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚷1553

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1553 k. Retaliation. Most Cited Cases
(Formerly 92k90.1(1))
To survive summary dismissal, a plaintiff asserting a First Amendment retaliation claim must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. U.S.C.A. Const.Amend. 1.

[7] Colleges and Universities 81 ⚷9.35(3.1)

81 Colleges and Universities
81k9 Students
81k9.35 Curriculum, Degrees, Grades, and Credits
81k9.35(3) Academic Expulsion, Suspension, or Probation
81k9.35(3.1) k. In General. Most Cited Cases

Constitutional Law 92 ⚷2011

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2009 Student Speech or Conduct
92k2011 k. Discipline or Retaliation. Most Cited Cases
(Formerly 92k90.1(1.4))
No causal connection existed between letter which first-year medical student co-authored to department chairman opposing the state university medical school's requirement that he retake a failed course during that summer and the student's dismissal after he unsuccessfully repeated first-year curriculum, as would support his First Amendment retaliation claim;

some 13 months passed between the date of the letter and his dismissal, numerous university officials on two academic committees approved his dismissal based on substantial evidence of his persistent academic deficiencies, and the university made a reasonable proposal in good faith that, if accepted, would have avoided his dismissal. U.S.C.A. Const.Amend. 1.

[8] Federal Courts 170B ⚷269

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases
Insofar as dismissed medical student was suing state university medical school administrators and professors in their official capacities under the Americans With Disabilities Act (ADA) and the Rehabilitation Act, he was seeking damages from the state, and the Eleventh Amendment therefore shielded them to the same extent that it shielded the university. U.S.C.A. Const.Amend. 11; Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[9] Civil Rights 78 ⚷1356

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1356 k. Education. Most Cited Cases
(Formerly 78k207(1))
Dismissed medical student could not sue state university medical school administrators and professors in their individual capacities under either Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by public entity against qualified individual with a disability in the benefits or activities of the public entity, or under remedies provision of vocational rehabilitation statute. Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[10] Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Federal Courts 170B ⚷267

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk267 k. Consent to Suit. Most Cited Cases
The ultimate guarantee of the Eleventh Amendment is that nonconsenting states may not be sued by private individuals in federal court. U.S.C.A. Const.Amend. 11.

[11] Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases
Congress may abrogate Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. U.S.C.A. Const.Amend. 11.

[12] Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases
Congress may not base its abrogation of the states' Eleventh Amendment immunity upon the powers enumerated in Article I of the Constitution. U.S.C.A. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 11.

[13] **Constitutional Law 92 ⚷4863**

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4861 Governmental Immunity in General
92k4863 k. Abrogation of Immunity. Most Cited Cases

Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases
The Fourteenth Amendment enforcement clause grants Congress the authority to abrogate the states' Eleventh Amendment sovereign immunity. U.S.C.A. Const.Amends. 11, 14.

[14] **Constitutional Law 92 ⚷4850**

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(A) In General
92k4850 k. In General. Most Cited Cases
(Formerly 92k82(6.1))
When operating under the Fourteenth Amendment enforcement clause, Congress may prohibit conduct that itself violates the Fourteenth Amendment's substantive guarantees, and may remedy or deter violations of these guarantees by prohibiting a somewhat broader swath of conduct than is otherwise unconstitutional, subject to the requirement that there be congruence and proportionality between the violation to be prevented or remedied and the means adopted to that end; Congress may go no further, however, for to do so would work a substantive redefinition of the guarantees of the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

[15] **Constitutional Law 92 ⚷4850**

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(A) In General
92k4850 k. In General. Most Cited Cases
(Formerly 92k82(6.1))
Congress has been given in the Fourteenth Amendment enforcement clause only the power to enforce, not the power to determine what constitutes a constitutional violation. U.S.C.A. Const.Amend. 14.

[16] **Constitutional Law 92 ⚷3073(1)**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3073 Disability and Disease, Physical or Mental
92k3073(1) k. In General. Most Cited Cases
(Formerly 92k213.1(2))
Where disability discrimination is at issue, the Fourteenth Amendment only proscribes government conduct for which there is no rational relationship between the disparity of treatment and some legitimate governmental purpose. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law 92 ⚷3073(1)**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3073 Disability and Disease, Physical or Mental
92k3073(1) k. In General. Most Cited Cases
(Formerly 92k213.1(2))
Where disability discrimination is at issue, so long as a state's disparate actions are rationally related to a legitimate purpose, no Fourteenth Amendment violation is presented even if the actions are done quite hard headedly or hardheartedly. U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law 92 ⚷3035**

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3031 Limits of Doctrine
92k3035 k. Perfect, Exact, or Complete Equality or Uniformity. Most Cited Cases
(Formerly 92k213.1(2))

Constitutional Law 92 ⚷3073(1)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3073 Disability and Disease, Physical or Mental
92k3073(1) k. In General. Most Cited Cases
(Formerly 92k213.1(2))
Baseline considerations under the Fourteenth Amendment to determine whether a rational relationship exists between disparity of treatment and some legitimate governmental purpose where disability discrimination is at issue are, (1) the classification is permissible so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification, (2) a state has no obligation to produce evidence to sustain the rationality of a statutory classification, but rather, a statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, and (3) the fit between the classification and the asserted government justification may be imperfect and may in practice result in some inequality. U.S.C.A. Const.Amend. 14.

[19] **Civil Rights 78 ⚷1005**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions
78k1005 k. Power to Enact and Validity. Most Cited Cases
(Formerly 78k103)

Constitutional Law 92 ⚷4866

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4866 k. Disabled Persons. Most Cited Cases
(Formerly 92k225.1)
In its entirety, Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by public entity against qualified individual with a disability in the benefits or activities of the public entity, exceeds Congress's authority under the Fourteenth Amendment enforcement clause; it is neither congruent nor proportional to the proscriptions of the Fourteenth Amendment, it shifts the burden of proof onto the state to defend the absence of an accommodation that would be presumptively permissible under the Fourteenth Amendment, with the burden of challenging it squarely on the plaintiff, and requires states to eradicate disparate effects divorced from any inquiry into intent. U.S.C.A. Const.Amend. 14; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[20] **Civil Rights 78 ⚷1330(6)**

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1330 Private Right of Action
78k1330(6) k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k200)
Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, incorporates an implied private right of action, by virtue of its incorporation of the remedies provision of the Rehabilitation Act, which in turn incorporates the remedial scheme of Title VI of the Civil Rights Act of 1964, which prohibits discrimination by public entity against an individual on ground of race, color,

or national origin, and which includes a judicially implied private cause of action. Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Americans with Disabilities Act of 1990, §§ 202, 203, 42 U.S.C.A. §§ 12132, 12133.

[21] Action 13 ⚷3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
When operating in the realm of judicially implied private rights of action, courts have a measure of latitude to shape a sensible remedial scheme that best comports with the statute.

[22] Civil Rights 78 ⚷1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Constitutional Law 92 ⚷4866

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4866 k. Disabled Persons. Most Cited Cases
(Formerly 78k107(1))
To comport with the Fourteenth Amendment enforcement clause, a private suit for money damages under Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability. Americans with Disabilities Act of 1990, §§ 202, 203, 42 U.S.C.A. §§ 12132, 12133.

[23] Civil Rights 78 ⚷1406

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1406 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k240(1))
To establish discriminatory animus, a plaintiff in a private suit for money damages under Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, may rely on a burden-shifting technique similar to that adopted in *McDonnell Douglas*, or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*, both of which center on ferreting out injurious irrational prejudice. Americans with Disabilities Act of 1990, §§ 202, 203, 42 U.S.C.A. §§ 12132, 12133.

[24] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Student who was dismissed from state university medical school after twice failing to successfully complete first-year curriculum, and who was subsequently diagnosed with attention deficit disorder (ADD) and a learning disability, was not entitled to monetary damages from the university, its administrators or professors under Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, absent evidence that the defendants were motivated by irrational discriminatory animus or ill will based on his alleged learning disability; the crux of his claim was simply that the university denied him the accommodations he sought. Americans with Disabilities Act of 1990, §§ 202, 203, 42 U.S.C.A. §§ 12132, 12133.

[25] **Civil Rights 78 ⚷1005**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions
78k1005 k. Power to Enact and Validity. Most Cited Cases
(Formerly 78k103)

Constitutional Law 92 ⚷4866

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4866 k. Disabled Persons. Most Cited Cases
(Formerly 92k225.1)
Remedies provision of the Rehabilitation Act exceeds Congress's authority under the Fourteenth Amendment enforcement clause. U.S.C.A. Const.Amend. 14; Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2).

[26] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
When providing funds from the federal purse, Congress may require as a condition of accepting those funds that a state agree to waive its Eleventh Amendment sovereign immunity from suit in federal court. U.S.C.A. Const.Amend. 11.

[27] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
That Congress clearly expressed intent in Rehabilitation Act to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity was not sufficient for Court of Appeals to find that state actually waived its sovereign immunity in accepting federal funds for state university. U.S.C.A. Const.Amend. 11; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

[28] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
As is the case with the waiver of any constitutional right, an effective waiver of a state's Eleventh Amendment sovereign immunity requires an intentional relinquishment or abandonment of a known right or privilege. U.S.C.A. Const.Amend. 11.

[29] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
In assessing whether a state has made a knowing and intentional waiver of its Eleventh Amendment immunity, every reasonable presumption against waiver is to be indulged. U.S.C.A. Const.Amend. 11.

[30] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
State did not knowingly waive its sovereign immunity against suit under remedies provision of

Rehabilitation Act when it accepted federal funds for state university. U.S.C.A. Const.Amend. 11; Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2).

[31] Civil Rights 78 ⚷1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))
A plaintiff may recover money damages from a non-state governmental entity under either Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, or under the remedies provision of the Rehabilitation Act, upon a showing of a statutory violation resulting from deliberate indifference to the rights secured the disabled by the acts. Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[32] Civil Rights 78 ⚷1456

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1456 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k262.1)
Private individuals may obtain injunctive relief for state violations of Title II of the Americans With Disabilities Act (ADA), which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

***103** Benjamin Z. Holczer, New York, NY, for Plaintiff-Appellant.
Mark Gimpel, Deputy Solicitor General (Eliot Spitzer, Attorney General of the State of New York; Deon J. Nossel, Assistant Solicitor General, of counsel), New York, NY, for Defendants-Appellees.
(William R. Yeomans, United States Assistant Attorney General, Civil Rights Division; Jessica Dunsay Silver; Seth M. Galanter; Washington, DC; for the United States as Intervenor.).
(Richard N. Simpson; Amy Ledoux; Sam R. Hananel; Ross, Dixon & Bell, L.L.P.; Washington, DC; S. Mark Goodman; Michael Hiestand; Arlington, VA; for Amicus Curiae Student Press Law Center on behalf of Plaintiff-Appellant.).
(Ogden A. Lewis; Daniel E. Wenner; Andrew H. Tannenbaum; Davis Polk & Wardwell; New York, NY; for Amici Curiae Access Now, The Center for Independence of the Disabled in New York, Disability Advocates, Judge David L. Bazelon Center for Mental Health Law, League for the Hard of Hearing, Mood Disorders Support Group, National Association of the Deaf, National Association of Protection and Advocacy Systems, The National Multiple Sclerosis Society-New York City Chapter, New York Association of Psychiatric Rehabilitation Services, New York Lawyers for the Public Interest, New York State Independent Living Council, and the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities in Support of Plaintiff-Appellant.).

Before: WALKER, Chief Judge, OAKES and PARKER, Circuit Judges.

JOHN M. WALKER, JR., Chief Judge:
This appeal stems from plaintiff-appellant Francisco Garcia's dismissal from a New York state medical school, the State University of New York Health Sciences Center at Brooklyn ("SUNY"), following his repeated failure to successfully complete the first-year medical school curriculum. After his dismissal, Garcia visited a ***104** psychologist who subsequently diagnosed him as having attention deficit disorder and a learning disability. Relying on this diagnosis, Garcia sought readmission to SUNY. Although SUNY agreed to readmit Garcia, the two could not come to terms on how much of the first-year curriculum Garcia would have to retake and so Garcia never actually re-enrolled.

Instead, Garcia brought suit against defendants-appellees SUNY and various SUNY administrators and professors. Garcia's complaint alleged violations of (1) the free speech guarantee of the First Amendment, *see* U.S. Const. amend. I, (2) Title II of the Americans with Disabilities Act ("ADA"), *see*42 U.S.C. § 12132, and (3)§ 504 of the Rehabilitation

Act, *see*29 U.S.C. § 794a(a)(2). The complaint was dismissed by the United States District Court for the Eastern District of New York (Reena Raggi, *District Judge*). *See Garcia v. State Univ. of New York Health Sciences Ctr. at Brooklyn*, No. CV 97-4189, 2000 WL 1469551 (E.D.N.Y. Aug.21, 2000). We affirm the district court's judgment dismissing the complaint.

Among other issues, this appeal raises the following question of first impression: whether, consistent with the Eleventh Amendment's guarantee of state sovereign immunity, Title II of the ADA and § 504 of the Rehabilitation Act may be applied against non-consenting states in private suits seeking money damages.

BACKGROUND

Garcia enrolled in the medical program at SUNY in the fall of 1993. His first year was not a successful one. Garcia failed four courses-gross anatomy, genetics, neuroscience, and epidemiology-and was in the lowest quartile in four others.

On May 12, 1994, after he received his failing mark in gross anatomy, Garcia and six other students who failed the course wrote a letter to the Chairman of the Department of Anatomy and Cell Biology, Dr. M.A.Q. Siddiqui. The letter requested a change in SUNY's policy that required them to retake the entire gross anatomy course over the summer. They sought instead to retake only the portions of the course they had failed. Their request was rejected.

Because of Garcia's poor grades, the First Year Grades Committee ("Grades Committee") recommended that he repeat the entire first year curriculum. Garcia appealed this decision to the Academic Promotions Committee ("Promotions Committee"). He denied that he had any "difficulty understanding concepts, solving problems or learning material" and stated that he could do better next year by working harder. The Promotions Committee upheld the Grades Committee's decision and required Garcia to repeat the first year curriculum.

Garcia's second year at SUNY (1994-95), which represented his second try at the first year curriculum, while somewhat improved, was still unsuccessful. He failed neuroscience again and barely passed embryology and histology/cell biology. This time the Grades Committee, after reviewing his academic record, recommended that he be dismissed. The Promotions Committee agreed and, in June 1995, Garcia was officially dismissed from SUNY.

Thereafter, Garcia arranged to be examined by an outside psychologist, Dr. Elizabeth Auricchio. She diagnosed him as having attention deficit disorder ("ADD") and a learning disability ("LD"). On approximately August 1, 1995, Garcia forwarded this diagnosis to SUNY with a request that he be readmitted and either have his neuroscience grade adjusted to a passing mark or be permitted to take a *105 make-up neuroscience exam scheduled for August 14, 1995.

On August 7, 1995, SUNY agreed to readmit Garcia, but refused to adjust his neuroscience grade or to permit him to sit for the August 14th make-up. Instead, SUNY conditioned Garcia's readmission on his (1) retaking the second and third trimesters of the first year curriculum, (2) working with SUNY's counselors to develop a study regimen to overcome his ADD and LD difficulties, and (3) undergoing a psychiatric evaluation and, if appropriate, treatment for his ADD.

Garcia states that "given his age (31 at the time), [his] financial situation and the humiliation he would face in explaining to family and friends that he was redoing the first year curriculum a third time, he rejected SUNY's proposal." He responded with a counter-proposal that he be permitted to advance to the second year curriculum without successfully completing neuroscience, and the following summer retake a neuroscience make-up course or make-up exam. SUNY rejected this proposal, explaining that,

[a] student must successfully complete all basic science courses in the year in order to progress into the succeeding year. With your "Unsatisfactory" grade in Neuroscience, a major course in the first year curriculum, you are not eligible to take second year courses.

No further proposals were made, and Garcia was not readmitted to SUNY.

Garcia filed suit in federal district court in Brooklyn seeking $5 million in damages from SUNY and the

other defendants; Garcia did not request injunctive relief. His complaint alleged (1) that his dismissal from SUNY in June 1995 was in retaliation for the May 1994 letter he had co-authored to Dr. Siddiqui opposing SUNY's requirement that he retake gross anatomy during that summer, and (2) that the defendants' refusal to permit him to sit for the make-up neuroscience exam or to adjust his 1994-95 neuroscience exam to a passing mark violated both Title II of the ADA and § 504 of the Rehabilitation Act.

Judge Raggi granted summary judgment in favor of the defendants. She concluded, *inter alia,* that (1) the letter to Dr. Siddiqui did not involve speech on a matter of "public concern" and thus was not protected by the First Amendment, and (2) the accommodations Garcia sought under Title II and § 504 were unreasonable. This appeal followed.

While the appeal was pending, the Supreme Court handed down its decision in *Bd. of Tr. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Court held that Title I of the ADA, which prohibits the states, municipalities and other employers from "discriminat[ing] against a qualified individual with a disability because of th[at] disability ... in regard to ... terms, conditions, and privileges of employment,"42 U.S.C. § 12112(a), is not an effective abrogation of state sovereign immunity under the Eleventh Amendment. *See Garrett,* 121 S.Ct. at 967-68. In light of *Garrett,* we requested that the parties brief the question of whether Title II of the ADA and § 504 of the Rehabilitation Act validly abrogate state sovereign immunity. The United States intervened with respect to this question.

DISCUSSION

I. First Amendment Retaliation

[1] Garcia contends that in dismissing his First Amendment retaliation claim, the district court erroneously relied on the "public concern" doctrine to hold that his May 1994 letter to Dr. Siddiqui was not protected speech. Under the public concern doctrine, when "expression cannot be ***106** fairly considered as relating to any matter of political, social or other concern to the community," but is simply a personal matter, it is not afforded First Amendment protection. *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[2][3] SUNY correctly concedes that the public concern doctrine does not apply to student speech in the university setting, *see Oyyjt v. Lin,* 932 F.Supp. 1100, 1108-09 (N.D.Ill.1996), but is reserved for situations where the government is acting as an employer, *see, e.g., Pickering v. Bd. of Educ.,* 391 U.S. 563, 574-75, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Hellstrom v. U.S. Dep't of Veterans Affairs,* 201 F.3d 94, 97 (2d Cir.2000); *Morris v. Lindau,* 196 F.3d 102, 109-10 (2d Cir.1999).

The key to the First Amendment analysis of government employment decisions ... is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters v. Churchill, 511 U.S. 661, 675, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality).

If every speech-related personnel decision were subjected to "intrusive oversight by the judiciary in the name of the First Amendment," effective government administration would be threatened and, in turn, the efficient provision of services and benefits would be jeopardized. *Connick,* 461 U.S. at 146, 103 S.Ct. 1684. Limiting First Amendment protection to speech related to matters of public concern ameliorates this risk: it strikes " 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs.' " *Id.* at 140, 103 S.Ct. 1684 (quoting *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731).

[4][5] University students are not "employed" by the government, so the government's interest in functioning efficiently is "subordinate" to the students' interest in free speech. *Waters,* 511 U.S. at 675, 114 S.Ct. 1878. The need for the public concern doctrine to accommodate an elevated efficiency

interest is therefore wholly absent. University students' speech deserves the same degree of protection that is afforded generally to citizens in the community, not the curtailed protection afforded government employees. *See Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) (stating that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and the "First Amendment protections should apply with [no] less force on college campuses than in the community at large").

Despite conceding that the district court erred in applying the public concern doctrine to Garcia's case, SUNY argues that the dismissal of Garcia's claim should nonetheless be affirmed. SUNY contends that Garcia has failed to advance factual allegations supporting a prima facie case of retaliation. We agree.

[6][7] "To survive summary dismissal, a plaintiff asserting [a] First Amendment retaliation claim[ ] must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the *107 protected speech and the adverse action." *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir.2001); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 386-87 (6th Cir.1999) (en banc) (per curiam). Garcia has failed to meet the third showing. There is no material evidence of a causal relation between the May 1994 letter Garcia co-authored to Dr. Siddiqui and Garcia's dismissal from SUNY in June of 1995. In fact, the record belies his claim of retaliation: (1) some thirteen months passed between the date of the letter and his dismissal, (2) numerous SUNY officials on both the Grades Committee and the Promotions Committee approved his dismissal, (3) those officials did so based on substantial evidence of Garcia's persistent academic deficiencies, and (4) SUNY made a reasonable proposal in good faith that, if accepted, would have avoided Garcia's dismissal.

II. Disability Discrimination Claims

A. Title II of the ADA

[8][9] SUNY and the other defendants argue that Garcia's Title II claim for money damages against them is barred by the Eleventh Amendment. In *Dube v. State Univ. of New York*, we held that "[f]or Eleventh Amendment purposes, SUNY is an integral part of the government of the State [of New York] and when it is sued the State is the real party." 900 F.2d 587, 594 (2d Cir.1990) (internal quotation marks omitted). Insofar as Garcia is suing the individual defendants in their official capacities, he is seeking damages from New York, and the Eleventh Amendment therefore shields them to the same extent that it shields SUNY. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Insofar as Garcia is suing the individual defendants in their individual capacities, neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials. *See Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir.2000) (Title II), *cert. denied*, 531 U.S. 1190, 121 S.Ct. 1188, 149 L.Ed.2d 104 (2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8 (8th Cir.1999) (en banc) (Title II); *Calloway v. Boro of Glassboro Dep't of Police*, 89 F.Supp.2d 543, 557 (D.N.J.2000) (Title II and § 504) (collecting similar cases); *Montez v. Romer*, 32 F.Supp.2d 1235, 1240-41 (D.Colo.1999) (Title II and § 504).

1. Eleventh Amendment Principles

The Eleventh Amendment of the Federal Constitution provides in relevant part:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State....

U.S. Const. amend. XI. On its face, the Eleventh Amendment does not reveal its applicability to the case at hand, for Garcia is not bringing suit against New York as a "Citizen of another State." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (stating "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts").

[10] Yet, as the Supreme Court has confirmed for over a century, *see Hans v. Louisiana*, 134 U.S. 1, 13, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the significance of

the Eleventh Amendment is not what it provides in its text, but the larger "background principle of state sovereign immunity" that it confirms. Seminole Tribe, 517 U.S. at 72, 116 S.Ct. 1114. "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." Garrett, 121 S.Ct. at 962.

*108 [11] This guarantee is not absolute. Congress may abrogate the "immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.' " Id. at 962 (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000)). With respect to Title II of the ADA, it is clear that the Congress fully intended to abrogate state sovereign immunity. See42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."). What is unresolved, however, is whether Title II was enacted pursuant to a grant of constitutional authority that empowers Congress to abrogate state sovereign immunity.

[12] In enacting Title II, Congress purported to rely on its authority under both the Commerce Clause of Article I and § 5 of the Fourteenth Amendment. See42 U.S.C. § 12101(b)(4) (invoking 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"). To the extent that Title II rests on Congress's authority under the Commerce Clause, it cannot validly abrogate state sovereign immunity. This is because "Congress may not ... base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."Garrett, 121 S.Ct. at 962; see also Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct. 1114 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

[13] "Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity." Kimel, 528 U.S. at 80, 120 S.Ct. 631. Thus, if Title II is a valid exercise of Congress's § 5 power, then nonconsenting states may be hailed into federal court by private individuals seeking money damages. See Garrett, 121 S.Ct. at 962. We turn our attention to this critical issue.

2. Title II and § 5 of the 14th Amendment

[14][15] Section 5 of the Fourteenth Amendment authorizes Congress to " 'enforce,' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.' " City of Boerne v. Flores, 521 U.S. 507, 517, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). When operating under § 5, Congress may prohibit conduct that itself violates the Fourteenth Amendment's substantive guarantees. Congress may also remedy or deter violations of these guarantees by "prohibiting a somewhat broader swath of conduct" than is otherwise unconstitutional, Garrett, 121 S.Ct. at 963 (internal quotation marks and citations omitted), subject to the requirement that there be "congruence and proportionality between the [violation] to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520, 117 S.Ct. 2157. Congress may go no further, however, for to do so would work a substantive redefinition of the guarantees of the Fourteenth Amendment, and Congress "has been given [only] the power 'to enforce,' not the power to determine *what constitutes* a constitutional violation." Kimel, 528 U.S. at 81, 120 S.Ct. 631 (citations omitted) (emphasis in original); see *109College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) ("[T]he term 'enforce' [in § 5] is to be taken seriously-... the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations.").

[16][17] We turn to the specific question of whether Title II of the ADA is within the ambit of Congress's authority under § 5. Where disability discrimination is at issue, the Fourteenth Amendment only proscribes government conduct for which there is no rational relationship between the disparity of treatment and some legitimate governmental purpose. See Garrett, 121 S.Ct. at 963-64; Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442-47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Indeed, "so

long as [a state's disparate] actions" are rationally related to a legitimate purpose, no Fourteenth Amendment violation is presented even if the actions are done "quite hard headedly" or "hardheartedly." Garrett, 121 S.Ct. at 964.

[18] Several baseline considerations are applied under the Fourteenth Amendment to determine whether such a rational relationship in fact exists. First, the classification is permissible so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *See* Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal quotation marks and citations omitted). Second, "[a] State ... has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.*"A statute is presumed constitutional and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (internal citation and quotation marks omitted). And finally, because "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations," the fit between the classification and the asserted government justification may be "imperfect" and may "in practice ... result[ ] in some inequality." *Id.* at 321, 113 S.Ct. 2637 (internal quotation marks omitted).

[19] Assessing the strictures of Title II against these baselines, the extent to which Title II is neither congruent nor proportional to the proscriptions of the Fourteenth Amendment becomes apparent. Consider Title II's requirement (as implemented through the DOJ regulations, *see*42 U.S.C. § 12134) that a state make reasonable modifications in its programs, services or activities, *see*28 C.F.R. §§ 35.130(b)(3)-(8), for "qualified individual [s] with a disability,"*id.;* 42 U.S.C. § 12131(2), unless the state can establish that the modification would work a fundamental alteration in the nature of the program, service, or activity, *see*28 C.F.R. § 35.130(b)(7). While the absence of a reasonable accommodation would be permissible under the Fourteenth Amendment so long as there were *any* rational basis for the absence, this provision of Title II allows but a single basis for not providing the accommodation: a showing that a fundamental alteration in the nature of the program, service, or activity would occur. *See* Thompson v. Colorado, 258 F.3d 1241, 1252 (10th Cir.2001) ("In contrast to the Equal Protection Clause prohibition on invidious discrimination against the disabled and irrational distinctions between the disabled and the nondisabled, Title II requires public entities to recognize the unique position of the disabled and to make favorable accommodations on their behalf.").

Moreover, whereas under the Fourteenth Amendment the absence of an accommodation would be presumptively permissible with the burden of challenging it ***110** squarely on the plaintiff, Title II shifts the burden of proof onto the state to defend the absence. Indeed, this burden shift is consistent with the elevated scrutiny generally applied to suspect classifications such as race and nationality, suggesting that Title II is working a substantive elevation in the status of the disabled in equal protection jurisprudence. *See* Garrett, 121 S.Ct. at 967 ("[Title I of the ADA] ... makes it the employer's duty to prove that it would suffer [an undue burden], instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision."); *cf.* Kimel, 528 U.S. at 87-88, 120 S.Ct. 631 ("Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers.... [T]he Act's substantive requirements nevertheless remain at a level akin to our heightened scrutiny cases....").

Finally, while the Fourteenth Amendment countenances inequality in the treatment of the disabled as long as the disparate treatment is rationally related to a legitimate government end, Title II's requirement that state governments make reasonable modifications is far broader: the eradication of unequal effects. Specifically, Title II focuses on disparate effects divorced from any inquiry into intent. *See generally* Roger C. Hartley, *The* New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After Boerne, 24 N.Y.U. Rev. L. & Soc. Change 481, 481-82 & n. 7 ("No other civil rights statute so aggressively roots out needless impediments to full participation in the mainstream of American economic and social life."). Even in cases involving suspect classifications subject to heightened scrutiny under the Fourteenth Amendment, disparate effects alone are insufficient to establish an equal protection violation. *See* Garrett, 121 S.Ct. at 967 (citing Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d

597 (1976)); *see also* *Alsbrook*, 184 F.3d at 1009 (stating that "it cannot be said that Title II identifies or counteracts particular state laws or specific state actions which violate the Constitution. Title II targets *every* state law, policy, or program"); *cf.* *City of Boerne*, 521 U.S. at 535, 117 S.Ct. 2157 ("In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.").

Although we find that Title II in its entirety exceeds Congress's authority under § 5, this conclusion does not end our inquiry as to whether Title II validly abrogates state sovereign immunity. This is because Title II need only comport with Congress's § 5 authority to the extent that the title allows private damage suits against states for violations.

[20] Title II itself is silent as to the parameters of when a monetary recovery may be had.[FN1] *See*42 U.S.C. § 12133. Instead,*111 Title II simply incorporates the remedial scheme of the Rehabilitation Act of 1973, *see*29 U.S.C. § 794a(a)(2) (incorporated into Title II by 42 U.S.C. § 12133), which in turn incorporates the remedial scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See* *Ferguson v. City of Phoenix*, 157 F.3d 668, 673 (9th Cir.1998). And significantly, Title VI's remedial scheme includes a judicially implied private cause of action. *See* *Guardians Ass'n v. Civil Serv. Comm'n, N.Y.C.*, 463 U.S. 582, 594-95, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983). Thus, by referencing Title VI's remedial scheme, Title II (and § 504 of the Rehabilitation Act) incorporate an implied private right of action.

FN1. This differs from Title I of the ADA which provided for monetary recovery for all violations of the provision. For example, while compensatory damages were available only for disparate treatment violations under Title I, *see*42 U.S.C. § 1981a(a)(2), back pay was expressly available for all Title I violations (i.e., both disparate treatment and disparate impact violations), *see*42 U.S.C. § 12117(a) (incorporating Title VII's provision of back-pay damage awards for both disparate treatment and disparate impact violations).

Thus, for it to validly abrogate state sovereign immunity, Title I, measured as a whole, had to target in a "congruent and proportional" manner conduct otherwise proscribed by the Fourteenth Amendment. *Garrett*, 121 S.Ct. at 963 ("[Section] 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' "). The same was true for the Age Discrimination in Employment Act of 1967. *See*29 U.S.C. §§ 630(b) & 633a(c); *see, e.g.*, *Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1162 (6th Cir.1991) ("Where a plaintiff proves that he was discharged because of his age in violation of the ADEA, he is entitled to recover, at a minimum, any back pay lost as a proximate result of the violation."); *see also* *Kimel*, 528 U.S. at 69, 120 S.Ct. 631.

[21] This is significant because, when operating in the realm of judicially implied private rights of action, courts "have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 284-85, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) ("Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on the scope of available remedies."). We believe this latitude allows us to restrict the availability of Title II monetary suits against the states in a manner that is consistent with Congress's § 5 authority, and that thereby validly abrogates state sovereign immunity from private monetary suits under Title II. Indeed, since Congress expressly intended to abrogate the states' sovereign immunity under Title II, *see*42 U.S.C. § 12202, it is particularly appropriate that we "fashion the scope of [the] implied right in a manner" that effectuates this aim and, at the same time, does not offend the Constitution. *Gebser*, 524 U.S. at 284, 118 S.Ct. 1989; *see also* *Franklin v. Gwinnett County Publ. Schs.*, 503 U.S. 60, 66, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) ("[A]lthough we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all *appropriate* remedies unless Congress has expressly indicated otherwise."(emphasis added) (citations omitted)). Moreover, to do otherwise would lead to the

following anomalous result: Congress passing a law that leaves the courts responsible for establishing the contours of the remedial scheme, only to have the courts adopt a scheme that compels a conclusion that the statute exceeds Congress's constitutional authority. *Cf. Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (counseling that courts should avoid interpretations that would render a statute unconstitutional).

The question, therefore, is how Title II monetary claims against the states can be limited so as to comport with Congress's § 5 authority. The answer, we believe, is to require plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability. Government actions based on discriminatory animus or ill will towards the disabled are generally the same actions that are proscribed by the Fourteenth Amendment-i.e., conduct that is based on irrational prejudice or wholly lacking a legitimate government interest. *See* James Leonard, ***112***A Damaged Remedy: Disability Discrimination Claims against State Entities under the Americans with Disabilities Act after* Seminole Tribe *and* Flores, 41 Ariz. L.Rev. 651, 727-37 (1999).

[22] We believe that adopting any lesser culpability standard for Title II monetary suits against states would do little to achieve the congruence and proportionality required under § 5 of the Fourteenth Amendment. The point is made clear by consideration of the next lower culpability standard available: allowing monetary awards upon a showing of an intentional or willful violation of Title II itself. Simply requiring a "knowing" violation of Title II would still leave states subject to monetary liability for the full spectrum of conduct proscribed by the title even though, as we have already discussed, these proscriptions far exceed the authority afforded Congress under § 5. In other words, only requiring proof of an intentional or willful violation would still leave state governments subjected to monetary liability for engaging in conduct that is constitutionally permissible.

[23] While we hold that a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability, we recognize direct proof of this will often be lacking: smoking guns are rarely left in plain view. To establish discriminatory animus, therefore, a plaintiff may rely on a burden-shifting technique similar to that adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

To be sure, both the *McDonnell Douglas* and *Price Waterhouse* approaches will lessen a plaintiff's difficulty in establishing animus relative to what would be demanded under traditional rational basis review, which requires that a plaintiff disprove the existence of any legitimate government justification. However, since both the *McDonnell Douglas* and *Price Waterhouse* approaches center on ferreting out injurious irrational prejudice, which after all is the concern of the Fourteenth Amendment where the disabled are concerned, and since both leave the ultimate burden of proof for establishing animus on the plaintiff, we believe they comport with Congress's enforcement authority under § 5. *See Kimel*, 528 U.S. at 81, 120 S.Ct. 631 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."); *see also City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157 ("Preventive measures prohibiting certain types of [state] laws may be appropriate when there is reason to believe that many of the [state] laws affected by the congressional enactment have a significant likelihood of being unconstitutional.").

[24] Having determined that a showing of discriminatory animus or ill will based on disability is necessary to recover damages under Title II in a private action against a state, we turn to the facts of the instant case. Garcia's allegations are devoid of any contention that SUNY or the other defendants were motivated by irrational discriminatory animus or ill will based on his alleged learning disability. The crux of Garcia's claim is simply that SUNY denied him the accommodations he sought, namely allowing him to take "an already scheduled Neuroscience make-up exam" after he had twice failed the course or adjusting his neuroscience grade to a passing mark.

Because Garcia's Title II claim does not allege discriminatory animus or ill will *113 based on his purported disability, we affirm the district court's grant of summary judgment dismissing it.

B. Section 504 of the Rehabilitation Act

Garcia alleges that in denying him the reasonable accommodations he sought following his dismissal from the medical program, SUNY and the other defendants also violated § 504 of the Rehabilitation Act. 29 U.S.C. § 794(a). Section 504 provides in pertinent part that,

[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, 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....

*Id.*SUNY does not dispute that at the time of the purported violation it was receiving federal financial assistance.

[25] Because § 504 of the Rehabilitation Act and Title II of the ADA offer essentially the same protections for people with disabilities,[FN2]*see Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir.1999), our conclusion that Title II of the ADA as a whole exceeds Congress's authority under § 5 of the Fourteenth Amendment applies with equal force to § 504 of the Rehabilitation Act.[FN3]However, unlike Title II of the ADA, § 504 was enacted pursuant to Congress's authority under the Spending Clause of Article I. *See* U.S. Const. art. I, § 8, cl. 1.

FN2. Indeed, the most significant distinction between Title II of the ADA and § 504 of the Rehabilitation Act is their reach. While Title II applies to all state and municipal governments, § 504 applies only to those government agencies or departments that accept federal funds, and only those periods during which the funds are accepted. *See Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir.2000) (en banc) ("A State and its instrumentalities can avoid § 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others.").

FN3. In *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 78-81 (2d Cir.2000), we relied on the legislative history of Title I of the ADA to hold that the employment provisions of the Rehabilitation Act were valid exercises of congressional authority under § 5 of the Fourteenth Amendment. *See id.* at 82 ("As Congress included identical unequivocal abrogation provisions in the ADA and the Rehabilitation Act, and as [Title I of] the ADA and Section 504 of the Rehabilitation Act impose identical obligations upon employers, the validity of abrogation under the twin statutes presents a single question for judicial review."). However, *Kilcullen* has since been implicitly abrogated by the Supreme Court's decision in *Garrett*, 121 S.Ct. at 965 ("The legislative record of [Title I of] the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

[26] When providing funds from the federal purse, Congress may require as a condition of accepting those funds that a state agree to waive its sovereign immunity from suit in federal court. *See College Savings Bank*, 527 U.S. at 686-87, 119 S.Ct. 2219; *see also South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Here, Garcia argues that § 2000d-7 of Title 42 operates as such a condition. Section 2000d-7 provides in pertinent part that,

[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of Section 504 of the Rehabilitation Act of 1973.

[27][28][29] While we agree with Garcia that this provision constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity, that conclusion alone is not sufficient *114 for us to find that New York actually waived its sovereign immunity in accepting federal funds for SUNY. *But*

see Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir.2000) (en banc). As the Supreme Court instructed in *College Savings Bank,*

[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action [e.g., accepting federal funds] it shall be deemed to have waived that immunity.

College Savings Bank, 527 U.S. at 680-81, 119 S.Ct. 2219. As is the case with the waiver of any constitutional right, an effective waiver of sovereign immunity requires an "intentional relinquishment or abandonment of a *known* right or privilege." *Id.* at 682, 119 S.Ct. 2219 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)) (emphasis added); *see also* College Savings Bank, 527 U.S. at 682, 119 S.Ct. 2219 ("State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected."); *see also* McGinty v. New York, 251 F.3d 84, 95 (2d Cir.2001) (noting "stringent" standard for finding waiver of state sovereign immunity). And in assessing whether a state has made a knowing and intentional waiver, the Supreme Court has instructed that "every reasonable presumption against waiver" is to be indulged. College Savings Bank, 527 U.S. at 682, 119 S.Ct. 2219 (internal quotation marks omitted).

[30] Turning to the instant case, we are unable to conclude that New York in fact waived its sovereign immunity against suit under § 504 when it accepted federal funds for SUNY. At the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. Indeed, the ADA expressly provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation...."42 U.S.C. § 12202. Since, as we have noted, the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, College Savings Bank, 527 U.S. at 682, 119 S.Ct. 2219, since by all reasonable appearances state sovereign immunity had already been lost,[FN4] *see* Kilcullen, 205 F.3d at 82.

FN4. We recognize that an argument could be made that if there is a colorable basis for the state to suspect that an express congressional abrogation is invalid, then the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity. This is because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity.

Even supposing such an argument to have merit, we would still conclude that New York did not waive its sovereign immunity here. This is because throughout the entire period involved in this dispute during which SUNY was accepting federal funds-September 1993 until August 1995-even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation of New York's sovereign immunity as to private damage suits under Title II. *Compare* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (plurality opinion) (holding that Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity), *with* Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct. 1114 (1996) (expressly "overruling *Union Gas* " and holding that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by the Eleventh Amendment). *Compare also* Katzenbach v. Morgan, 384 U.S. 641, 651-52 n. 10, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) (suggesting in dicta that Congress can increase the substantive protections of the Fourteenth Amendment under its § 5 authority), *with* City of Boerne, 521 U.S. at 527-29, 117 S.Ct. 2157 (1997) (stating that "[t]here is language in ...*Katzenbach v. Morgan*... which could be interpreted as acknowledging a power in Congress to

enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment" but holding that, in fact, no such authority exists).

Accordingly, Garcia's § 504 damage claim against New York fails because New ***115** York had not knowingly waived its sovereign immunity from suit.[FN5]

FN5. Several of our sister circuits have held that a state's acceptance of federal funds constitutes a waiver of its sovereign immunity from suit under § 504 of the Rehabilitation Act. *See, e.g., Jim C.*, 235 F.3d at 1082; *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.1997). These cases are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682, 119 S.Ct. 2219.

C. Related Observations

[31] Two final points deserve mention. First, prior to today, we have held that a plaintiff may recover money damages under either Title II of the ADA or § 504 of the Rehabilitation Act upon a showing of a statutory violation resulting from "deliberate indifference" to the rights secured the disabled by the acts. *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir.1998), *vacated on other grounds by*527 U.S. 1031, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999); *see also Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-42 (9th Cir.2001). Although today's decision alters that holding by requiring proof of discriminatory animus or ill will for Title II damage claims brought against states, nothing we have said affects the applicability of the deliberate indifference standard to Title II claims against non-state governmental entities. Moreover, deliberate indifference remains the necessary showing for § 504 claims since the Rehabilitation Act was enacted pursuant to Congress's Spending Clause authority and therefore does not require that damage remedies be tailored to be congruent and proportional to the proscriptions of the Fourteenth Amendment.[FN6]

FN6. Where Spending Clause legislation is concerned, the Supreme Court has generally adopted deliberate indifference as the necessary showing for private damage recoveries. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643-47, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Gebser*, 524 U.S. at 290-91, 118 S.Ct. 1989. Adoption of this standard has been based on a general recognition that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Franklin*, 503 U.S. at 75, 112 S.Ct. 1028; *Guardians Ass'n*, 463 U.S. at 597-99, 103 S.Ct. 3221.

[32] Second, our holding that private damage claims under Title II require proof of discriminatory animus or ill will based on disability does not affect Title II's general applicability to the states, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-57, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1984), as no such challenge was raised in this appeal, *cf. Thompson*, 258 F.3d at 1255 n. 11. Thus, actions by private individuals for injunctive relief for state violations of Title II have not been foreclosed by today's decision, *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *see also Garrett*, 121 S.Ct. at 968 n. 9.

CONCLUSION

We have carefully considered the plaintiff's remaining contentions and find them ***116** without merit. Accordingly, the judgment of the district court dismissing the action is affirmed.

Each side to bear its own costs for this appeal.

C.A.2 (N.Y.),2001.
Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn
280 F.3d 98, 161 Ed. Law Rep. 759, 12 A.D. Cases 538, 22 NDLR P 30

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Greater Los Angeles Council on Deafness, Inc. v. Zolin
C.A.9 (Cal.),1987.

United States Court of Appeals,Ninth Circuit.
GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.; Barbara U. Sheridan and Joy Anne Maucere, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,
v.
Frank S. ZOLIN, individually and as Jury Commissioner for the County of Los Angeles; Raymond F. Arce, individually and as Director of Juror Services for the County of Los Angeles; County of Los Angeles; Superior Court of the State of California for the County of Los Angeles, Defendants-Appellees.
No. 84-6448.

Argued and Submitted Dec. 3, 1985.
Submission Vacated Jan. 29, 1986.
Ordered Resubmitted April 25, 1986.
Decided March 11, 1987.

Council on deafness and individuals brought action against county, jury commissioner, director of juror services, and superior court to challenge decision not to provide sign-language interpreters to enable deaf individuals to serve as jurors. The United States District Court for the Central District of California, Edward Rafeedie, J., 607 F.Supp. 175, entered judgment for county, superior court, commissioner, and director. Council and individuals appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) director and commissioner were not shielded from liability by quasi-judicial or legislative immunity; (2) Eleventh Amendment immunity protected superior court, but did not protect county, commissioner, and director; and (3) past federal funding of relevant program supported action for damages and declaratory relief, but not injunctive relief, under statute, which prohibits discrimination against handicapped persons and programs receiving federal financial support.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Courts 170B ⚷611

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk611 k. Necessity of Presentation in General. Most Cited Cases
Deciding issue on appeal, which had not been addressed by district court, was inappropriate.

[2] Civil Rights 78 ⚷1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases
(Formerly 78k214(8), 78k13.8(5))
Jury commissioner and director of juror services did not perform integral part of judicial process when they determined not to provide sign-language interpreters to assist deaf individuals in jury service and, therefore, were not entitled to absolute, quasi-judicial immunity from monetary damages. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A. Const.Amend. 14; West's Ann.Cal.Gov.Code § 11135.

[3] Civil Rights 78 ⚷1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases
(Formerly 78k214(8), 78k13.8(5))

Jury commissioner and director of juror services, who decided not to provide sign-language interpreters to enable deaf individuals to serve as jurors, made executive, rather than legislative decision and, therefore, were not entitled to legislative immunity from liability for monetary damages, where commissioner and director were not empowered by legislative body to promulgate regulations to implement legislative will, and where commissioner and director did not use any particular procedure in arriving at decision not to provide interpreters. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; West's Ann.Cal.Gov.Code § 11135.

[4] Civil Rights 78 ⚷1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases
(Formerly 78k214(8), 78k13.8(5))
Jury commissioner and director of juror services, who decided not to provide sign-language interpreters to enable deaf individuals to serve as jurors, were entitled only to qualified immunity and were protected from liability for monetary damages only if conduct did not violate clearly established statutory or constitutional rights of which reasonable person would have known. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; West's Ann.Cal.Gov.Code § 11135.

[5] Civil Rights 78 ⚷1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases
(Formerly 78k214(8), 78k13.8(5))
Jury commissioner and director of juror services, who waived good faith defense to liability for monetary damages for decision not to provide sign-language interpreters to enable deaf individuals to serve as jurors, were not protected by qualified immunity. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; West's Ann.Cal.Gov.Code § 11135.

[6] Civil Rights 78 ⚷1350

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1350 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k206(2.1), 78k206(2), 78k13.7)
Evidence that county paid salaries and benefits of jury commissioner and director of juror services and that commissioner, director, and judge relied upon advice of county council regarding responsibilities toward deaf jurors established county's participation in decision of commissioner and director not to provide sign-language interpreters to enable deaf individuals to serve as jurors and, therefore, established county's liability for damages, if statute, which prohibits discrimination against handicapped persons in programs receiving federal financial support, was violated. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; West's Ann.Cal.Gov.Code § 11135.

[7] Federal Courts 170B ⚷270

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk270 k. Cities or Other Political Subdivisions, Actions Involving. Most Cited Cases
County enjoyed no Eleventh Amendment immunity from liability for monetary damages in connection with decision of jury commissioner and director of juror services not to provide sign-language interpreters to enable deaf individuals to serve as jurors. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A. Const.Amend. 11; West's Ann.Cal.Gov.Code § 11135.

[8] Federal Courts 170B ⚷269

170B Federal Courts
170BIV Citizenship, Residence or Character of

Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases
(Formerly 170Bk268.1, 170Bk268)
Suit against superior court was suit against state, which was barred by Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11; West's Ann.Cal. Const. Art. 6, §§ 1, 5.

[9] Federal Courts 170B ⚷270

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk270 k. Cities or Other Political Subdivisions, Actions Involving. Most Cited Cases
Lawsuit against jury commissioner and director of juror services, which would be satisfied from county treasury, was not barred by Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11.

[10] Civil Rights 78 ⚷1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k126, 78k9.16)
Termination of federal funding should not bar claim for damages under statute, which prohibits discrimination against handicapped persons in programs receiving federal financial support. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[11] Civil Rights 78 ⚷1456

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1456 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k262.1, 78k262, 78k13.2(1))
Prior termination of federal funding without any indication that it would be renewed barred injunction ordering end to discriminatory behavior, in that statute, which prohibits discrimination against handicapped persons in programs receiving federal financial support, did not prohibit discrimination against handicapped as such, but simply barred use of federal funds to support programs or activities that discriminated; declining to follow *Bachman v. American Society of Clinical Pathologists*, 577 F.Supp. 1257 (D.N.J.). Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[12] Declaratory Judgment 118A ⚷8

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(A) In General
118Ak8 k. Termination or Settlement of Controversy. Most Cited Cases
Declaratory relief should be denied when it will not aid in clarifying and settling legal relations in issue and when it will not terminate proceedings and afford parties relief from uncertainty and controversy faced. Fed.Rules Civ.Proc.Rule 57, 28 U.S.C.A.

[13] Declaratory Judgment 118A ⚷41

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak41 k. Existence and Effect in General. Most Cited Cases
Existence of other remedies does not preclude appropriate declaratory relief. Fed.Rules Civ.Proc.Rule 57, 28 U.S.C.A.

[14] Declaratory Judgment 118A ⚷395

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak395 k. Determination and Disposition of Cause. Most Cited Cases
Recognition that program definition was highly case-specific matter did not resolve question whether declaratory relief was properly denied in case alleging that decision not to provide sign-language interpreters to enable deaf individuals to serve as jurors violated statute, which prohibits discrimination against handicapped persons in program receiving

federal financial support; thus remand was necessary for determinations of unresolved issues. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Fed.Rules Civ.Proc.Rule 57, 28 U.S.C.A.

[15] **Civil Rights 78 ⚷1719**

78 Civil Rights
78V State and Local Remedies
78k1718 Right of Action; Nature and Grounds
78k1719 k. In General. Most Cited Cases
(Formerly 78k449, 78k68)
Private right of action was permitted by California statute, which prohibits discrimination on basis of ethnic group identification, religion, age, sex, color, or physical or mental disability by any program or activity receiving financial assistance from state. West's Ann.Cal.Gov.Code §§ 11135, 11136, 11139, 19230(a).

[16] **Constitutional Law 92 ⚷726**

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)4 Particular Constitutional Provisions in General
92k726 k. Discrimination in General. Most Cited Cases
(Formerly 92k42.1(1), 92k42.1)
Council on deafness had sufficient stake in outcome of controversy to have standing to maintain challenge to decision of jury commissioner and director of juror services not to provide sign-language interpreters to enable deaf individuals to serve as jurors. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A. Const. Art. 3, § 1 et seq.

[17] **Civil Rights 78 ⚷1331(4)**

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k201, 78k13.6)
Council on deafness challenging decision of jury commissioner and director of juror services not to provide sign-language interpreters to enable deaf individuals to serve as jurors was entitled to invoke statute, which prohibits discrimination against handicapped persons in programs receiving federal financial support, if claim was for expenses reasonably and foreseeably expended to secure for handicapped juror and interpreter that county, commissioner, and director were legally obligated to provide, and, therefore, had standing; declining to follow *Sanders v. Marquette Public Schools*, 561 F.Supp. 1361 (W.D.Mich.). Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A. Const. Art. 3, § 1 et seq.

[18] **Federal Courts 170B ⚷41**

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk41 k. Nature and Grounds in General. Most Cited Cases
Abstention was not appropriate where no pending state proceeding existed.

[19] **Federal Courts 170B ⚷617**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk617 k. Sufficiency of Presentation of Questions. Most Cited Cases
Council on deafness and deaf individuals alleging violations of due process and equal protection as result of decision of jury commissioner and director of juror services not to provide sign-language interpreters to enable deaf individuals to serve as jurors waived constitutional claims by failing to press them adequately before district court and by relying solely on statutory claims. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A. Const.Amend. 14.

***1106** Stanley Fleishman, Los Angeles, Cal., for plaintiffs-appellants.

De Witt W. Clinton, Frederick R. Bennett, Deputy, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before FLETCHER, PREGERSON and CANBY, Circuit Judges.

CANBY, Circuit Judge:
The Greater Los Angeles Council on Deafness (GLAD) and deaf individuals Barbara Sheridan and Joy Ann Maucere appeal an adverse judgment in their suit against Los Angeles County, its superior court, its jury commissioner, Frank Zolin, and its director of juror services, Raymond Arce. Appellants sought monetary, injunctive and declaratory relief after county officials refused to provide, at public expense, sign-language interpreters ("interpreters") to enable deaf individuals to serve as jurors. This refusal, appellants argue, violates their fourteenth amendment rights to equal protection and due process, as well as statutory rights under section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), and Cal.Gov't Code § 11135 (West 1980).[FN1]

FN1. In their complaint, appellants also alleged violation of 31 U.S.C. § 6716(b)(2), which prohibits discrimination on the basis of handicap by state and local government agencies that receive revenue sharing funds. The district court denied relief under the Revenue Sharing Act because of appellants' failure to exhaust the prescribed administrative remedy before suing. Appellants do not challenge this ruling on appeal.

BACKGROUND

The facts are not disputed. On January 1, 1981, a change in California law made hearing-impaired as well as other handicapped persons competent to serve as jurors. Cal.Civ.Proc.Code §§ 198, 205 (West 1982).[FN2] In March 1981, appellants Sheridan and Maucere received summonses to appear for jury service in Los Angeles County Superior Court. Both women sent letters to the court explaining that their ability to serve depended on whether the court would provide them with interpreters at public expense.[FN3] Appellee Arce responded that there was no provision for payment of an interpreter and excused them from jury service.

FN2. Under related provisions, a party may challenge a hearing-impaired venireman for cause, but interpreters must be admitted into the jury room once a deaf person is seated. Cal.Civ.Proc.Code §§ 602(2), 610 (West Supp.1986).

FN3. All parties concede that the individual appellants are fully competent to serve as jurors and that they declined to serve only because of the expense of providing their own interpreter.

In August and September 1981, GLAD paid more than $2000 for an interpreter to assist Nathan Shapiro, a deaf person who served as an alternate juror in a civil trial for 22 days. After unsuccessfully seeking reimbursement from the County for this expense, GLAD, joined by appellants Sheridan and Maucere, brought this action. After a bench trial, the district court entered judgment for defendants. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 607 F.Supp. 175 (C.D.Cal.1984) (hereinafter *GLAD*). The court later confirmed its ruling by denying plaintiffs' motion under Fed.R.Civ.P. 59(e), and plaintiffs brought this timely appeal. We now affirm in part, reverse in part and remand.

DISCUSSION

I. THE CLAIM UNDER SECTION 504

A. *Section 504*

Section 504 by its terms prohibits discrimination against handicapped persons in ***1107** programs receiving federal financial support.[FN4] As the district court stated, section 504 was enacted as a general civil rights provision for the handicapped, designed " 'to prevent discrimination against all handicapped individuals ... in employment, housing, transportation, education, health services, or any other Federally-aided programs.' " *GLAD*, 607 F.Supp. at 180 (quoting S.Rep. No. 1297, 93rd Cong., 1st Sess. *reprinted in*1974 U.S.Code Cong. & Admin.News 6373, 6388). We have recognized a private right of action under section 504, *Kling v.*

County of Los Angeles, 633 F.2d 876, 878 (9th Cir.1980), and plaintiffs suing under section 504 may pursue the full panoply of remedies, including equitable relief and monetary damages, *see* Kling v. County of Los Angeles, 769 F.2d 532, 534 (9th Cir.) (damages), *rev'd on other grounds*, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed.2d 277 (1985); *Kling*, 633 F.2d at 879 (injunction); *see also* Bachman v. American Society of Clinical Pathologists, 577 F.Supp. 1257, 1262 (D.N.J.1983).

FN4. Section 504, 29 U.S.C. § 794 (1982), provides, in pertinent part:

> 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....

As the district court further noted, to prove a section 504 violation, the plaintiffs must show (1) that hearing-impaired people are "handicapped persons" under the Rehabilitation Act, (2) that they are "otherwise qualified" to serve as jurors, (3) that the relevant program is federally funded, and (4) that the refusal to provide interpreters prevents deaf people from serving as jurors. *See* Bentivegna v. U.S. Dep't. of Labor, 694 F.2d 619, 621 (9th Cir.1982).

[1] The district court, however, never reached the ultimate question whether section 504 requires the defendants to provide sign-language interpreters for jurors serving in the Superior Courts. Although appellants urge us to decide that issue on this appeal, it would be inappropriate for us to do so when the district court has not addressed this issue.[FN5] The issues that are properly before us are those upon which the district court ruled in denying relief to appellants. We turn to them now.

FN5. We similarly do not reach subissues of fact that the district court did not rule upon. An example is the question whether the lack of interpreters effectively barred deaf persons from serving as jurors, or whether other measures such a lip-reading or use of hearing aids could serve in place of interpreters.

B. *Denial of Monetary Relief*

The district court denied monetary relief because it found the defendants either shielded by immunity or uninvolved with the jury-selection process.

1. *Quasi-judicial Immunity*

[2] The district court held that the individual defendants were immune from a damage award because they were shielded by absolute "quasi-judicial immunity." *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 2812, 86 L.Ed.2d 411 (1985); Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). The district court relied heavily on our decision in Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1291 (9th Cir.1982). In *Pomerantz*, a case superficially similar to this case, blind citizens challenged their exclusion from Los Angeles County juries. We affirmed the district court's determination that the court officials were shielded by quasi-judicial immunity. It so happens that among the court officials who were found immune in *Pomerantz* are the very ones who are individual defendants here. We nonetheless disagree with the district court's ruling that defendants Arce and Zolin are entitled to an absolute immunity in this case.[FN6]

FN6. The type of immunity to which a public official is entitled is a question of law, reviewed here *de novo*. *See* United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

When deciding whether a public official is immune from liability for acts performed in his official capacity, qualified immunity is the general rule and absolute immunity ***1108** the exceptional case. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982); Butz v. Economou, 438 U.S. 478, 506-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978). The burden is on the official claiming the immunity to demonstrate that public policy requires recognition of an absolute immunity in his case. Harlow, 457 U.S. at 808, 102 S.Ct. at 2733; Butz, 438 U.S. at 506-07, 98 S.Ct. at 2910-11. It is well-settled that the immunity to which

a public official is entitled depends not on the official's title or agency, but on the nature of the function that the person was performing when taking the actions that provoked the lawsuit. *E.g.*, Mitchell, 105 S.Ct. at 2813; *Imbler*, 424 U.S. at 430, 96 S.Ct. at 994-95; *Bothke v. Fluor Engineers & Constructors, Inc.*, 713 F.2d 1405, 1412 (9th Cir.1983), *vacated on other grounds*, 468 U.S. 1201, 104 S.Ct. 3566, 82 L.Ed.2d 867 (1984).

Quasi-judicial immunity, like judicial immunity, derives historically from the recognition that participation in the court system raises a significant risk of "entanglement in vexatious litigation." Mitchell, 105 S.Ct. at 2813. As the Supreme Court has recognized:

The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.

Id. Quite obviously, similar blame might also be pinned on other court officials variously responsible for assisting in an adjudication, such as the clerk of the court, or the persons responsible for selecting eligible potential jurors. Accordingly, we held in *Pomerantz* that the Los Angeles County Superior Court's jury administration personnel were entitled to quasi-judicial immunity for actions they performed in determining the eligibility of potential jurors to serve. *See* Pomerantz, 674 F.2d at 1290-91.

The district court here apparently believed that, as in *Pomerantz*, the individual defendants were engaged in the juror-selection process when the complained-of acts occurred. This was error.

In *Pomerantz*, the challenge was to defendants' exclusion of blind persons from juries as unqualified. By contrast, there exists no question here that the deaf plaintiffs are perfectly qualified to serve as jurors. The challenge is to defendants' determination that they need not provide these handicapped persons, defined by state statute to be generally eligible for jury service, with the reasonable accommodations necessary to permit them to participate in this important activity of citizenship.

Although the decisions challenged in this lawsuit were made in the course of defendants' official duties, they were not "an integral part of the judicial process," which has been seen as the lynchpin of both the judicial and quasi-judicial immunities. *Imbler*, 424 U.S. at 430, 96 S.Ct. at 994-95; *see* Mitchell, 105 S.Ct. at 2813; *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir.1982). The individual defendants' actions in issue here are simply not the sort of actions that "have been the primary wellsprings of absolute immunities," Mitchell, 105 S.Ct. at 2813, such as the quasi-judicial immunity. We conclude that defendants are not entitled to quasi-judicial immunity.

2. *Legislative Immunity*

[3] Nor was the decision to deny interpreters a legislative one, as the district court alternatively held. *See* GLAD, 607 F.Supp. at 179 n. 8. It is true that Zolin and Arce were establishing a policy on behalf of the Los Angeles County Superior Court. But this was not a case where the officials involved were empowered by a legislative body to promulgate regulations to implement the legislative will. The record does not indicate that any formal rulemaking occurred or that defendants used any particular procedure in arriving at their decision not to provide interpreters. The decisionmaking process here in no way resembled a legislative act in the traditional sense. Instead, faced with statutes declaring deaf persons generally qualified to ***1109** serve as jurors, Zolin and Arce acted to execute those legislative mandates. Theirs was an executive decision. Legislative immunity does not shield it.

We reject defendants' argument that this case is controlled by *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). There, the Supreme Court held that state supreme court justices were immune from suits for acts performed in their legislative capacity. *Id.* at 731-34, 100 S.Ct. at 1974-76. The justices had been sued over rules they had promulgated governing discipline of members of the State Bar. The rules in *Consumers Union*, therefore, constituted far more than an internal interpretation of how to implement a statute. The Court held that, in promulgating the rules, members of the state supreme court *were* the state's legislators. *Id.* at 734, 100 S.Ct. at 1975-76. The same cannot be said for Zolin and Arce with

respect to the policy at issue.

3. *Qualified Immunity*

[4] Aside from their misplaced reliance on *Pomerantz* and *Consumers Union,* defendants do not point to anything that even arguably requires us to recognize an absolute immunity for them in the factual context presented here. *See Butz,* 438 U.S. at 505-06, 98 S.Ct. at 2910-11. Accordingly, we conclude that the individual defendants here are entitled only to a qualified immunity, which protects them fully "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. at 818, 102 S.Ct. at 2738 (1982).

[5] A qualified immunity does not help defendants in this case, however, because they waived their good faith defense.[FN7] We must, therefore, remand the plaintiffs' action for damages because the individual defendants are not, as the district court ruled, immune from liability for their actions here.

> FN7. Before stipulating to the waiver, the record shows that Arce testified that he was aware of section 504's requirement of reasonable accommodation to handicapped persons to persons otherwise qualified to serve as jurors. The same defendants, it appears, had previously agreed to settle a case brought by some potential jurors with physical disabilities who were barred from participation as jurors because of building-access problems. The defendants were therefore aware of section 504's general requirements when they decided not to provide interpreters.

4. *Lack of Involvement in Jury Selection*

The district court also ruled that Los Angeles County was not liable for damages here because it found that the County was uninvolved in the jury-selection process. *GLAD,* 607 F.Supp. at 179. The court again relied on *Pomerantz,* where we affirmed a similar district court finding. *See Pomerantz,* 674 F.2d at 1291.

[6] As we have already made clear, however, it is irrelevant whether the County participated in the selection of jurors. The question here is whether the County participated in the decision to deny plaintiffs the assistance of interpreters. On this point, the district court's findings compel us to conclude that it did. The County paid the salaries and benefits of both individual defendants. More important, the district court found that Arce, Zolin and a Superior Court judge sought and relied upon advice from the County Counsel regarding their responsibilities toward deaf jurors. Several meetings concerning the Court's responsibility to deaf jurors were held; and various County officials participated. The evidence indicates, therefore, sufficient County participation in the challenged practices to render it liable for damages if a violation of section 504 is found to have occurred.

5. *Eleventh Amendment Immunity*

Having determined that neither the individual defendants nor the County are immune from liability, we must still evaluate whether the eleventh amendment bars the lawsuit in any regard. The district court found the eleventh amendment inapplicable because the County, and not the State, was ***1110** primarily responsible for funding, housing and operation of the Superior Court.[FN8] We cannot entirely agree.

> FN8. For example, the district court found that $47 million of the Superior Court's $52 million budget in 1982 came from the County. *GLAD,* 607 F.Supp. at 178.

In *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 3149, 87 L.Ed.2d 171 (1985), the Supreme Court held that the Rehabilitation Act, and specifically section 504, did not abrogate the eleventh amendment bar to suits in federal court against the states. To the extent that the state is a defending party in this suit, *Atascadero* makes it clear that plaintiffs can seek neither damages nor equitable relief under section 504. The question is whether the state is being sued here.

a) *The County*

[7] The eleventh amendment does not bar actions against cities and counties. *See Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977). It

therefore does not preclude the suit against the County.[FN9]

FN9. To the extent appellees argue that Los Angeles County may not be sued under the eleventh amendment due to its status as a state political subdivision, the argument must fail. In *Moor v. County of Alameda*, 411 U.S. 693, 718-20, 93 S.Ct. 1785, 1800-01, 36 L.Ed.2d 596 (1973), the Supreme Court specifically addressed and rejected this contention by another California county.

b) *The Superior Court*

[8] More difficult are the questions whether the Superior Court or its employees may be sued. Although the County does pay most of the Superior Court's bills, state case law and constitutional provisions make clear that the Court is a State agency. *See* Cal. Const. art. 6 §§ 1, 5 (West Supp.1986); *Sacramento & San Joaquin Drainage Dist. v. Superior Court*, 196 Cal. 414, 432, 238 P. 687, 694 (1925). The official name of the court is the Superior Court of the State of California; its geographical location within any particular county cannot change the fact that the court derives its power from the State and is ultimately regulated by the State. Judges are appointed by California's governor, and their salaries are established and paid by the State. We conclude that a suit against the Superior Court is a suit against the State, barred by the eleventh amendment. *See Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir.1986).[FN10]

FN10. Since the eleventh amendment by its terms bars suits against a state "in law or equity," our holding necessarily applies also to plaintiffs' claims against the Superior Court for injunctive and declaratory relief.

c) *The Individual Defendants*

[9] In a technical sense, employees of the Superior Court are state employees despite the fact that they are paid by the County and are included in County employee-benefit plans. *See Greenaway v. Workmen's Comp. App. Bd.*, 269 Cal.App. 2d 49, 53-54, 57-59, 74 Cal.Rptr. 452, 455, 458-59 (1969). There is, then, a potential eleventh amendment problem with suing these individuals.

A functional approach governs the eleventh amendment's application to actions for money damages against state officials. Such actions are considered to be suits against the state, and thus barred, if " 'the state is the real, substantial party in interest.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984) (quoting *Ford Motor Co. v. Indiana Dep't of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945)). We must look behind the pleadings to determine whether a decree in the case would operate in fact against the sovereign. If the judgment would actually run against the state treasury, the action is barred. *Id.* at 101-02,104 S.Ct. at 908-09; *Shaw*, 788 F.2d at 604.

On the facts of this case, however, the district court found that the County, and not the State, would be responsible for any judgment that might be rendered. Our independent examination of the record shows this finding to be clearly correct. ***1111** Because the state treasury is not in jeopardy, the action against the individual defendants for damages is not barred by the eleventh amendment.

C. *Denial of Equitable Relief*

1. *Denial of the Injunction*

The district court refused appellants' request for a mandatory injunction ordering the County to provide interpreters without cost. The district court found that there was neither current, nor the likelihood of future, federal funding of the county court system. The system was, therefore, not subject to the mandate of section 504. *See GLAD*, 607 F.Supp. at 180-81. We review the factual finding for clear error and the legal conclusion *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

Our review of the record satisfies us that the finding was not clearly erroneous. Further, we agree with the district court that past federal funding provides no basis for an injunction under section 504.

We recognize that at least one district court has held

otherwise. In Bachman v. American Society of Clinical Pathologists, 577 F.Supp. 1257, 1262 (D.N.J.1983), the court stated that handicapped persons who are discriminated against by federal grantees, "may seek affirmative injunctive and compensatory relief under section 504, even though the federal financial assistance has terminated." The *Bachman* court cites no authority for this proposition, however, and past federal funding is not a factual characteristic of any of the cases it relied upon. Instead, the cases discuss matters fully resolved in this circuit, such as the existence of a private right of action under section 504 and the variety of remedies available to section 504 plaintiffs.

[10] We agree that the termination of federal funding should not bar a claim for damages. As the *Bachman* court recognized, the statute and implementing regulations are written in the present tense, *see* 29 U.S.C. § 794; 45 C.F.R. § 84.1 (1985), reflecting the fact that federal funding is conditioned on the recipient's simultaneous compliance with the anti-discrimination provisions of section 504. Bachman, 577 F.Supp. at 1260. "Failure to comply with this condition ... constitutes a statutory violation which is not cured merely upon the discontinuance of the federal assistance." *Id.* at 1261. If a person suffers discrimination in violation of section 504, he may collect appropriate damages even if federal funding of the program has ended.

[11] We cannot agree, however, that an injunction ordering an end to discriminatory behavior may properly issue under section 504 where, as here, federal funding has ended and there is no indication that it will be renewed. The mandate of section 504 is simply inapplicable to future conduct unless there is a showing that the program or activity in issue is receiving, or in the future will likely receive, federal funding. The statute does not prohibit discrimination against the handicapped as such; it simply bars the use of federal funds to support programs or activities that so discriminate.[FN11] *See U.S. Dep't of Transportation v. Paralyzed Veterans of America*, --- U.S. ----, 106 S.Ct. 2705, 2711, 91 L.Ed.2d 494 (1986). The district court properly denied the injunction.

FN11. In this regard, section 504 is similar to other statutes placing conditions on the receipt of federal funding. One example is Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982), which bars sex discrimination by any educational program or activity receiving federal funding. As the Supreme Court noted in Grove City College v. Bell, 465 U.S. 555, 575, 104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984), Congress may attach reasonable conditions to federal financial assistance. The recipients of federal funding are not thereby obligated to accept the conditions, however, because they "may terminate [their] participation in the ... program and thus avoid" the conditions imposed by the statute. *Id.*

Section 504 is accordingly unlike provisions in the Civil Rights Act of 1964, in which Congress, in an exercise of its regulatory power, prohibited discrimination directly. *E.g.*, 42 U.S.C. § 2000a (1982); *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245-49, 85 S.Ct. 348, 351-53, 13 L.Ed.2d 258 (1964).

2. *Denial of Declaratory Relief*

The district court also refused to grant ***1112** declaratory relief.[FN12] The court ruled that a declaration would not be useful because certain issues related to section 504 litigation were factually too case-specific to permit a general ruling on them. Accordingly, the court did not believe that a declaration would eliminate uncertainty about legal obligations under section 504 or prevent future litigation.

FN12. The court's decision concerning declaratory relief came in its denial of plaintiffs' post-trial motion under Rule 59(e). It was not published.

Whether or not to grant a declaratory judgment is a matter committed to the sound discretion of the district court. Doe v. Gallinot, 657 F.2d 1017, 1024 (9th Cir.1981). But, with declaratory-judgment rulings, unlike many other discretionary acts, we must exercise our own discretion to determine the propriety of the district court's ruling. United States v. State of Washington, 759 F.2d 1353, 1356-57 (9th

Cir.1985) (en banc) (per curiam). As a result, we effectively review a district court's decision to grant or deny declaratory relief *de novo*. *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir.1986); *Washington*, 759 F.2d at 1362 (Nelson, J., dissenting in part).

[12][13] Declaratory relief should be denied when it will neither aid in clarifying and settling legal relations in issue nor terminate the proceedings and afford the parties relief from the uncertainty and controversy they faced. *E.g.*, *Washington*, 759 F.2d at 1357; *McGraw-Edison Co. v. Performed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.), *cert. denied*, 385 U.S. 919, 87 S.Ct. 229, 17 L.Ed.2d 143 (1966). The decision to grant declaratory relief "should always be made with reference to the public interest," *Washington*, 759 F.2d at 1357, recognizing that declarations can serve an important educational function for the public at large as well as for the parties to the lawsuit, *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir.1984). Thus, the existence of other remedies does not preclude appropriate declaratory relief. Fed.R.Civ.P. 57. With these principles in mind, we turn to the propriety of denying declaratory relief in this case.

In order to state a cause of action under section 504, a plaintiff must allege discrimination by or exclusion from a "program or activity" receiving federal financial assistance. 29 U.S.C. § 794.[FN13] Plaintiffs must identify specifically the program or activity at issue when legal obligations, like those imposed by section 504, turn on the existence of federal funding. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984); *see also U.S. Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 106 S.Ct. 2705, 2714, 91 L.Ed.2d 494 (1986) (relevant program or activity determined by reference to particular grant statute, not by reference to "hypothetical collective concepts").

> FN13. The Supreme Court has recently commented on the financial assistance requirement. For purposes of section 504, we may not draw a distinction between direct or indirect federal aid. Moreover, "federal financial assistance" may be either monetary or nonmonetary. *See U.S. Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 106 S.Ct. 2705, 2711-12 & n. 11, 91 L.Ed.2d 494.

The district court here concluded that the issue of which specific program was involved was sufficiently case-specific that a declaration would do little or nothing to eliminate uncertainty or prevent future litigation. The court relied on *United States v. University Hospital*, 729 F.2d 144, 151 (2d Cir.1984), where the Second Circuit stated that "the issue of program-specificity cannot be properly analyzed in the abstract, but instead requires a concrete set of facts." We agree that it is difficult to generalize in determining whether a sufficient nexus exists between a program receiving federal assistance and a plaintiff to support a section 504 action. *Cf. Tudyman v. United Airlines*, 608 F.Supp. 739, 742 (C.D.Cal.1984) (declining to decide program definition on summary judgment).

[14] The recognition that program definition is often a highly case-specific matter does not resolve the question whether declaratory relief was properly denied here, however. This case appears to us quite similar to *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir.1984). There, the parents of two ***1113** fifth-grade students sued to recover for allegedly unlawful searches of the students by school officials. Plaintiffs sought both damages and a declaration that the searches violated the students' fourth amendment rights. A jury had found that the officials had acted in good faith, and it accordingly denied monetary relief on qualified-immunity grounds. The district court denied the declaration, apparently believing that it would serve no purpose.

We reversed. We held that the district court had examined the usefulness of the declaration only from the defendants' point of view. The court had ignored the fact that plaintiffs had been wronged and deserved to have their position vindicated even if damages were unavailable to compensate them. Further, we held that the district court had disregarded the public-education function that a declaration can serve. Because the searches were clearly unlawful, we ordered the district court to enter an appropriate declaration in plaintiffs' favor. *Id.* at 1470-71.

We conclude that we should remand this case for the district court to re-evaluate, in light of the applicability of *Bilbrey*, its decision denying

declaratory relief.[FN14] Such relief might be appropriate as a vindication of plaintiffs' position and as a public statement of the extent of handicapped persons' rights under section 504. It may even forestall future litigation. *See generally* McGraw-Edison, 362 F.2d at 342-43. Whether declaratory relief is ultimately justified must, however, await determination of issues not yet resolved by the district court, including those of program specificity and the specific requirements of section 504 when federal funding is present. After exploration of those issues and any others that it finds to be appropriate, the district court may again exercise its discretion, in light of *Bilbrey* and our decision here, whether to award declaratory relief.

FN14. Our reliance on *Bilbrey* should make clear that we also reject the district court's conclusion that the request for a declaration was moot due to an absence of current federal funding. In *Bilbrey*, we found that a *bona fide* controversy existed notwithstanding the fact that the students searched had both gone on to high school and that one of the defendant school officials had left his post. The declaration would still "serve to delineate important rights and responsibilities." *Bilbrey*, 738 F.2d at 1471.

II. THE CALIFORNIA STATUTE

A. *Private Right of Action Under Section 11135*

[15] Appellants object to dismissal of their pendent claim under Cal.Gov't Code § 11135 (West 1980).[FN15] The district court held that no private right of action existed under the state statute because of the existence of what it determined was a mandatory, exclusive administrative remedy. *See GLAD*, 607 F.Supp. at 182-83. We review questions of state law *de novo*. *Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir.1984) (en banc).

FN15. Section 11135 provides:

> No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

The question of a private right of action under section 11135 has never been addressed by the California courts. Indeed, the statute has been mentioned in California cases only a few times. Nonetheless, we conclude, for reasons that follow, that California courts would likely construe the statute as supporting a private right of action. *See Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975).

While the section 11135 cases do not address whether a private right of action exists under the statute, the cases all involved private litigants, who, like plaintiffs here, were either handicapped persons or organizations of handicapped people.[FN16] Moreover, the similarity of language between***1114** section 11135 and section 504 clearly supports finding a private right of action under section 11135. *See Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir.1980) (private right of action under section 504).

FN16. We are aware of only three cases actually construing section 11135. *Westside Community for Independent Living v. Obledo*, 33 Cal.3d 348, 657 P.2d 365, 188 Cal.Rptr. 873 (1983), appears unhelpful as it involved an attempt by handicapped rights groups to compel promulgation of regulations to enforce Section 11135. *Martin v. City of Los Angeles*, 162 Cal.App.3d 559, 209 Cal.Rptr. 301 (1984), involved a suit by a handicapped person to compel architectural modifications to a police station. Although relief was denied, judgment was on the merits. Finally, *People v. Levinson*, 155 Cal.App.3d Supp. 13, 203 Cal.Rptr. 426 (Super.1984), involved an unsuccessful challenge to a fine imposed on a deaf traffic offender. He argued under 11135 that an interpreter should have been provided so that he could attend traffic school in lieu of his fine. Once again, the court reached the merits of the controversy.

Also important to our decision is California's stated

policy to achieve, insofar as possible, the "total integration of handicapped persons into the mainstream of society." *In re Marriage of Carney*, 24 Cal.3d 725, 740, 598 P.2d 36, 44, 157 Cal.Rptr. 383, 391 (1979) (citing section 11135 as one example of the state legislature's effort in this regard). Cal. Gov't Code § 11139 (West 1980), for example, mandates construing section 11135 and related civil rights provisions so as not to frustrate their purpose. Further, among the numerous handicapped rights statutes scattered throughout the California Codes is an unequivocal statement that it is California's policy "to encourage and enable disabled persons to participate fully in the social and economic life of the state...." Cal.Gov't Code § 19230(a) (West 1980). Refusing handicapped people an opportunity to vindicate their rights through private lawsuits would, in our view, be inconsistent with these statements of policy from California's legislature and courts.

We reach our conclusion despite the existence of an administrative remedy not present in the federal statutory scheme. *See*Cal.Gov't Code § 11136 (West 1980).[FN17] Section 11136, however, is not written in mandatory or exclusive terms. We do not read it as precluding a private judicial remedy. *Cf.*31 U.S.C. § 6721(a) (1982) (Revenue Sharing Act remedy expressly barring private lawsuits until prescribed administrative remedy exhausted). Nor does the fact that the California legislature expressly provided for private rights of action in certain articles of its Government Code necessarily indicate a legislative intent to preclude private actions to vindicate rights granted by other parts of the Code. Our conclusion is supported by section 11139, mandating liberal construction of the Code's civil rights provisions.

FN17. Section 11136 provides, in pertinent part:

> Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state, has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, or any regulation adopted to implement such section, the head of the state agency shall notify the contractor, grantee, or local agency of such violation and shall, after considering all relevant evidence, determine whether there is probable cause to believe that a violation of the provisions of Section 11135, or any regulation adopted to implement such section has occurred. In the event that it is determined that there is probable cause to believe that the provisions of Section 11135, or any regulation adopted to implement such section, have been violated, the head of the state agency shall cause to be instituted a hearing ... to determine whether a violation has occurred.

The added enforcement possibilities created by permitting private lawsuits would, in our view, best effectuate a civil rights provision like section 11135. The reasons for recognizing a private right of action under section 504 seem applicable here. *See Kling*, 633 F.2d at 878. Accordingly, we conclude that a private right of action exists under Cal.Gov't Code § 11135.

B. *The Eleventh Amendment*

Defendants argue that even if there is a private right of action under section 11135, federal courts cannot grant relief because of the eleventh amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-25, 104 S.Ct. 900, 920-21, 79 L.Ed.2d 67 (1984) (federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of state law).

Under our ruling above, *supra* Part I(B)(5), defendants are clearly correct that the eleventh amendment bars the suit against the Superior Court. Equally clear is that the suit against the County is not barred. Again, the troublesome question is the suit against the individual defendants. ***1115** We recognize that defendants are technically state employees. Nonetheless, because of the finding that relief against them will in fact constitute relief against the County, we conclude that the action based on section 11135 may proceed without violating the *Pennhurst* rule.

III. GLAD'S STANDING TO SUE

[16] Appellees argue, apparently for the first time,

that GLAD lacks standing to bring an action under section 504.[FN18] Its argument, based on *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975); *accord Kling*, 633 F.2d at 878, is that GLAD may not bring a private action under section 504 because it is not a member of the class benefited by the statute.

FN18. Appellees' claim is more a question of GLAD's entitlement to relief under section 504 more than a question of Article III standing to sue. For jurisdictional purposes, the record establishes that GLAD has a sufficient stake in the outcome of this controversy to maintain this action. *See Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72, 102 S.Ct. 752, 757-59, 70 L.Ed.2d 700 (1982).

Appellees assert that this case is analogous to *Sanders v. Marquette Public Schools*, 561 F.Supp. 1361, 1368-70 (W.D.Mich.1983), where the court held that a father of a handicapped child could not sue under section 504 for his personal pain and suffering and for alternative school expenses incurred when a school district allegedly denied his daughter's right to education. The father, the court held, was not in the class that Congress intended to benefit by enacting section 504.

We cannot accept the *Sanders* ruling to the extent that it precluded the father from recovering expenses he incurred to secure for his daughter an education that the school district was legally obligated to provide. The expenses were incurred for the daughter's benefit, and the father's relationship made the expenditures foreseeable and appropriate, and rendered him a suitable person to assert and enforce rights of his daughter. *See Singleton v. Wulff*, 428 U.S. 106, 114-115, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826 (1976) (plurality opinion).

[17] This court has already held that organizations of or for handicapped persons have standing to sue for injunctive relief under section 504. *Williams v. United States*, 704 F.2d 1162, 1163 (9th Cir.1983). GLAD is therefore clearly entitled to invoke section 504 for some purposes. So long as its claim is for expenses reasonably and foreseeably expended to secure for a handicapped juror an interpreter that the defendants were legally obligated to provide, we see no reason why GLAD, organized for the benefit of hearing-impaired persons, cannot maintain a damages action under section 504. Whether GLAD may actually recover its expenses must await further litigation of the merits in district court; our holding is that GLAD has standing to litigate that claim.

IV. CONSTITUTIONAL CLAIMS

[18] In their complaint, appellants alleged that refusal to provide them with an interpreter violated fourteenth amendment due process and equal protection. The district court found that these claims were waived because they were not mentioned during trial and because appellants' post-trial brief stated, "Because plaintiffs recognize that this case is better resolved without reaching a constitutional question, they do not here press their constitutional claim." Appellants refer to several points in the record where they contend they did raise the constitutional claims during trial. They also argue that they did not waive the claims in their post-trial brief, but merely followed *Campbell v. Kruse*, 434 U.S. 808, 98 S.Ct. 38, 54 L.Ed.2d 65 (1977) (vacating judgment based on constitutional claim and remanding for decision under section 504).[FN19]

FN19. Appellees argue that the federal courts should abstain from deciding the issue because the California statutes declaring handicapped people competent to serve as jurors have not been authoritatively construed. We reject the contention. First, abstention is a matter left to the trial court's sound discretion. *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir.1983). Second, appellees seem to argue that this is an appropriate case for abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The problem with this argument is that there is no pending state proceeding in this case. Most important, there is no indication that appellees ever raised the abstention argument below. As this is the first time the issue has been raised, it is not properly considered on appeal. *Trans Container Services (Basel) A.G. v. Security*

Forwarders, Inc., 752 F.2d 483, 487 (9th Cir.1985).

[19] We agree with the district court's conclusion that plaintiffs waived their constitutional claims. Although the presumption is against waivers of constitutional rights, *e.g.*, ***1116***Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 1246-47, 16 L.Ed.2d 314 (1966), a party may waive constitutional claims by failing to press them adequately before a court. Our review of the record indicates that, although plaintiffs included constitutional claims in the complaint, the case was in fact tried solely on the statutory claims. The constitutional claims were hardly mentioned outside of plaintiffs' counsel's opening remarks. Plaintiffs' statement in their post-trial brief only serves to reinforce what the trial record already makes clear-that plaintiffs relied only on their statutory claims. Our preference for avoiding constitutional questions where possible, *e.g.*, *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 2997-98, 86 L.Ed.2d 664 (1985); *Campbell*, 434 U.S. 808, 98 S.Ct. 38, does not relieve litigants of the responsibility to present evidence and arguments on every claim they wish to pursue. The district court properly concluded that the constitutional claims had been abandoned. *Cf. Robert's Waikiki U-Drive, Inc. v. Budget Rent-a-Car Systems, Inc.*, 732 F.2d 1403, 1408-09 (9th Cir.1984).

CONCLUSION

To summarize, we hold that past federal funding of the relevant program can support an action for damages and declaratory relief under section 504. An injunction, however, may not be based on past funding.

We conclude that the district court erred in ruling that the individual defendants here were shielded from liability by quasi-judicial or legislative immunity. Moreover, the eleventh amendment does not bar the lawsuit *in toto* because the County, and not the State, will be responsible for any monetary judgment that may result. Because the Superior Court is a state entity, however, it must be dismissed on eleventh amendment grounds.

We further conclude that the district court improperly held that there was no private right of action under Cal.Gov't Code § 11135. We agree, however, that plaintiffs had abandoned their constitutional claims.

In light of the foregoing, we affirm the district court's dismissal of the claim for injunctive relief under section 504 and of the constitutional claims against all defendants. We also affirm the dismissal of the entire action against the Superior Court. In all other respects, we reverse the judgment and remand for further proceedings consistent with this opinion. Appellants are entitled to costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

C.A.9 (Cal.),1987.
Greater Los Angeles Council on Deafness, Inc. v. Zolin
812 F.2d 1103

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Jones v. Illinois Dept. of Rehabilitation Services
C.A.Ill., 1982.

United States Court of Appeals,Seventh Circuit.
Charles P. JONES, Plaintiff-Appellee, Cross-Appellant,
v.
ILLINOIS DEPARTMENT OF REHABILITATION SERVICES and James S. Jeffers, in his official capacity as Director of the Illinois Department of Rehabilitation Services, Defendants-Appellants, Cross-Appellees,
v.
ILLINOIS INSTITUTE OF TECHNOLOGY and Dr. Thomas L. Martin, Jr., President, Defendants-Appellees.
Nos. 81-1267, 81-1312, 81-2478 and 81-2558.

Argued March 31, 1982.
Decided Sept. 27, 1982.

Deaf college student brought action against college, its president, Illinois Department of Rehabilitation Services and its director alleging that failure of defendants to provide him with interpreter services violated Rehabilitation Act. The United States District Court for the Northern District of Illinois, Eastern Division, 504 F.Supp. 1244, Joel M. Flaum, J., concluded that IDRS had primary responsibility for providing such services, found college's cross claim against IDRS for costs of services already provided was barred and awarded student attorney fees, and appeals were taken. The Court of Appeals, Pell, Circuit Judge, held that: (1) student's graduation did not render his case moot; (2) regulations promulgated pursuant to the Act placed primary burden of providing interpreter services to deaf college student on IDRS; (3) trial court did not abuse its discretion in setting amount of attorney fees student recovered; (4) failure of district court to make findings as to whether student was entitled to recover costs under Rehabilitation Act required reversal and remand; (5) court had jurisdiction to rule on college's standing under the Act, for purpose of determining whether college was prevailing party; (6) college lacked standing to bring cross claim against IDRS; and (7) college was not a prevailing party entitled to award of attorney fees under the Act.

Affirmed in part, and reversed and remanded in part.

West Headnotes

[1] Federal Courts 170B ⚷13.30

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.30 k. Schools and Colleges. Most Cited Cases
(Formerly 170Bk13)
Deaf student's graduation from college did not moot action seeking services of sign language interpreter he required to participate in and benefit from his classes, since case was capable of repetition both as to plaintiff and as to other deaf clients of Illinois Department of Rehabilitation Services who were or would be students at the college. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[2] Evidence 157 ⚷12

157 Evidence
157I Judicial Notice
157k12 k. Statistical Facts. Most Cited Cases
In deaf student's action seeking services of sign language interpreter he required to participate in and benefit from his college classes, Court of Appeals would take judicial notice that rubella epidemic in 1963-65 doubled number of births of hearing-impaired infants, with result that some 15,000 deaf individuals were at or approaching age of college or professional education. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[3] Administrative Law and Procedure 15A ⚷413

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative

Construction. Most Cited Cases
Analysis of final regulation by Secretary of Health, Education and Welfare who promulgated regulations and was charged with administration of statutes, is entitled to substantial deference.

[4] Colleges and Universities 81 ⚷9.10

81 Colleges and Universities
81k9 Students
81k9.10 k. In General. Most Cited Cases
(Formerly 81k9)
Regulations promulgated pursuant to Rehabilitation Act placed primary burden of providing interpreter services to deaf college student on Illinois Department of Rehabilitation Services. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[5] Federal Courts 170B ⚷830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney's Fees and Other Allowances. Most Cited Cases
Standard of review of trial court's award of attorney fees under Rehabilitation Act is limited to determination of whether court abused its discretion in setting fee award. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

[6] Federal Civil Procedure 170A ⚷2737.14

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.14 k. Miscellaneous Matters. Most Cited Cases
(Formerly 170Ak2737)
Factors for evaluating attorney fees claims are merely guidelines, and it is not required that each be considered and passed on specifically.

[7] Civil Rights 78 ⚷1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302, 78k13.17(19), 170Ak2737.5)
By adverting in detail to factors for evaluating attorney fees claims, trial court adequately evidenced proper exercise of its discretion in setting amount of fee award under Rehabilitation Act, and trial court did not abuse its discretion, in determining amount of reasonable fee, by taking into account fact that one of plaintiff's two claims was rejected. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

[8] Civil Rights 78 ⚷1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302, 78k13.17(19), 170Ak2737.5)
Under Rehabilitation Act, award of attorney fees with multiplier of one and one-half is exceptional and must be based on extraordinary circumstances. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

[9] Federal Courts 170B ⚷941

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk937 Necessity for New Trial or Further Proceedings Below
170Bk941 k. Insufficiency or Lack of Verdict or Findings. Most Cited Cases
Failure of district court to make findings as to whether deaf student was entitled to recover costs under Rehabilitation Act required reversal and remand. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

[10] Federal Courts 170B ⚷681.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(F) Effect of Transfer and Supersedeas or Stay
170Bk681 Effect of Transfer of Cause or Proceedings Therefor
170Bk681.1 k. In General. Most Cited

Cases
(Formerly 170Bk681)
After entry of judgment, district court retained such jurisdiction of case as was necessary to determine issues essential to resolution of entitlement to award of attorney fees under Rehabilitation Act, and therefore, district court had jurisdiction to amend original judgment after it determined that college lacked standing and could not be prevailing party within meaning of Act. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

[11] Federal Civil Procedure 170A ⚷786

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(C) Answer
170AVII(C)3 Set-Offs, Counterclaims and Cross-Claims
170Ak786 k. Cross-Claim Against Coparty. Most Cited Cases
While cross claims under Federal Rules of Civil Procedure are within ancillary jurisdiction of court and do not require independent jurisdictional basis, such cross claims must assert plea for affirmative relief, not a mere allegation of complete defense against opposing party's claim, and must seek relief on behalf of party asserting it, not on behalf of party other than cross claimant. Fed.Rules Civ.Proc. Rule 13(g), 28 U.S.C.A.

[12] Federal Civil Procedure 170A ⚷786

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(C) Answer
170AVII(C)3 Set-Offs, Counterclaims and Cross-Claims
170Ak786 k. Cross-Claim Against Coparty. Most Cited Cases
Since college's cross claim against Illinois Department of Rehabilitation Services for costs of interpreter services already provided deaf student was essentially a method of presenting its defense against student, and further did not assert its own right to relief under Rehabilitation Act, but rather that of student, college lacked standing to bring its cross claim. Fed.Rules Civ.Proc. Rule 13(g), 28 U.S.C.A.

[13] Federal Civil Procedure 170A ⚷103.4

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.4 k. Rights of Third Parties or Public. Most Cited Cases
(Formerly 170Ak103)
Generally, complainant must assert his own legal interests, rather than those of third party, to maintain action in federal courts.

[14] Federal Civil Procedure 170A ⚷2737.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases
(Formerly 170Ak2737)
Party may prevail for purposes of award of attorney fees without proceeding to judgment.

[15] Federal Civil Procedure 170A ⚷2737.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases
(Formerly 170Ak2737)
Party must have viable claim against another before it can be considered to have prevailed and be entitled to attorney fees.

[16] Civil Rights 78 ⚷1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
(Formerly 78k296, 78k13.17(13), 170Ak2737.6)
College was not a prevailing party entitled to award of attorney fees under Rehabilitation Act, where college had no viable claim against Illinois Department of Rehabilitation Services from which it sought such fees. Rehabilitation Act of 1973, § 505(b), 29 U.S.C.A. § 794a(b).

*726 Mary Anne Smith, IIT, George Harold Klumpner, Chicago, Ill., for defendants-appellants, cross-appellees.
Marc P. Charmatz, National Assoc. of the Deaf, Washington, D. C., for plaintiff-appellee, cross-appellant.

Before PELL, Circuit Judge, KASHIWA, Associate Judge,[FN*] and ESCHBACH, Circuit Judge.

FN* Shiro Kashiwa, Associate Judge of the United States Court of Claims, sitting by designation.

PELL, Circuit Judge.
The plaintiff-appellee, cross-appellant Charles P. Jones brought this action for declaratory and injunctive relief under the Rehabilitation Act of 1973, 29 U.S.C. ss 701-94, against the Illinois Department of Rehabilitation Services (IDRS) and its director Jeffers, and the Illinois Institute of Technology (IIT) and its President Martin. His complaint alleged that by failing to provide him with the services of a sign language interpreter to enable him effectively to participate in and benefit from his classes at IIT, IDRS violated the provisions of Title I of the Act, 28 U.S.C. ss 701-50, and both IDRS and IIT violated section 504 of the Act, 29 U.S.C. s 794. All parties filed motions for summary judgment. As to Jones' claim under Title I of the Act, the court granted IDRS' motion and denied Jones' motion, finding that there was no private right of action under that portion of the Act. As to Jones' section 504 claims, the court granted Jones' motion, and denied that of IDRS, concluding that although either IIT or IDRS could be required to provide interpreter services under the Act, IDRS had the primary responsibility for providing such services.[FN1] As to IIT's cross-claim against IDRS for the cost of services already provided, the court found that claim barred by the Eleventh Amendment and denied the motion.[FN2] The court entered an injunction requiring IDRS to provide interpreter services to Jones at IDRS expense, and if Jones ceased to be eligible for IDRS vocation rehabilitation services, requiring IIT to do the same.

FN1. Jones also sought relief under the equal protection clause of the 14th Amendment and 42 U.S.C. s 1983. The district court did not reach those claims in light of its holding that Jones could obtain all the relief he sought under section 504.504 F.Supp. at 1257. Jones has not pressed his constitutional claim in this court.

FN2. IIT has not appealed from that portion of the judgment. IIT's cross-claim also sought injunctive relief under s 504 requiring IDRS to provide Jones with interpreter services. The court's original opinion granted that motion, which sought essentially the same relief requested by Jones, but expressly reserved consideration of the question whether IIT had standing to bring suit under section 504.504 F.Supp. at 1258 n.55. When IIT moved for attorneys' fees, the district court found it necessary to reach the standing question in order to determine whether IIT was a prevailing party, and concluded it did not have standing. It then amended its prior judgment to delete references to a grant of summary judgment to IIT. See further discussion below at IV.

IDRS appeals from that portion of the judgment granting Jones relief under section 504 of the Act. Jones appeals from the denial of his claim under Title I of the Act. Jones and IIT also appeal from the court's disposition of their claims for attorneys' fees. The case presents the following issues on appeal: (1) whether the district court erred in holding that no private right of action can be implied under Title I of the Act; (2) whether a cause of action exists under 42 U.S.C. s 1983 for a violation of Title I of the Act; (3) whether the district court erred in holding that IDRS had the primary responsibility under section 504 to provide interpreter services; and (4) whether the district court erred in ruling on Jones' and IIT's motions for attorneys' fees.

I.

The facts were stipulated by the parties, and are set forth in some detail in the *727 opinion of the district court, 504 F.Supp. 1244 (N.D.Ill.1981). We will rehearse only those necessary to disposition of the issues before this court. The plaintiff Jones is a deaf person and therefore a handicapped individual within the meaning of the Act, 29 U.S.C. s 706(7)(a). He is also a "qualified handicapped person" within the meaning of regulations promulgated pursuant to the

Act, which means, with respect to post-secondary and vocational education services, that he meets the academic and technical standards requisite to admission and participation.34 C.F.R. s 104.3(k)(3) (1981). Until May of 1982, when he graduated, Jones was a student at IIT majoring in mechanical engineering. He required the services of an interpreter to participate in and benefit from his classes.

IDRS, the Illinois state agency responsible for the state's vocational rehabilitation (VR) program, receives financial assistance from the federal Rehabilitation Services Administration to carry out that program. IDRS has determined that Jones is eligible for VR services, and has provided him with financial assistance for tuition, room and board, and books to enable him to attend IIT. IIT is a not-for-profit institution of higher education which receives federal funds, and has signed an Assurance of Compliance Form, agreeing to comply with section 504 as a condition of receiving such funds.

Jones was to begin classes at IIT in late August of 1979. On August 10, IDRS advised IIT that it could not legally assume the cost of interpreter services for Jones' classes. IIT thereupon provided an interpreter for Jones until October 4, 1979, when IIT informed IDRS it would not continue to do so. IDRS provided interpreter services from October 8, 1979 until October 26, 1979, when its director determined it would make no more payments. IIT paid for an interpreter for the remainder of Jones' first semester. On December 11, 1979, IIT informed Jones that it would no longer provide interpreter services. Subsequently IDRS and IIT agreed to share the cost of the interpreter pending the resolution of this case.

II.

We turn first to Jones' contention, raised for the first time at the oral argument of this case, that the case is moot because Jones graduated from IIT on May 16, 1982.

Jones relies primarily on the case of DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). DeFunis had sought admission to law school but was not accepted. He brought suit alleging that he had been discriminated against, and obtained an injunction requiring his admission to law school. By the time the appeal reached the Supreme Court, DeFunis was in his final quarter of law school, and was about to graduate. The Supreme Court held that because DeFunis would complete law school regardless of any decision of the Court, there was no definite and concrete controversy between the parties, and therefore the case was moot. The Court also rejected any suggestion that the case fell within the "capable of repetition yet evading review" exception to the mootness doctrine, noting, "DeFunis will never again be required to run the gauntlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned."416 U.S. at 319, 94 S.Ct. at 1707.

[1] We are persuaded that the instant case, however, does fall within the exception to the mootness doctrine. In Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), a pregnant woman brought suit challenging the constitutionality of the Texas criminal abortion statutes. By the time the case reached the Supreme Court, she was no longer pregnant. The Court rejected any contention that the case was moot, noting first that a pregnancy would generally come to term before the usual appellate process could be completed, thereby making the case one that could evade review. Secondly, the Court pointed out, "Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us,"410 U.S. at 125, 93 S.Ct. at 712, and *728 thus the case was capable of repetition. We believe the case before us is similarly capable of repetition yet evading review.

The case is capable of repetition both as to Jones, the named plaintiff, and as to other deaf clients of IDRS who are or will be students at IIT. Unlike DeFunis, Jones is completing only his undergraduate education. Although he disclaims any current intent to attend graduate school, that is a possibility that cannot be discounted in today's society and in his highly technical profession. If he returns to school as an IDRS client, the controversy over additional interpreter services would renew and continue for as long as he remained in school.

[2] The case is also capable of repetition by other hearing-impaired IIT students who are IDRS clients. IIT points out that one deaf student who is an IDRS client is now enrolled at IIT, and another eligible student has been accepted for the fall of 1982. The

court further takes judicial notice that a rubella epidemic in 1963-65 doubled the number of births of hearing-impaired infants, with the result that some 15,000 deaf individuals are now at or approaching the age of college or professional education. See, e.g., Deafness and Rubella: Infants in the 60's, Adults in the 80's, 125 American Annals Of The Deaf 959 (1980); U.S. News & World Rep., October 19, 1981 at 57. Thus the situation presented by this case is reasonably certain to recur at IIT and at other colleges and universities in Illinois and other states.

We conclude that Jones' graduation has not rendered his case moot. We turn, therefore, to consider the merits of the case; first, to Jones' claims against IDRS and IIT under section 504 of the Act and the regulations promulgated thereunder.

III.

Section 504 of the Act, 29 U.S.C. s 794 (1976), provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Secretary of Health, Education and Welfare promulgated regulations under the statute.[FN3] They set out not only general requirements for all programs funded by the Agency, but detail, in subparts E, 34 C.F.R. ss 104.41-47, and F, 34 C.F.R. ss 104.51-54, respectively, the specific obligations pertinent to providers of postsecondary education, such as IIT, and providers of health, welfare and other social services, such as IDRS.[FN4]

FN3. The original responsibility for enforcement of section 504 was delegated to the Department of Health, Education and Welfare. On May 9, 1980, that responsibility was transferred to the Department of Education.45 Fed.Reg. 30802. The regulations were initially reported by HEW at 45 C.F.R. pt. 84. On May 9, 1980 they were redesignated under Title 34. Our citations are to the current redesignations.

FN4.34 C.F.R. pt. 84, App. A at 360 (1981).

The district court concluded that under the statutes and the regulations, either IDRS or IIT could be required to provide Jones with interpreter services. The court then turned to the more difficult question, "who has the primary responsibility for providing the interpreter services."504 F.Supp. at 1252 (emphasis added). It concluded that since the Analysis of Final Regulations promulgated by the Secretary indicated that "the bulk" of auxiliary aids were to be paid for by state and private agencies, and not postsecondary institutions, and since nothing in the Act precluded IDRS from providing such services, the primary responsibility fell to IDRS, with IIT liable only if Jones ceased to be eligible for IDRS VR services.

IDRS contends the trial court erred in its interpretation of the regulations under subpart E, and that since IDRS does not operate a program of providing interpreters to students in postsecondary institutions, it has no responsibility to provide Jones with an interpreter. We turn first to analyze whether the district court correctly interpreted*729 the applicable regulations under subpart E, and then to determine what obligations the regulations impose upon IDRS.

34 C.F.R. s 104.44(d) of subpart E, requires that a federal funds recipient such as IIT ensure that no handicapped student be denied the benefits of, excluded from participation in, or otherwise be subject to discrimination because of the absence of auxiliary aids. In subsection (d)(2), "auxiliary aids" is defined to include interpreters. IDRS argues that this clearly imposes the duty to provide interpreters on IIT. This analysis ignores the interpretive analysis of the regulations issued by the Secretary who promulgated them, and furthermore ignores IDRS' obligations as set forth in subpart F.

[3] When regulation 104.44(d) was proposed, colleges and universities expressed concern about the cost of providing such auxiliary aids. The Secretary responded to that concern in the Analysis of Final Regulation:

Under s 104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of

necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet the obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies not by colleges or universities.

34 C.F.R. pt. 84, App. A. at 359 (1981). Such an analysis, issued by the Secretary who promulgated the regulations and was charged with administration of the statutes, is entitled to substantial deference.Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); see Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). Furthermore, such a construction places the preliminary financial burden of supplying an interpreter directly on the state VR agency which receives federal Rehabilitation Services Administration funds specifically for the purposes of vocational rehabilitation and training, rather than on a university, which does not receive federal funds earmarked for that purpose. We believe a contrary construction, which would impose costly burdens upon colleges and universities without providing them with funds to meet them, would not only be ill-advised, but might well exceed the agency's authority under the statute.University of Texas v. Camenisch, 451 U.S. 390, 399, 101 S.Ct. 1830, 1835, 68 L.Ed.2d 175 (1981) (Burger, C. J., concurring) (intimating that interpretation of regulations under s 504 which imposed cost of provision of interpreter services on university might exceed statutory authority).

[4] IDRS' interpretation of the regulations also ignores the duties imposed upon it by subpart F. Section 104.52(a) requires that no provider of services such as IDRS may provide benefits or services in a manner that limits the participation of qualified handicapped persons. Sections 104.52(d)(1) and (3) provide more specifically that recipients such as IDRS are required to provide auxiliary aids, again defined to include interpreters. Thus whether IDRS now operates a program of interpreter services is essentially irrelevant to its obligations under the regulation.[FN5] We further note that unlike the obligations imposed on universities under subpart E, those imposed by subpart F are not qualified by any language of the Secretary's interpretive analysis. Because the providers subpart F regulates are recipients of federal funds earmarked for compliance with the section, neither does it *730 pose a danger of exceeding the statutory mandate. We therefore conclude that the trial court's interpretation of the regulations as placing the primary burden of providing interpreter services on IDRS was correct.[FN6]

FN5. In Schornstein v. New Jersey Division of Vocational Rehabilitation Services, 519 F.Supp. 773 (D.N.J.1981), aff'd, 688 F.2d 824 (3d Cir. 1982) (mem.), the court found that the state VR agency's policy of refusing to provide such services to college students as a class violated Title I of the Act.

FN6. IDRS argued before the district court that it was prohibited from providing Jones with interpreter services by sections 101(a)(8), 101(a)(12), and 103(a)(3) of the Act, 29 U.S.C. ss 721(a)(8), 721(a)(12), and 723(a)(3), and the regulations promulgated thereunder. The gist of IDRS' argument was that those provisions of the Act require the state to provide interpreter services only if a client is ineligible for "similar benefits" under any other program, from other community resources, or other sources. Since Jones is eligible for such benefits from IIT, IDRS contended, it is thereby precluded from providing them. In a scholarly analysis, the district court rejected this argument, concluding that the language of the statute referred only to other VR benefit programs and community resources whose major function is to provide VR services, and did not include institutions of higher education. Because IDRS has not advanced this argument in its brief to this court, we deem it waived, and need not consider whether the trial court's thorough analysis was erroneous.

The cases relied upon by IDRS to support its interpretation of the regulation are inapposite. In Camenisch v. University of Texas, 616 F.2d 127 (5th

Cir. 1980), vacated and remanded on other grounds, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); Barnes v. Converse College, 436 F.Supp. 635 (D.S.C.1977); and Crawford v. University of North Carolina, 440 F.Supp. 1047 (M.D.N.C.1977), the plaintiffs were all ineligible for state VR services; therefore none of those courts were faced with determining whether the state agency had the primary responsibility for providing interpreter service.

We conclude, therefore, that the trial court correctly identified the respective obligations of IDRS and IIT under section 504 of the Act. The trial court's order granting Jones summary judgment against IDRS on the section 504 claim is therefore affirmed.[FN7]

FN7. Jones also sought relief under Title I of the Act, and under 42 U.S.C. s 1983. Because he has obtained all the relief he sought through his section 504 claim, we need not reach the question whether there is a private right of action under Title I of the Act, or under section 1983 to enforce the rights conferred by Title I. See Pennhurst State School v. Halderman, 451 U.S. 1, 28 n.21, 101 S.Ct. 1531, 1545 n.21, 67 L.Ed.2d 694 (1981); Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5, 99 S.Ct. 2361, 2366 n.5, 60 L.Ed.2d 980 (1979); cf. Ryans v. New Jersey Commission for the Blind, 542 F.Supp. 841 (D.N.J.1982) (plaintiff could sue under s 1983 to enforce Title I of the Act).

IV.

Jones and IIT also appeal from the district court's disposition of their claims for attorneys' fees under the Act, 29 U.S.C. s 794a(b) (1976). Jones sought fees and costs of $39,395.63, based on his attorneys' hourly rates and a multiplier of one-and-one-half. IIT sought an award of $5,250. The district court awarded Jones fees of $16,350, and denied IIT's motion altogether. We turn first to Jones' claim that the trial court erred in its determination of the amount of the fee award.

[5] Our standard of review of a trial court's award of attorneys' fees is limited to the determination of whether the court abused its discretion in setting the fee award. See, e.g., Harrington v. De Vito, 656 F.2d 264, 269 (7th Cir. 1981), cert. denied, -- U.S. --, 102 S.Ct. 1621, 71 L.Ed.2d 854 (1982) (fee award under 42 U.S.C. s 1988).[FN8] Jones contends that the trial court abused its discretion because, although it adverted to the factors for evaluating fees claims set by this court in Muscare v. Quinn, 614 F.2d 577, 579 (7th Cir. 1980) (adopting test of Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976), in s 1988 cases), it offered no analysis of them, and did not give specific reasons for its decision. Jones now seeks a remand for the district court to address "specifically" the Waters-Muscare criteria.

FN8.Section 794a fee awards are governed by the same considerations controlling in s 1988 actions. See, e.g., Keyes v. New York City Dept. of Personnel, No. 79 Civ. 5786 (S.D.N.Y. Aug. 22, 1980).

*731 [6][7] As an initial matter, we note that the factors enumerated in Muscare are guidelines, and it is not required that each be considered and passed on specifically.Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980). We are satisfied that by adverting in detail to the Muscare factors the trial court adequately evidenced the proper exercise of its discretion in setting the amount of the fee award.

Furthermore, we do not agree with Jones' contention that the court did not set forth his reasons for reducing the amount of the award. After noting the impact of the Muscare test on the fee, the court specifically pointed out, "Furthermore, attorneys' fees should be awarded only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed."This is in accord with the law of this circuit on the award of attorneys' fees, as the district court indicated by its citation of Busche v. Burkee, 649 F.2d 509, 522 (7th Cir. 1981), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212, and Muscare, 614 F.2d at 580. See also Syvock v. Milwaukee Boiler Mfg., 665 F.2d 149, 162-65 (7th Cir. 1981). In this case, Jones alleged two separate violations of his rights: one under Title I of the Act, and the other under section 504. Because the court addressed but rejected the Title I claim against IDRS, it was not an abuse of discretion for the trial court to take that into account in determining the amount of a reasonable fee. See United Handicapped Federation

v. Andre, 622 F.2d 342, 348 (8th Cir. 1980); Muscare, 614 F.2d at 580.

[8][9] We conclude, therefore, although the case is a close one, that the trial court did not abuse its discretion in setting the amount of attorneys' fees Jones recovered.[FN9] The trial court did not, however, expressly consider or rule on Jones' claim for costs. Such costs are in general compensable under the statute.29 U.S.C. s 794a(b) (1976). See, e.g., McPherson v. School District # 186, 465 F.Supp. 749, 763 (S.D.Ill.1978). The district court made no findings that these costs were in any way an exception to that rule. The case is therefore reversed and remanded, solely on this issue, with instructions to determine whether those items of costs should be awarded.

FN9. In addition to their claim that the trial court improperly reduced the hourly rates claimed by counsel, Jones contends that the failure of the district court to award a multiplier of one-and-one-half was erroneous. While this court has on occasion allowed the use of such a device in an appropriate case, see, e.g., Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598 (7th Cir. 1979), such awards are exceptional and must be based on extraordinary circumstances. See, e.g., Bonner v. Coughlin, 657 F.2d 931, 936 (7th Cir. 1981), cert. denied, -- U.S. --, 102 S.Ct. 612, 70 L.Ed.2d 599. When the trial court has not determined that such a multiplier is proper, this court generally will not impose such a procedure.

In ruling on IIT's motion for attorneys' fees, the trial court stated that in its opinion on the merits it did not have to reach the issue of whether IIT had standing, but that it was now necessary to reach that issue in order to determine whether IIT was a prevailing party for attorneys' fees purposes. It concluded that recovery under the Act was restricted to intended beneficiaries of the Act, and that IIT was not such a beneficiary and therefore lacked standing, and could not be a prevailing party within the meaning of section 794a(b). It therefore amended its opinion on the merits nunc pro tunc to delete the references in its previous opinion to the granting of the motion of IIT for summary judgment. IIT contends that the district court had no jurisdiction to amend the original judgment; that it had standing to bring a cross-claim against IDRS under Rule 13(g) of the Federal Rules of Civil Procedure; and that it is a prevailing party entitled to an award of attorneys' fees under the Act. We turn first to IIT's contention that the district court had no jurisdiction to amend the original judgment.

IIT first argues that the time in which a district court may sua sponte amend an original judgment is limited by the temporal and other strictures of Rules 52(b), 59(e) or 60(b) of the Federal Rules of Civil Procedure, and further, that the filing of the notice of appeal divested the district court *732 of jurisdiction. Of these rules only 60(b) is even arguably applicable to this case. It permits the court to relieve a party from a final judgment because of mistake, inadvertence, surprise, or excusable neglect. The rule permits motions for such relief to be made within a reasonable time, up to one year. Courts have construed a "reasonable time" for court-initiated amendments to extend only to the time permitted for appeal. See, e.g., Meadows v. Cohen, 409 F.2d 750, 752 n.4 (5th Cir. 1969); 7 Moore, Federal Practice s 60.22(3) at 262 (2d ed. 1979).

[10] We are not persuaded, however, that Rule 60(b) is the applicable rule. This is not a case of judicial mistake, inadvertence, surprise, or excusable neglect. Rather the motion for attorneys' fees required the court to examine issues beyond those it was necessary to reach in its original disposition in order to determine whether IIT had prevailed within the meaning of the Act. This case is not therefore controlled by the time limits of Rule 60(b), but rather by the opinion of this court in Terket v. Lund, 623 F.2d 29 (7th Cir. 1980), which addressed the question whether a court is divested of jurisdiction to award attorneys' fees after a notice of appeal is filed from the judgment on the merits. In holding that the district court retained such jurisdiction, the court specifically noted:

Regardless of whether an award under s 1988 is collateral enough to permit an interlocutory appeal, it seems clear that it involves an exercise of the district court's judgment requiring an examination of factors beyond the issues decided with the merits of the suit and also different from the largely ministerial task of taxing the traditional items of costs. See Muscare v. Quinn, 614 F.2d 577, 579-80 (7th Cir. 1980).

623 F.2d at 33. The court's reference is to that portion of Muscare devoted to determining whether Muscare was a prevailing party-precisely the question presented to the district court by IIT's motion for fees. We are persuaded therefore that the court retained such jurisdiction of the case as was necessary to determine issues essential to the resolution of the fee award controversy. Such a rule does not lead to the danger of piecemeal appeals when the procedures for consolidation of appeals from judgments on the merits and awards of attorneys' fees set out in Terket, 623 F.2d at 34, are followed, as they were here. Furthermore, when the Terket consolidation procedure is followed, the entire question of the propriety of the district court disposition is presented to the appeals court, and there is no possible prejudice to an appealing party.

IIT points out that the Terket court specifically prohibited "the sort of reconsideration of the merits which could lead to altering the substantive judgment or in any way interfere with the pending appeal."623 F.2d at 34. That is correct as an abstract proposition of law, but does not have any bearing on this case. The court's technical amendment of its original order did not alter the substance of the final judgment or the legal relations between the parties. We conclude that the court did have jurisdiction to rule on IIT's standing under the Act, for the purpose of determining whether IIT was a prevailing party.

As noted above, the district court ruled that because IIT was not an intended beneficiary of the Act, it lacked standing to assert a private right of action under section 504 of the Act, and was not therefore a prevailing party. On appeal IIT does not argue that it was an intended beneficiary of the Act, but rather that its right to bring a cross-claim against IDRS comes from Fed.R.Civ.P. 13(g). That rule provides that a party can bring as a cross-claim against a co-party any claim arising out of the transaction which is the subject matter of the original suit. It further provides that the cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant under the claim asserted against the cross-claimant in the original action.

[11][12] While Rule 13(g) claims are within the ancillary jurisdiction of the court and do not require an independent jurisdictional basis, Dow Corning Corp. v. Schpak, 65 F.R.D. 71 (N.D.Ill.1974); see *7336 C. Wright & A. Miller, Federal Practice & Procedure s 1433 at 177, there are two limits on 13(g) availability. The first is that such a cross-claim must assert a plea for affirmative relief, and not a mere allegation of a complete defense against the opposing party's claim.Washington Building Realty Corp. v. Peoples Drug Stores, Inc., 161 F.2d 879 (D.C.Cir.1947); Paur v. Crookston Marine, 83 F.R.D. 466, 471 (D.N.D.1979); 6 C. Wright & A. Miller, Federal Practice & Procedure s 1431 at 162 & n.73. In this case, IIT's cross-claim constitutes merely such a defense, because, as the district court properly noted, IDRS' duty under section 504 extends only to the plaintiff. IIT therefore cannot have any claim for affirmative relief against IDRS under section 504, and its cross-claim does not fall within the limits of Rule 13(g).

[13] The second limit on assertion of a cross-claim under Rule 13(g) is the related requirement that a cross-claim seek relief on behalf of the party asserting it, and not on behalf of a party other than the cross-claimant.6 C. Wright & A. Miller, Federal Practice and Procedure s 1431 at 162 & n.74. This is in accord with the general requirement that a complainant must assert his own legal interests, rather than those of a third party, to maintain an action in the federal courts. See, e.g., Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

We conclude, therefore, that since IIT's cross-claim was essentially a method of presenting its defense against Jones, and further did not assert its own right to relief under the Act, but rather that of Jones, it did not fall within the bounds of Rule 13(g). IIT further contends, however, that even absent standing to bring its cross-claim, it is a prevailing party within the meaning of the Act because its original position vis-a-vis provision of services to Jones (that IDRS was responsible) has been vindicated.

[14][15][16] This court and others have recognized that a party may prevail for purposes of an award of attorneys' fees without proceeding to a judgment. See, e.g., Harrington v. De Vito, 656 F.2d 264 (7th Cir. 1981), cert. denied, -- U.S. --, 102 S.Ct. 1621, 71 L.Ed.2d 854 (1982); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980). Those cases have not, however, dispensed with the requirement that one party have a

viable claim against another before it can be considered to have prevailed. As noted above, IIT did not have such a claim, and it did not therefore prevail within the meaning of the Act.

In accordance with all the foregoing reasons, the decision of the district court is affirmed, with the exception of that portion of the decision denying Jones costs in the amount of $1,000. The decision is therefore

Affirmed In Part, Reversed And Remanded In Part.

C.A.Ill., 1982.
Jones v. Illinois Dept. of Rehabilitation Services
689 F.2d 724, 34 Fed.R.Serv.2d 1631, 6 Ed. Law Rep. 927, 11 Fed. R. Evid. Serv. 1471

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Klingler v. Director, Dept. of Revenue, State of Mo.
C.A.8 (Mo.),2006.

United States Court of Appeals,Eighth Circuit.
Charlotte KLINGLER; Charles Wehner; Shelia Brashear, Appellees,
v.
DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI, Appellant.
No. 03-2345.

Submitted: Sept. 13, 2005.
Filed: Jan. 17, 2006.

Background: Buyers of state windshield placards authorizing use of reserved parking spaces by physically disabled persons brought class action, challenging $2.00 annual fee for placard as violative of Americans with Disabilities Act (ADA). The United States District Court for the Western District of Missouri, William A. Knox, United States Magistrate Judge, initially denied relief but, upon appellate reversal and remand, 281 F.3d 776, granted relief, and state appealed. The Court of Appeals, 366 F.3d 614, again reversed and remanded, and buyers sought certiorari. The Supreme Court, 545 U.S. 1111, 125 S.Ct. 2899, 162 L.Ed.2d 291, vacated and remanded.

Holding: On remand, the Court of Appeals, Arnold, Circuit Judge, held that state's collection of annual fee for parking placards was discriminatory surcharge.
Affirmed.

West Headnotes

Civil Rights 78 ⚷1021

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1021 k. Physical Access and Mobility; Carriers. Most Cited Cases
Fee charged under Missouri law for removable windshield placards authorizing use of reserved parking spaces by physically disabled persons was discriminatory surcharge proscribed by ADA, even though state also provided disabled residents option of obtaining specially marked license plates at no additional cost. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(f); V.A.M.S. § 301.142(11).

West Codenotes
Held InvalidV.A.M.S. § 301.142(11)
***1078** Michael Pritchett, argued, Asst. Atty. Gen., Jefferson City, MO, for appellant.
***1079** Stephen R. Senn, argued, Lakeland, FL (Robert G. Fegers, Winter Haven, FL, on the brief), for appellee.

Before WOLLMAN, ARNOLD, and MELLOY, Circuit Judges.

ARNOLD, Circuit Judge.
This is our third pass at this case, which requires us to decide whether the State of Missouri violated the American with Disabilities Act (ADA) by charging an annual fee for the use of windshield placards that allow disabled people to park in reserved spaces. The plaintiffs, disabled persons who have purchased the placards, claim that the fee is a discriminatory surcharge prohibited by the ADA and its regulations. In our first opinion, we held that the eleventh amendment barred the plaintiffs from seeking monetary damages, but that they could pursue declaratory and injunctive relief against the state. *Klingler v. Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir.2002) (per curiam) (*Klingler I*). In our second opinion, after the district court [FN1] on remand entered summary judgment in favor of the plaintiffs, we reversed, holding that the commerce clause did not authorize Congress to prohibit states from collecting such fees. *Klingler v. Director, Dep't of Revenue*, 366 F.3d 614, 617-20 (8th Cir.2004)(*Klingler II*). The plaintiffs petitioned for review of that decision by the Supreme Court, which granted *certiorari*, vacated our judgment, and remanded the case for reconsideration in light of *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), and *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). *Klingler v.*

§ 12132. The regulations enacted pursuant to Title II also employ broad language, requiring each service, program or activity, "when viewed in its entirety," to be "readily accessible." 28 C.F.R. § 35.150(a). Rather than imposing a uniform, one-size-fits-all method of compliance, the regulations provide flexibility by authorizing a variety of ways for public entities to provide accessibility to disabled people. *See*28 C.F.R. § 35.150(b).

While the ADA and its regulations do not specifically require Missouri to maintain a placard system, they do anticipate the use of reserved parking spaces near the entrances to buildings that have parking lots open to the public. *See, e.g.,* ADA Accessibility Guidelines for Buildings and Facilities, Appendix A to 28 C.F.R. Ch. I, Pt. 36, at § 4.6.2; 28 C.F.R. § 35.151(c). The commentary accompanying these regulations, moreover, states that "a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction." 28 C.F.R. Ch. I, Pt. 35, ***1081**Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed.Reg. 35,694, 35,710 (July 26, 1991), *reprinted in* Appendix A to 28 C.F.R. Ch. I, Pt. 35; *see also* Americans with Disabilities Act Title II Technical Assistance Manual, at § 5.4000. These agency interpretations, which are entitled to some deference, *see TeamBank, N.A. v. McClure,* 279 F.3d 614, 619 n. 4 (8th Cir.2002), recognize that some disabled people will find it difficult, if not impossible, to gain access to public facilities safely if they do not have enough room to unload a wheelchair from their vehicle, or if they must traverse the full length of a parking lot.

Missouri's legislature has also recognized that reserved parking spaces help ensure access to disabled people. The state has authorized governments and private business to reserve parking spaces for use by disabled persons. *See*Mo.Rev.Stat. § 301.143.2. These reserved spaces must meet the design requirements of the ADA and its related regulations. Mo.Rev.Stat. § 301.143.5; *see*28 C.F.R. § 36.304(a), (b)(18). As we have said, Missouri has taken steps to assure the availability of reserved spaces by requiring any person who parks in them to display either a specially marked license plate or the removable placard. *See*Mo.Rev.Stat. §§ 301.142.7, 301.142.8, 301.142.10. Those who fail to display a placard or a license plate are subject to a fine of up to $300, and their vehicle may be towed. Mo.Rev.Stat. § 301.143.4.

Missouri contends that by providing disabled residents the option of obtaining specially marked license plates at no additional cost, it has satisfied the ADA's requirements. We disagree. Not all disabled individuals own cars: some rely upon friends and family for transportation, while others may borrow or rent vehicles from time to time. *See Klingler II,* 366 F.3d at 619. Missouri's statutes limit the availability of the special license plates to non-disabled individuals; only the owners of vehicles "operated at least fifty percent of the time by a physically disabled person" or "used to primarily transport physically disabled members of the owner's household" may obtain the plates. Mo.Rev.Stat. § 301.142.7. When a disabled person drives or rides in a vehicle belonging to an individual who does not meet these requirements, the removable placard is necessary to permit parking in a reserved space.

Nor do we believe that Missouri can impose fees for the placards on the basis that the placard system itself is not "required" by the ADA. It is possible that Missouri could comply with the ADA's requirements without issuing removable placards; as we have noted, the ADA purposely offers public entities flexibility in meeting the Act's standard for program access. This flexibility, however, cannot be used to render meaningless the surcharge prohibition in § 35.130(f). Although no particular method of providing access may be required, Missouri is obligated under Title II to make government services, programs, and activities readily accessible to disabled individuals. However Missouri chooses to meet this obligation, it must comply with § 35.130(f). We think that a program is "required," as that word is used by the statute, if in fact it discharges an obligation imposed by the ADA. Missouri has elected to use parking placards to ensure that disabled people have access to government programs. Having made that decision, Missouri is prohibited from imposing a surcharge on disabled people for placards that are necessary to use reserved parking spaces.

We note that the placard program not only helps Missouri meet its own Title II obligation to make government programs accessible, it also helps private entities meet their obligations under Title III to ***1082**

provide "full and equal" accommodations to disabled persons. *See*42 U.S.C. § 12182. This is because the placards are required to park in reserved spaces at private facilities. *See*Mo.Rev.Stat. § 301.143.2. Although the ADA and its implementing regulations do not require Missouri to police reserved spaces set aside by private businesses, we think that its decision to do so obligates it to provide the spaces free of charge. The relevant regulation prohibits Missouri from levying a surcharge to cover the cost of any measure required "by *the Act* or this part." 28 C.F.R. § 35.130(f) (emphasis added). It does not distinguish between Title II and Title III obligations, but prohibits public entities from singling out the disabled to pay the cost of any ADA compliance efforts.

This makes sense. If the surcharge prohibition applied only to the costs incurred by a public entity fulfilling its Title II obligations, a public entity could relieve private entities of the costs of Title III compliance by voluntarily assuming those costs and then passing them on to disabled people. We do not read the regulation to permit the State of Missouri, say, to install wheelchair ramps, elevators, and accessible bathroom fixtures at a department store, and then recoup those costs through a surcharge on disabled people. It likewise does not permit the State of Missouri to charge disabled people for a placard that is necessary to park in reserved spaces at both government and private facilities.

Rather than distributing the cost of ensuring accessible parking among all of its citizens, Missouri's scheme imposes a fee upon those disabled persons who require the removable placards. We conclude that this is a surcharge that violates § 35.130(f). In doing so, we join a number of courts that have invalidated similar fee-for-placard systems in other states. *See Dare v. California*, 191 F.3d 1167, 1172-73 (9th Cir.1999), *cert. denied*,531 U.S. 1190, 121 S.Ct. 1187, 149 L.Ed.2d 103 (2001); *Thompson v. Colorado*, 29 F.Supp.2d 1226, 1232 (D.Colo.1998), *vacated on other grounds*,278 F.3d 1020 (10th Cir.2001); *Thrope v. State of Ohio*, 19 F.Supp.2d 816, 824-25 (S.D.Ohio 1998).

Because Missouri's collection of the fee for removable placards violates § 35.130(f), we affirm the district court's judgment granting the plaintiffs' request for declaratory and injunctive relief.

III.

The plaintiffs ask us to reinstate their monetary claim, in light of the Supreme Court's instruction to reconsider this case in light of *Lane*.Our previous rejection of the plaintiffs' monetary claim was based upon our decision in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir.1999) (en banc). *See Klingler I*, 281 F.3d at 777. Another panel of this court has already had the opportunity to reconsider *Alsbrook* in light of *Lane*.In *Bill M. ex rel. William M. v. Nebraska Dep't of Health and Human Servs. Finance and Support*, 408 F.3d 1096, 1100 (8th Cir.2005), the panel determined that *Alsbrook* remained good law except when a plaintiff alleges that he or she has been denied access to the courts. Because we are unable to discern any basis for distinguishing the instant case from *Bill M.*, and because we are bound by that holding, we decline the plaintiffs' invitation to reinstate their claim for monetary damages.

IV.

For the reasons stated, we affirm the district court's grant of the plaintiffs' summary judgment motion and its award of declaratory and injunctive relief, and we remand the case to the district court for ***1083** entry of a judgment consistent with this opinion.

C.A.8 (Mo.),2006.
Klingler v. Director, Dept. of Revenue, State of Mo.
433 F.3d 1078, 17 A.D. Cases 801, 31 NDLR P 206

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Lloyd v. Regional Transp. Authority,
C.A.Ill. 1977.

United States Court of Appeals,Seventh Circuit.
George A. LLOYD and Janet B. Wolfe, etc.,
Plaintiffs-Appellants,
v.
The REGIONAL TRANSPORTATION AUTHORITY and the Chicago Transit Authority,
Defendants-Appellees.
No. 76-1524.

Argued Dec. 1, 1976.
Decided Jan. 18, 1977.

Class action was brought on behalf of the class of all mobility-disabled persons in the northeastern region of Illinois, alleging that the plaintiff class was unable to use public transportation system operated by the two municipal defendants because of physical disabilities. Defendants were alleged to have violated the Urban Mass Transportation Act of 1964, the Rehabilitation Act of 1973, the Architectural Barriers Act of 1968 and the equal protection clause of the Fourteenth Amendment. The United States District Court for the Northern District of Illinois, Eastern Division, Joel M. Flaum, J., granted defendants' motion to dismiss on the ground that none of the three statutes conferred a private right of action and that the equal protection clause did not apply. Plaintiffs appealed, and the Court of Appeals, Cummings, Circuit Judge, held that the section of the Rehabilitation Act of 1973 which forbids discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance established affirmative rights; that a private cause of action could be implied to vindicate those rights; and that because no administrative remedy was open to plaintiffs, neither the exhaustion of remedies doctrine nor the primary jurisdiction doctrine applied.

Vacated and remanded.

West Headnotes

[1] Civil Rights 78 ⚷1343

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1343 k. In General. Most Cited Cases
(Formerly 78k206(1), 78k13.7)
Municipal corporations are outside the scope of the Civil Rights Act of 1871. 42 U.S.C.A. § 1983.

[2] Federal Civil Procedure 170A ⚷1829

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 k. Construction of Pleadings. Most Cited Cases
On motion to dismiss, complaint must be read liberally.

[3] United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)
Section of Rehabilitation Act of 1973 which prohibits discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance, when considered together with regulations which implement the section, establishes affirmative rights. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[4] Action 13 ⚷3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Four factors relevant to determining whether a private remedy is implicit in statute which does not expressly provide such remedy are: whether plaintiff

is one of the class for whose special benefit the statute was enacted; whether there is any indication of legislative intent, explicit or implicit, either to create or to deny such a remedy; whether such remedy is consistent with the underlying purposes of the legislative scheme; and whether it would be inappropriate to infer a cause of action based solely on federal law because such cause of action would be within an area traditionally relegated to state law.

[5] United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)

A principal purpose of the 1974 Rehabilitation Act amendments was to include within scope of section which prohibits discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance individuals who may have been unintentionally excluded from the protection of the section by the original definition of handicapped individuals which overemphasized employability. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[6] Action 13 ⚷1

13 Action
13I Grounds and Conditions Precedent
13k1 k. Nature and Elements of Cause of Action and Suspension of Remedies. Most Cited Cases

When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.

[7] Civil Rights 78 ⚷1308

78 Civil Rights
78III Federal Remedies in General
78k1306 Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies
78k1308 k. Administrative Remedies in General. Most Cited Cases
(Formerly 78k194, 78k12.4, 393k82(1), 393k82)

Until effective enforcement regulations are promulgated, section of the Rehabilitation Act of 1973 which establishes an implied private cause of action to vindicate affirmative right of otherwise qualified handicapped individuals to nondiscrimination in programs or activities receiving federal financial assistance should not be subjugated to the doctrine of exhaustion of remedies; however, assuming a meaningful administrative enforcement mechanism, the private cause of action implied under the section should be limited to a posteriori judicial review. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[8] United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)

In view of fact that "mobility-disabled" persons, who alleged that they were unable to use municipal defendants' public transportation system because of physical disabilities, were among the class for whose special benefit the legislature enacted that section of the Rehabilitation Act of 1973 which prohibits discrimination against otherwise qualified handicapped individuals in programs receiving federal financial assistance and because there were indications that legislature intended to create independent federal cause of action to vindicate affirmative rights established by the section and it was consistent with underlying purpose of Act and would not intrude upon area traditionally relegated to state law to imply private remedy, section implicitly provided a private remedy. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[9] Civil Rights 78 ⚷1313

78 Civil Rights
78III Federal Remedies in General
78k1306 Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies
78k1313 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k194, 78k12.4, 393k82(3), 393k82)

Because no administrative remedy was open to "mobility-disabled" persons who brought class action to challenge municipal public transportation facilities as violative of, inter alia, the Rehabilitation Act of

1973, neither the exhaustion nor primary jurisdiction doctrine was applicable. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

*1278 Neil K. Quinn, Walter J. Kendall, Chicago, Ill., for plaintiffs-appellants.
Norman J. Barry, Joseph P. Della Maria, Jr., and Ronald F. Bartkowicz, Chicago, Ill., for Chicago Transit Authority.
Don H. Reuben, James C. Munson, Chicago, Ill., for Regional Transportation Authority.

Before CUMMINGS and TONE, Circuit Judges, and GRANT, Senior District Judge.[FN*]

FN* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

CUMMINGS, Circuit Judge.
[1] This class action was filed under the Civil Rights Act of 1871 (42 U.S.C. s 1983),[FN1] the Rehabilitation Act of 1973 (29 U.S.C. ss 701 et seq.), the Architectural Barriers Act of 1968 (42 U.S.C. ss 4151 and 4152), and unspecified regulations promulgated under the statutes.[FN2]Plaintiffs also relied on various sections of the Constitution but now rest their constitutional argument only on the Equal Protection Clause of the Fourteenth Amendment.

FN1. Plaintiffs no longer rely on 42 U.S.C. s 1983 (see reply br. 7), apparently because municipal corporations like defendants are outside its ambit. City of Kenosha v. Bruno, 412 U.S. 507, 513, 93 S.Ct. 2222, 37 L.Ed.2d 109.

FN2. In their appellate brief (at 11-13) plaintiffs also rely on a 1975 amendment to Section 165 of the Federal-Aid Highway Act of 1973, providing that the Secretary of Transportation "shall not approve any program or project * * * (not) requiring access to public mass transportation facilities, equipment and services for elderly or handicapped persons" which is funded under certain specified sections of Title 23 of the United States Code (23 U.S.C.A. s 142 note; 88 Stat. 2283). The 1975 amendment defined the handicapped to "includ(e) those who are nonambulatory wheelchair-bound and those with semiambulatory capabilities."Id. However, since this provision was not cited in the complaint and barely mentioned in the district court's opinion, we will not consider it.

*1279 [2] The named plaintiffs are George A. Lloyd, a quadriplegic who has been confined to a wheelchair since 1953, and Janet B. Wolfe, who is "mobility-disabled" because of a chronic pulmonary dysfunction. They sued on behalf of a class of all mobility-disabled persons in the northeastern region of Illinois. The two defendants are the Regional Transportation Authority (RTA),[FN3] which provides public transportation and assists in the public mass transportation system in that region, and the Chicago Transit Authority (CTA), [FN4] which operates a mass transportation system in the Chicago metropolitan area. The complaint alleges that the suing class is unable to use defendants' public transportation system because of physical disabilities. Plaintiffs aver on information and belief that defendants are in the process of planning for the purchase of new transportation equipment utilizing federal funds [FN5] and that, unless defendants are compelled to take affirmative action, the transportation system will continue to be inaccessible to the mobility-disabled.

FN3. The RTA is a municipal corporation established pursuant to Ill.Rev.Stat.1975, ch. 111 2/3 , ss 701.01 et seq.

FN4. The CTA is a municipal corporation established pursuant to Ill.Rev.Stat.1975, ch. 111 2/3 , ss 301 et seq.

FN5. Reading the complaint liberally as we must on a motion to dismiss, we deem it possible that plans for the purchase of new equipment on June 5, 1975, the date of the complaint, were not all consummated at the level of final approval of federal funding before the effective date of the Urban Mass Transportation Administrator's regulations on May 31, 1976. See also note 30 infra.

The complaint sets out four causes of action. First, plaintiffs assert that defendants have violated Section 16 of the Urban Mass Transportation Act of 1964 (49

U.S.C. s 1612) because they have not met the transportation needs of handicapped persons. Secondly, plaintiffs charge that defendants have violated Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. s 794) because, by reason of their handicaps, plaintiffs have been denied the meaningful usage of defendants' federally financed mass transportation facilities. Thirdly, plaintiffs claim that defendants have not complied with Sections 1 and 2 of the Architectural Barriers Act of 1968 (42 U.S.C. ss 4151 and 4152) because they have not designed vehicular facilities permitting ready access to physically handicapped persons. Finally, defendants' denial of public transportation system access to plaintiffs and their class is said to violate the Fourteenth Amendment's Equal Protection Clause.

The plaintiffs sought a preliminary injunction to prevent the defendants from designing or placing into operation any new federally funded facilities unless the facilities were accessible to all mobility-disabled persons. Plaintiffs also prayed for a mandatory injunction compelling the defendants to make the existing transportation system accessible to the mobility-disabled.

The district court filed a memorandum opinion granting the defendants' motions to dismiss on the ground that the three statutes in question do not confer a private right of action. The opinion stated that the only substantial constitutional claim of plaintiffs was founded on the Equal Protection Clause but that it was inapplicable because

"(d)efendants have not created any inequalities of treatment. They are not alleged to be providing handicapped persons with any lesser facilities than other persons."[FN6]

FN6. The district judge found it unnecessary to decide whether the Secretary of Transportation or his delegates were indispensable parties. Similarly, he did not pass on whether the Secretary of Health, Education and Welfare and the Urban Mass Transportation Administrator had to be named as defendants, as urged by the Urban Mass Transportation Administrator (who filed an amicus curiae brief with us) and by the CTA.

***1280** We vacate and remand.

SECTION 504 CONFERS AFFIRMATIVE RIGHTS

[3] Plaintiffs and two amici curiae [FN7] rely on Section 504 of the Rehabilitation Act of 1973 as giving plaintiffs the right to file a private action to enforce compliance with the statutes relied upon in the complaint and the recent regulations of the Urban Mass Transportation Administration.[FN8]Section 504 provides:

FN7. They are the National Center for Law and the Handicapped, Inc. of South Bend, Indiana, and a group of eight organizations representing disabled persons, whose counsel was the Public Interest Law Center of Philadelphia.

FN8. Those regulations were issued on April 27, 1976, and made effective May 31, 1976. They appear in 49 C.F.R. ss 609.1-609.25 and 613.204 and in 41 F.R. 18239-18241 and 18234 (April 30, 1976). Two appendices were also added. 49 C.F.R. ss 609.15(a), (b) and (c) were revised effective October 12, 1976. 41 F.R. 45842 (October 18, 1976).

"No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (29 U.S.C. s 794).
This provision closely tracks [FN9] Section 601 of the Civil Rights Act of 1964,[FN10] which was construed in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1. There a unanimous Supreme Court held that Section 601 provided a private cause of action. See also Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1969), certiorari denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350. While adverting to regulations and guidelines issued by the Department of Health, Education and Welfare (HEW) pursuant to Section 602 of the Act [FN11] and the respondent school district's contractual agreement to comply with Title VI of the Civil Rights Act of 1964 and the regulations thereunder,[FN12] Justice Douglas (speaking for himself and Justices Brennan, Marshall, Powell and

Rehnquist) stated, in reversing the court of appeals, that "(w)e do not reach the Equal Protection Clause argument which has been advanced but rely solely on s 601."414 U.S. at 566, 94 S.Ct. at 788. The concurring opinion of Justice Stewart (with whom the Chief Justice and Justice Blackmun joined) relied on Section 601 and the HEW regulations and guidelines and mentioned that plaintiffs there could concededly sue as third-party beneficiaries of said contract. Finally, Justice Blackmun (with whom the Chief Justice joined) stated that because the plaintiff class involved 2800 school children, he concurred in the holding that the San Francisco School District could not continue to teach students in English without teaching English to Chinese-speaking children or giving their classes in the Chinese language.[FN13]***1281** Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, Lau is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed.[FN14]

FN9. Indeed, Section 504 had its genesis in an abortive attempt by Congressman Vanik to include the handicapped within the strictures of the Civil Rights Act of 1964 itself. In floor debate on the Rehabilitation Act of 1973, he expressed pleasure that his language was included in what was to become Section 504. 119 Cong. Rec. 7114 (1973).

FN10. Section 601 of the Civil Rights Act of 1964 provides:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (42 U.S.C. s 2000d).

FN11. Section 602 provides:
"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken * * * " (42 U.S.C. s 2000d-1).

FN12.45 C.F.R. pt. 80.

FN13. A perceived importance in the number of discriminatees seeking relief has caused one court to consider the numerosity of the plaintiff class as a limitation of Lau. Serna v. Portakes Municipal Schools, 499 F.2d 1147, 1154 (10th Cir. 1974).

FN14. Accord: Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa.1976); Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va.1976); Rhode Island Society for Autistic Children v. Board of Regents, Civil Action No. 5081 (D.R.I. August 1, 1975); Cherry v. Mathews, 419 F.Supp. 922 (D.D.C.1976); Sites v. McKenzie, 423 F.Supp. 1190, (N.D.W.Va.1976). See also Bartels v. Biernat, 405 F.Supp. 1012 (E.D.Wis.1975). To the extent that Young v. Coleman, Civil Action No. H-76-201 (D.Conn. Dec. 17, 1976), may be contra, we disagree therewith. The district judge did not realize that the Urban Mass Transportation Administrator's regulations had been issued in part under Section 504 (mem. op. 9), which was his reason for distinguishing Lau v. Nichols, supra.He left open the question whether Section 504 authorizes a private right of action in circumstances like these (mem. op. 9, 10). Also, the defendants there satisfied him that they were making good faith efforts to comply with the Urban Mass Transportation Act (mem. op. 8), and the State of Connecticut Department of Transportation represented that it would comply with the April and October requirements of the Urban Mass Transportation Administrator (n. 5).

Judge Flaum held that Lau was not controlling because this case was devoid of analogs to the HEW guidelines there involved. In the district court's view, the "obligation to provide special programs did not flow from the cited statutory language (Section 601 of the Civil Rights Act of 1964), but rather from Health, Education and Welfare guidelines which were enacted pursuant to the additional statutory section, s 2000d-1 (Section 602 of the Civil Rights Act of 1964)." Even though the opinion of the Court in Lau can be read as authority for allowing this action to proceed under Section 504 of the Rehabilitation Act alone, developments subsequent to the district court's opinion have provided a virtual one-to-one correspondence between the conceptual props supporting the concurring opinions in Lau and the elements of the instant case.

Here the conceptual analog of Section 602 of the Civil Rights Act of 1964 came into being on April 28, 1976, in the form of Executive Order 11914, 41 F.R. 17871 (April 29, 1976). The Executive Order authorizes HEW and other federal agencies dispensing financial assistance to adopt rules, regulations and orders to ensure that recipients of federal aid are in compliance with Section 504. If compliance cannot be secured voluntarily, it may be compelled by suspension or termination of federal assistance after a hearing or by "other appropriate means authorized by law."HEW is given the responsibility of establishing standards for who are "handicapped individuals" and for determining what are "discriminatory practices" as well as coordinating the implementation of Section 504 by all federal agencies. While the Rehabilitation Act itself contains no express directive to issue regulations,[FN15]***1282** the 1974 Amendments to the Act generated a legislative history which indicates that Congress contemplated speedy implementation of Section 504 through regulations. See S.Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974); H.R.Rep. No. 32-1457, 93d Cong., 2d Sess. 27-28 (1974); S.Rep. No. 32-1297, 93d Cong., 2d Sess. 39-40 (1974)."In review of the foregoing, (it can be concluded) that the (HEW) Secretary is required to promulgate regulations effectuating s 504."Cherry v. Mathews, 419 F.Supp. 922 (D.D.C., 1976).[FN16]

FN15. However, the legislative history of the 1974 Rehabilitation Act Amendments explicitly contemplates an Executive Order such as 11914 which would consolidate in HEW the government-wide responsibility of issuing regulations to implement Section 504:

"It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago September 26, 1973.

"The conferees noted, and the Committee reiterates, that Executive Order No. 11758, section 2, delegates to the Secretary of Labor the responsibility for carrying out the responsibilities embodied in section 503 of the Rehabilitation Act of 1973, and a similar delegation of responsibility to the Secretary of HEW is urged to carry out on a Government-wide basis those responsibilities embodied in section 504." 4 U.S.Code Cong. & Admin.News, p. 6391 (1974).

FN16. The district court in Cherry chose not to set a date when the final 504 regulations must issue but did retain jurisdiction to ensure that "no further unreasonable delays affect the promulgation of regulations under s 504."No appeal was taken from the July 19 memorandum opinion.

Forty days after the district court's opinion was issued, the Urban Mass Transportation Administrator promulgated final regulations, in part under the authority of Section 504. These regulations and various accompanying guidelines are squarely couched in affirmative language. Thus new regulation 49 CFR s 613.204 provides:

"Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

"The Urban Mass Transportation Administrator will grant project approvals pursuant to 23 CFR 450.320(a)(3) only if:

"(a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons ; and

"(b) The annual element of the transportation improvement program developed pursuant to 23 CFR 450.118 and submitted after September 30, 1976, contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities ; and

(c) After September 30, 1977, reasonable progress has been demonstrated in implementing previously programmed projects." (Emphasis supplied.)

Advisory information issued simultaneously, to be added to the appendix to 23 CFR Part 450, Subpart A, sets forth general guidance on the meaning of "special efforts" in planning:
"The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term 'special efforts' refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, 'special efforts' in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period."(Emphasis supplied.)

Further advisory information published as an appendix to 49 CFR Part 613, Subpart B, gives several examples of a level of effort that will be deemed to satisfy the special efforts requirement.[FN17]While the guidelines ***1283** do not purport to be regulatory standards or minimums,[FN18] they do suggest a commitment to an affirmative remedial program of substantial scope. The most recently issued Urban Mass Transportation Administrator's regulation (49 CFR s 609.15(b), 41 F.R. 45842 (October 18, 1976)) provides in pertinent part that:

FN17. The examples given are the following:
"1. A program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 (49 U.S.C. s 1604) apportionment to the urbanized area. These 'five percent funds' may be derived from sources other than section 5. The term 'average' permits lower expenditure years to be balanced by higher expenditure years but does not permit an initial delay in implementing projects. The term 'section 5 apportionment' refers to UMTA's formula apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population under 200,000. Projects that qualify as local 'special efforts' for wheelchair users and other semiambulatory persons under the initial paragraphs of this advisory information would be counted in computing the five percent.
"2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

"3. A system, of any design, that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available is requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service."41 F.R. 18234 (April 30, 1976).

FN18.41 F.R. 18234 (April 30, 1976). However, the same appended material does describe some qualitative boundaries to the special efforts concept:
"Projects funded by UMTA under section 16(b)(2) (49 U.S.C. s 1612(b)(2)) may be identified as deriving from local special efforts to meet the needs of wheelchair users and semiambulatory persons only to the extent that the following four conditions are met: (1) the service and vehicles serve wheelchair users and semiambulatory persons; (2) the service meets a priority need identified in this planning process; (3) the service is not restricted to a particularized organizational or institutional clientele; and (4) any fares charged are comparable to those which are charged on standard transit buses for trips of similar length."Id.

"procurement solicitations shall provide for a bus design which permits the addition of a wheelchair accessibility option and shall require an assurance from each bidder that it offers a wheelchair accessibility option for its buses. The term 'wheelchair accessibility option' means a level change mechanism (e. g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device."
Indeed, in oral argument the CTA conceded that the regulations created an affirmative duty on federal grant recipients.

Four months after the district judge's opinion, HEW issued proposed regulations implementing Section 504.[FN19]Paralleling 45 CFR s 80.3(b)(1) (ii) and (iv), the provisions explicitly mentioned by eight Justices in Lau, proposed regulations 49 CFR ss 84.4(b)(1)(ii) and (iv) specify that recipients of federal financial assistance may not

FN19. HEW's proposed regulations appear at 41 F.R. 29560-29567 (July 16, 1976) and are intended to become 45 CFR ss 84.1-84.54. Notice of Proposed Rulemaking was published at 41 F.R. 20296 (May 17, 1976). Even this early in the rulemaking process, the HEW Secretary conceded that Section 504 created individual rights:
"Thus, while we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights."Id.

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

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

Moreover s 84.4(b)(2) establishes that
"A recipient may not provide different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others."(Emphasis supplied.) [FN20]

FN20.Sections 84.4(b)(i) and (b)(2) were redrafted from the language appearing in the Nature of Intent of Proposed Rulemaking of May 17, 1976, because the commentators objected to the draft regulations' emphasis on different treatment. Thus "as effective as" was substituted for "comparable" in the May 17 draft. The accompanying advisory information outlined the intent of this change:
"(The new terminology) is intended to encompass the concept of equivalent as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding

needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See 'Lau v. Nichols ', 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). The rewording of this provision is intended to emphasize that, although separate services may be required in some instances, the provision of unnecessarily separate or different services is discriminatory."41 F.R. 29551 (July 16, 1976).

*1284 Finally, pending the adoption of a new procedural regulation consolidating all of the enforcement procedures implementing the civil rights statutes for which HEW has enforcement responsibilities,[FN21] the "procedural provisions of the title VI regulation, which may be found at 45 CFR Part 80, will be incorporated by reference into the section 504 regulations for use during the interim."41 F.R. 29548 (July 16, 1976). The regulations thus reduce to concrete terms the abstract words of section 504.

FN21. On April 22, 1976, HEW released an Intent to Issue Notice of Proposed Rulemaking styled "Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities."41 F.R. 18394 (May 3, 1976).

Taken together with the numerosity of the class,[FN22] every element of the two [FN23] concurring opinions in Lau is also satisfied under the statutory and administrative framework of the instant case. The existence of affirmative rights under Section 504 necessarily follows, for, to paraphrase Justice Douglas in Lau :

FN22. The complaint alleges that there may be hundreds of thousands of mobility-disabled persons in the northeastern region of Illinois.

FN23. Justice White concurred without comment in the Lau result without joining either in the opinion of the Court or in the concurring opinions authored by Justices Stewart and Blackmun.

"Under these (federal) standards there is no equality of treatment merely by providing (the handicapped) with the same facilities (as ambulatory persons) * * *; for (handicapped persons) who (can) not (gain access to such facilities) are effectively foreclosed from any meaningful (public transportation)."414 U.S. at 566, 94 S.Ct. at 788.[FN24]

FN24. HEW's May 17, 1976, statement of policy on interpreting Section 504 acknowledges as much:
"Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination."41 F.R. 20296 (May 17, 1976).

Cf. Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158.

PRIVATE RIGHT OF ACTION

[4][5] Having demonstrated that Lau v. Nichols is conclusive on the question of the existence of affirmative rights under Section 504 and the regulations, we now turn to a consideration whether a private cause of action may be implied to vindicate these rights. As the parties have acknowledged, Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26, sets out the four factors relevant to determining whether a private remedy is implicit in a statute not expressly providing one. They are:

"First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' (emphasis supplied) that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the

legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would *1285 be inappropriate to infer a cause of action based solely on federal law?"(Citations omitted.)

Applying the Cort factors here leads to the conclusion that a private cause of action must be implied from Section 504.

(1) Plaintiffs of course are among the class specifically benefited by the enactment of the statute. As demonstrated above, Section 504 establishes affirmative private rights. In particular, these rights apply to transportation barriers impeding handicapped individuals.[FN25]29 U.S.C. s 701(11).

FN25. Indeed, one of the principal purposes of the 1974 Rehabilitation Act Amendments was to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which over-emphasized employability. In the Senate Report, it was made plain that inter alia :
"Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in * * * transportation * * * programs." 4 U.S.Code Cong. & Admin.News, p. 6388 (1974).

[6][7] (2) While the 1973 legislative history of Section 504 is bereft of much explanation,[FN26] the legislative history of the Rehabilitation Act Amendments of 1974 [FN27] casts light on the original Congressional intent. These amendments, inter alia, redefined the term "handicapped individual" as used in Section 504 and, as clarifying amendments, have cogent significance in construing Section 504. See Red Lion Broadcasting Co., Inc. v. Federal Trade Commission, 395 U.S. 367, 380-381, 89 S.Ct. 1794, 23 L.Ed.2d 371. It is noteworthy that the Senate Report was submitted on November 26, 1974, and the Lau opinion construing Section 601 of the Civil Rights Act of 1964 was handed down on January 21 of that year and certainly known by the Senate Committee.[FN28] Indeed, the report of the Senate Labor and Public Welfare Committee notes that the

FN26. The 1973 legislative history leaves ambiguous whether or not Section 504 is a mandatory provision. See 2 U.S.Code Cong. & Admin.News, pp. 2123, 2143 (1973).

FN27.Pub.L. 93-516, 88 Stat. 1617.

FN28. Lau is also referred to in the introduction to HEW's proposed regulations (41 F.R. 29551, July 16, 1976). See note 20 supra. The third-party beneficiary theory advanced by Justice Stewart in Lau (414 U.S. at 571 n. 2, 94 S.Ct. 786) and by the Fifth Circuit in Bossier Parish School Board, supra, 370 F.2d at 852, is likewise mentioned there (41 F.R. 29552, July 16, 1976).

"new definition applies to section 503, as well as to section 504, in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services. * * * Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." 4 U.S.Code Cong. & Admin.News, p. 6390 (1974).
The Committee continues by stating that Section 504's similarity to Section 601 of the Civil Rights Act of 1964 was not accidental:

"Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended."(4 U.S.Code Cong. & Admin.News, p. 6390 (1974)).

Further, the scope of the enforcement mechanism to result from such conscious parallelism did not escape comment:

"The language of section 504, in followig (sic) the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of ***1286** recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action."Id. at pp. 6390-6391.(Emphasis supplied.)

While the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court, still it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.[FN29]See Steele v. Louisville & N. R. Co., 323 U.S. 192, 206-207, 65 S.Ct. 226, 89 L.Ed. 173. In any event, under the second prong of the Cort test, there is surely an indication of legislative intent to create such a remedy and none to deny it.

FN29. We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. Cf. Hardy v. Leonard, 377 F.Supp. 831 (N.D.Cal.1974); Southern Christian Leadership Conference, Inc. v. Connolly, 331 F.Supp. 940 (E.D.Mich.1971). See also Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief, 83 Yale L.J. 425, 451-456 (1974). But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.

[8] (3) It is certainly consistent with the underlying purposes of the legislative scheme to imply such a remedy. Indeed, one of the explicitly detailed purposes of the Rehabilitation Act of 1973 was to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals."29 U.S.C. s 701(11). Moreover, since a private cause of action in this case serves to enforce the uniform substantive standards laid down by the UMTA and HEW regulations, the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country is not presented here. And no objection to local implementation of these substantive standards can prevail since the nationwide Urban Mass Transportation Administrator's regulations which set out standards for meeting the needs of the handicapped in transportation only serve as a guide for the local implementation of transportation opportunities for the mobility-disabled. 41 F.R. 18234 (April 30, 1976).

(4) Affording a private remedy under Section 504 of the Rehabilitation Act of 1973 would not be the kind

of suit traditionally relegated to state law in an area basically the concern of the States. In fact, both the RTA and CTA conceded below that it was the intent of Congress to deal ***1287** with the transportation needs of the handicapped on a national basis.

Because all four Cort tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy. Therefore, we need not and do not consider whether the Equal Protection Clause (together with 28 U.S.C. s 1343) and the other statutes cited in the complaint also confer jurisdiction on the district court.

Defendants rely principally on Cannon v. University of Chicago Nos. 76-1238 and 1239, decided August 27, (7th Cir. 1976), in arguing that Section 504 does not provide for a private right of action. There a panel of this Court held that Title IX of the Education Amendments of 1972 (20 U.S.C. s 1681) does not permit a private cause of action. However, the Court noted that in contradistinction to Lau, Cannon involved only an individual plaintiff who had not exhausted her administrative remedies (slip op. 11 - 16). Here we have a huge class, and plaintiffs and amicus Urban Mass Transportation Administrator have not persuaded us that any administrative remedy is yet available to plaintiffs and their class, nor has Congress provided other means of enforcement. Furthermore, it should be noted that the Cannon opinion is not final, for the panel granted the petition for rehearing in part on November 30, 1976, and now again has the case sub judice. There HEW's most recent brief quotes legislative history of Section 504 to show that a private right of action should be inferred (Br. 15-16).

[9] Defendants and the amicus Urban Mass Transportation Administrator also rely on Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943, 948 (7th Cir. 1976), in claiming that here plaintiffs must exhaust their administrative remedies before seeking judicial relief. There we applied the primary jurisdiction doctrine because the regulations specifically provided "for judicial review of administrative actions regarding school bus operations after certain procedures have been exhausted."No comparable regulations presently exist with respect to the problem at hand. There being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies. Rosado v. Wyman, 397 U.S. 397, 405-406, 90 S.Ct. 1207, 25 L.Ed.2d 442.

Upon remand, defendants may of course be able to show that they are in compliance with the statutes on which plaintiffs rely and the regulations thereunder.[FN30]The affidavit filed in the district court by defendant CTA's general operations manager tends in that direction although it may already be partly obsolete in view of the Transbus developments (41 F.R. 15735, 32286-32287, 45842 (April 14, 1976; August 2, 1976; October 18, 1976)). See also notes 17-18 and accompanying text supra. Our opinion expresses no view on the ultimate merits of plaintiffs' case because the undeveloped record does not show whether RTA and CTA are following the statutes and regulations.[FN31]

FN30. Since the Urban Mass Transportation Administrator's regulations became effective on May 31, 1976, plaintiffs now challenge only projects whose funding was approved after that date. On remand, leave should be granted to plaintiffs to make post-May 31 allegations. Cf. note 5 supra.

FN31. In Lau, the opinion of the Court adverted to a contract between HEW and the San Francisco Unified School District compelling it to comply with Title VI of the Civil Rights Act of 1964 and HEW's regulations thereunder and to take any necessary measures to effectuate the contract (414 U.S. at 568-569, 94 S.Ct. 786). Through discovery on remand, plaintiffs will be able to ascertain whether any agreements between defendants and federal agencies contain equivalent terms.

In concluding, we cannot fault the district court for its dismissal order. Without the benefit of any regulations, it is difficult to perceive what relief could have been afforded at that stage. However, the Urban Mass Transportation Administrator's regulations were issued before this appeal was briefed and argued and of course apply to our deliberations. Thorpe v. Housing Authority, 393 U.S. 268, 281-282, 89 S.Ct. 518, 21 L.Ed.2d 474;United States v. Fitzgerald, 545 F.2d 578, 581 (7th Cir. 1976). Since the plaintiffs may now be able to ***1288** show that they are entitled to remedial action, the case must be returned to the

district court for appropriate further proceedings. If effective by then, consideration will also have to be given to HEW's proposed regulations (note 19 supra).

Vacated and remanded.[FN32]

FN32. On remand, leave should be granted to amend the complaint to add the HEW Secretary, the Secretary of Transportation and the Urban Mass Transportation Administrator as defendants and Section 165 of the Federal-Aid Highway Act of 1973, as amended (88 Stat. 2283) as one of the statutes relied upon, as prayed in plaintiffs' briefs (Br. 12 and Reply Br. 6) Such amendments will not unfairly surprise the litigants, for the CTA below and the district court discussed the federal official point, as did the amicus Urban Mass Transportation Administrator, and the Federal-Aid Highway Act was first discussed in RTA's briefs below and again in the district court's opinion.

C.A.Ill. 1977.
Lloyd v. Regional Transp. Authority
548 F.2d 1277, 44 A.L.R. Fed. 131

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Marcus v. State of Kansas, Dept. of Revenue C.A.10 (Kan.),1999.

United States Court of Appeals,Tenth Circuit.
Joel MARCUS and David V. Morando, on their own behalf and all others similarly situated, Plaintiffs-Appellants,
v.
State of KANSAS, DEPARTMENT OF REVENUE, Defendant-Appellee.
No. 97-3313.

March 23, 1999.

Disabled Kansas citizens brought suit alleging that imposition of fee by Kansas for parking placards and individual identification cards violated Americans with Disabilities Act (ADA) and Department of Justice regulation. The United States District Court for the District of Kansas, Dale E. Saffels, J., 980 F.Fupp. 398, determined that Tax Injunction Act deprived it of jurisdiction and dismissed action. Plaintiffs appealed. The Court of Appeals, McKay, Circuit Judge, held that challenged fee was not tax within meaning of Act.

Reversed.

West Headnotes

[1] Administrative Law and Procedure 15A ⚷416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect
15Ak416.1 k. In General. Most Cited Cases
Regulations enacted by Department of Justice are entitled to substantial deference.

[2] Federal Courts 170B ⚷776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's dismissal for lack of subject matter jurisdiction is reviewed de novo.

[3] Federal Courts 170B ⚷34

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases
Because jurisdiction of federal courts is limited, there is presumption against jurisdiction, and party invoking federal jurisdiction bears burden of proof.

[4] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
Tax Injunction Act imposes broad limitation on federal court interference with state collection of taxes and is not limited to injunctive relief; Act bars declaratory relief, and suits for damages as well. 28 U.S.C.A. § 1341.

[5] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
Purpose of Tax Injunction Act is to promote comity and to afford states the broadest independence,

consistent with federal constitution, in administration of their affairs, particularly revenue raising. 28 U.S.C.A. § 1341.

[6] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
Tax Injunction Act is treated as bar to federal jurisdiction over cases involving enjoinment, suspension, restraint, levy, or collection of taxes imposed by states. 28 U.S.C.A. § 1341.

[7] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
If state assessment is tax, rather than regulatory fee, Tax Injunction Act applies and operates to bar federal jurisdiction unless state does not provide plain, speedy and efficient remedy. 28 U.S.C.A. § 1341.

[8] Federal Courts 170B ⚷417

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk417 k. Federal Jurisdiction. Most Cited Cases
Whether state assessment is tax or regulatory fee, for purposes of Tax Injunction Act, is question of federal law. 28 U.S.C.A. § 1341.

[9] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
Label given by state for assessment or charge is not dispositive of issue of whether assessment or charge is tax, for purposes of Tax Injunction Act; critical inquiry focuses on purpose of assessment and ultimate use of funds. 28 U.S.C.A. § 1341.

[10] Federal Courts 170B ⚷27

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk26 Loss or Divestiture of Jurisdiction; Statutory Restrictions
170Bk27 k. State Taxes. Most Cited Cases
Neither fee assessed by Kansas for disabled parking placards and identification cards, nor fee for vehicle registration or renewal constituted "tax" under Tax Injunction Act, as would deprive district court of jurisdiction over suit challenging such assessments; each assessment was expressly tied to administrative costs of specific regulatory scheme and, therefore, was regulatory. 28 U.S.C.A. § 1341; K.S.A. 8-1,125(c), 8-145d; Kan.Admin. Reg. 92-51-40.

***1306** Stephen R. Senn of Peterson & Myers, P.A., Lakeland, Florida (John J. Miller of Law Offices of John J. Miller, P.A., Overland Park, Kansas; and Robert Joseph Antonello of Antonello & Fegers, Winter Haven, Florida, with him on the briefs), for Plaintiffs-Appellants.
Joseph Brian Cox, Special Assistant Attorney General (Richard Cram with him on the brief), Legal Services Bureau, Kansas Department of Revenue, Topeka, Kansas, for Defendant-Appellee.

Before BRISCOE, McKAY, and LUCERO, Circuit Judges.

McKAY, Circuit Judge.
Plaintiffs Joel Marcus and David V. Morando appeal the district court's dismissal of their action pursuant to Federal Rule of Civil Procedure 12(b)(1). Because their claims arose under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, Plaintiffs asserted federal jurisdiction pursuant to 28 U.S.C. § 1331. However, the district court determined that the Tax Injunction Act, 28 U.S.C. § 1341, deprived it of jurisdiction over the subject

matter of the action and accordingly dismissed the action without reaching its merits.

I.

[1] Title II of the ADA requires public entities to ensure 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" provided by the entities. 42 U.S.C. § 12132. Congress directed the Department of Justice to develop regulations to implement the public services provisions of Title II. *See*42 U.S.C. § 12134(a).[FN1] In accordance with Congress' mandate, the ***1307** Department of Justice developed regulations requiring that where parking is provided for public buildings, a certain number of parking spaces on "the shortest accessible route of travel *from adjacent parking* to an accessible entrance" must be specially designated for people with disabilities. 28 C.F.R. Ch. 1, pt. 36, App. A § 4.6.2 (Accessibility Guidelines for Buildings and Facilities). The Department of Justice regulations further provide:

> FN1. The regulations enacted by the Department of Justice are entitled to substantial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "Moreover, because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations [of the Rehabilitation Act], the former regulations have the force of law." *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir.), *cert. denied*,516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995).

A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.
Id. § 35.130(f). The intent of this surcharge provision is to "prevent [ ] disabled persons from being denied access to ADA-mandated benefits or services because they do not have the funds to pay for them, and [to] spread [ ] the costs of such benefits or services to all taxpayers." *Thrope v. Ohio*, 19 F.Supp.2d 816, 819 (S.D.Ohio 1998) (citing *McGarry v. Director, Dep't of Revenue, Mo.*, 7 F.Supp.2d 1022, 1028 (W.D.Mo.1998)).

To comply with the ADA regulations set forth above, the State of Kansas has enacted a statutory scheme governing the provision of parking accommodations for individuals with disabilities. Under the Kansas scheme, persons who qualify as "individuals with disabilities" may park in specially designated parking spaces so long as they have an identification card and display a special license plate, a permanent parking placard, or a temporary placard on or in their vehicles. *See*Kan. Stat. Ann. §§ 8-1,124 & 8-1,125(a). Both the license plates and the placards must "display the international symbol of access to the physically disabled." *Id.* § 8-1,125(a). Using a designated parking space without a special license plate or placard is punishable as a misdemeanor. *See id.* § 8-1,129.

Other than the general vehicle registration fee charged to all automobile owners, there is no additional charge for the licence plate entitling the holder to use parking accommodations set aside for people with disabilities. *See id.* § 8-1,125(b). To obtain a placard and an identification card, however, qualified individuals must pay a total of $5.25, along with an additional $5.25 renewal charge every three years. The first portion of the $5.25 assessment consists of a "service fee" in the amount of $2.25 which is paid to the county treasurer. *See id.*§ 8-145d. This portion of the assessment is imposed on all persons applying for vehicle registration or renewal, not only on individuals applying for disabled parking placards. *See id.* County treasurers must deposit the $2.25 into "the special fund created pursuant to K.S.A. [§] 8-145." *Id.* Section 8-145 expressly appropriates the "special fund" "for the use of the county treasurer in paying for necessary help and expenses incidental to the administration of duties in accordance with the provisions of this law and extra compensation to the county treasurer for the services performed in administering the provisions of this act." *Id.* § 8-145(b). If there is a balance in the fund at the close of a calendar year, the money is "withdrawn and credited to the general fund of the county." *Id.* The money in the general fund is then remitted to the

secretary of revenue, deposited with the state treasurer, and credited to the state highway fund. *See id.* § 8-145(c).

The remaining portion of the $5.25 charge is authorized by statute. *See id.* § 8-1,125(c) ("The secretary of revenue may adopt rules and regulations prescribing a fee for placards and individual identification cards issued pursuant to this section...."). Accordingly, the Kansas Department of Revenue promulgated the following regulation:

The fee for any placard issued to a handicapped person or any person responsible for the transportation of a handicapped person pursuant to L.1986, Ch. 36, Sec. 1 shall be $2. The fee for any individual identification card issued to a handicapped person pursuant to L.1986, Ch. 36, Sec. 2 shall be $1.

Kan. Admin. Regs. § 92-51-40. The statute authorizing the collection of these funds ***1308** indicates that these fees "shall not exceed the actual cost of issuance" of the identification cards and placards. *See*Kan. Stat. Ann. § 8-1,125(c).

Plaintiffs are citizens of the State of Kansas and both qualify as persons with disabilities within the meaning of section 8-1,124 of the Kansas Statutes. In pursuing this action, they also seek to represent a class of persons who similarly qualify as persons with disabilities under section 8-1,124. Defendant State of Kansas, Department of Revenue, is responsible for the administration of the statutory scheme at issue in this case. In their complaint, Plaintiffs alleged that Defendant's imposition of a fee for parking placards and individual identification cards violates 42 U.S.C. § 12132 of the ADA and 28 C.F.R. § 35.130(f), the regulatory surcharge provision. Plaintiffs sought injunctive and declaratory relief and repayment with interest of the monies collected by Defendant from Plaintiffs and their class members in violation of the ADA. Defendant filed a motion to stay discovery and class certification shortly after filing its answer to the complaint. Defendant argued that because the primary issues raised were ones of law and because "legal briefing or dispositive motions" would resolve these issues, discovery was unnecessary. Appellant's App. at 21B. Plaintiffs opposed the motion to stay class certification but indicated that a stay of discovery might be appropriate if the parties could stipulate to the relevant facts. The district court granted Defendant's motion to stay discovery and class certification and directed the parties to file stipulated facts. Consequently, the parties submitted a stipulation of the facts relevant to this dispute.

After Plaintiffs filed a motion for summary judgment, Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant advanced several arguments in support of its motion. The district court granted Defendant's motion to dismiss based on the argument that the charge for the placards and identification cards was a tax and not a regulatory fee and that, as such, the Tax Injunction Act deprived the court of subject matter jurisdiction. *See Marcus v. Kansas, Dep't of Revenue*, 980 F.Supp. 398, 402-03 (D.Kan.1997). The Tax Injunction Act provides in full: "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

In reaching its conclusion that the charge was a tax, the district court examined each component of the charge. Initially, the court noted that the $2.25 assessment collected by county treasurers as a "service fee" did not bear a relation to the cost of the service provided nor did it appear to be regulatory in nature. *See Marcus*, 980 F.Supp. at 402. The court also remarked that the $2.25 assessment is imposed not only on persons applying for disabled parking placards but also on all persons applying for vehicle registration. *See id.* The court believed that "[s]uch general application may indicate a revenue raising intent." *Id.* The court then stated that the remaining $2.00 for the placard and the $1.00 for the identification card, which are authorized by section 92-51-40 of the Kansas Administrative Regulations, also "bear[ ] no relation to cost." *Id.* The court justified this conclusion by stating that at least a portion of this money is directed to the State Highway Fund, which, "in turn, is used for expenditures that ultimately benefit the general public." *Id.* (citing Kan. Stat. Ann. § 68-416(b)(3)). The court concluded that, even if some portion of the fee were regulatory in nature, it could not assert jurisdiction over such portion "without 'doing violence to the revenue raising provisions of the measure.' " *Id.* at 403 (citations omitted). The court

went on to explain that even if the Tax Injunction Act applies, federal courts may still assert jurisdiction if the state fails to provide a "plain, speedy, and efficient remedy" in the state courts. *Id.* Because Plaintiffs did not allege the absence of such a remedy, however, this exception to the Tax Injunction Act did not apply. *See id.*

On appeal, Plaintiffs contend that: the district court should have allowed discovery on the issue of whether the charge at issue in this case is a regulatory fee or a tax for purposes of the Tax Injunction Act; the district court's ruling that the charge at issue was a regulatory fee and not a tax was erroneous in any event; and statements of ***1309** congressional intent surrounding the Tax Injunction Act show that the Act was not meant to preclude federal jurisdiction in cases like this one. We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

[2][3] Our review of the district court's dismissal for lack of subject matter jurisdiction is de novo. *See Painter v. Shalala*, 97 F.3d 1351, 1355 (10th Cir.1996). The Federal Rules of Civil Procedure instruct that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3). Because the jurisdiction of federal courts is limited, "there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir.1991). "A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974).

II.

[4][5][6] The issue before us is whether a state-imposed assessment for disabled parking placards constitutes a tax or a regulatory fee for purposes of the Tax Injunction Act. The resolution of this issue is determinative of whether federal jurisdiction exists in this case. The Tax Injunction Act imposes a "broad limitation on federal court interference with state collection of taxes [and] is not limited to injunctive relief. The Tax Injunction Act bars declaratory relief, and suits for damages as well." *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir.1986) (internal citations omitted). The purposes of the Act are "to promote comity and to afford states the broadest independence, consistent with the federal constitution, in the administration of their affairs, particularly revenue raising." *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir.1987); *accord Collins Holding Corp. v. Jasper County, S.C.*, 123 F.3d 797, 799 (4th Cir.1997) (explaining that the Tax Injunction Act "reflects the importance of the taxing power to the operation of state governments" and the goal of preventing federal courts from interfering with state revenue collection); *Thrope*, 19 F.Supp.2d at 822 ("The Tax Injunction Act is based on principles of federalism and is designed to prevent a federal court from interfering with the administration of a state tax system."). Thus, the Tax Injunction Act "operates to divest the federal courts of subject matter jurisdiction over claims challenging state taxation procedures where the state courts provide a 'plain, speedy and efficient remedy.' " *Lussier v. Florida, Dep't of Highway Safety & Motor Vehicles*, 972 F.Supp. 1412, 1417 (M.D.Fla.1997) (citation omitted).[FN2]

FN2. This court previously has noted that "the statutory limitations of the Tax Injunction Act are not jurisdictional; rather, they define the scope of remedies a federal court may grant in a suit challenging taxes levied under state law." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1186 n. 8 (10th Cir.1998), *cert. denied*, 525 U.S. 1122, 119 S.Ct. 904, 142 L.Ed.2d 902 (1999); *see also id.* at 1191 ("[T]he Act clearly functions as a limitation on the equitable remedies a federal court may provide in a property tax dispute that otherwise has appropriate federal court subject-matter jurisdiction, i.e., federal question jurisdiction or diversity jurisdiction."). However, the United States Supreme Court has stated that it has "interpreted and applied the Tax Injunction Act as a 'jurisdictional rule' and a 'broad jurisdictional barrier.' " *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997) (quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976)); *see also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 67 L.Ed.2d 464

(1981) ("[T]he Act ... [is] first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."); *Brooks*, 801 F.2d at 1240-41 (holding that Tax Injunction Act deprived federal district courts of subject-matter jurisdiction in action involving tax on cigarettes); *May v. Supreme Court of Colo.*, 508 F.2d 136, 137 (10th Cir.1974) (stating that "28 U.S.C. § 1341 does not operate to confer jurisdiction but instead limits jurisdiction which might otherwise exist"), *cert. denied*,422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671 (1975). For example, the Supreme Court held in *California v. Grace Brethren Church*, 457 U.S. 393, 396, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982), that the Tax Injunction Act barred the federal district court from exercising jurisdiction over the case. In accordance with these Supreme Court precedents, we treat the Tax Injunction Act as a bar to federal jurisdiction over cases involving the enjoinment, suspension, restraint, levy, or collection of taxes imposed by states. *See*28 U.S.C. § 1341.

***1310** To date, no federal circuit court has addressed the precise issue of whether assessments imposed for disabled parking placards constitute taxes or fees under the Tax Injunction Act.[FN3]Among the federal district courts to address the issue, however, a clear split has developed. At least in part, the split appears to be due to the precise manner in which the collected funds are used under each state's statutory scheme. In addition to the District of Kansas decision on review here, *see Marcus*, 980 F.Supp. at 402-03, two other district courts have determined that assessments imposed by states on applicants for disability parking placards constitute "taxes" for purposes of the Tax Injunction Act, resulting in a bar to federal jurisdiction. *See Hedgepeth v. Tennessee*, 33 F.Supp.2d 668, 671-73 (W.D.Tenn.1998) (holding that the Tax Injunction Act barred federal jurisdiction partly because $20.50 handicap placard fee and $3.00 renewal fee apportioned into state's highway fund, general fund, police pay supplement fund, and trooper safety were revenue raising measures and thus constituted taxes); *Lussier*, 972 F.Supp. at 1420 (holding that revenue raising was the dominant purpose of statutory scheme under which the majority of the monies collected was remitted to the Department of Highway Safety and that "the ultimate use of the funds collected ... make[s] clear that the funds are spent on general public purposes"). However, two additional federal district courts recently reached the opposite conclusion. *See Banta v. Louisiana*, No. 98-765-A, slip op. at 4-5 (M.D.La. Jan. 7, 1999) (denying plaintiffs' motion to remand to state court because Tax Injunction Act did not preclude federal jurisdiction over suit involving regulatory fees for hang tags, identification cards, and special license plates which were explicitly tied to the cost of issuance); *Thrope*, 19 F.Supp.2d at 823 (holding that Tax Injunction Act did not bar federal jurisdiction because $5.00 assessment was charged only to applicants for parking placards and was designed to cover the regulatory costs of issuing the placards, even though the charge was deposited into the bureau of motor vehicles fund). Several other federal district courts have concluded that charges for parking placards similar to those imposed in this case violate the ADA, but none of these courts have addressed the Tax Injunction Act. *See Duprey v. Connecticut, Dep't of Motor Vehicles*, 28 F.Supp.2d 702, 708-11 (D.Conn.1998) (granting plaintiff's cross-motion for summary judgment and holding that fee violated ADA because it constituted a surcharge, was imposed only on persons with disabilities, and was used to cover the costs of ADA-mandated measures); *McGarry*, 7 F.Supp.2d at 1029 (granting plaintiffs' summary judgment motion and concluding that $2.00 fee imposed for parking placards violated ADA); *Dare v. California, Dep't of Motor Vehicles*, No. CV96-5569 JSL, 1997 U.S. Dist. LEXIS 23158, at *1-*3 (C.D.Cal. May 30, 1997) (granting partial summary judgment in favor of plaintiffs and holding that state's imposition of biennial $6.00 fee for disabled parking placards violates surcharge provision of ADA).

FN3. The Court of Appeals for the Fourth Circuit recently affirmed the dismissal of a lawsuit involving an ADA challenge to the charges imposed for handicapped parking placards by the State of North Carolina. *See Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 706-08 (4th Cir.1999) (holding that the suit was barred because the state was entitled to sovereign immunity under the Eleventh Amendment). *But cf. Alsbrook v. City of Maumelle, Ark.*, 156 F.3d 825, 830-31 (8th Cir.) (holding that

defendant was not immune from suit because Congress did not exceed its powers under Section 5 of the Fourteenth Amendment in enacting the ADA), *vacated on reh'g en banc* (Nov. 12, 1998); Seaborn v. Florida, Dep't of Corrections, 143 F.3d 1405, 1407 (11th Cir.1998) (concluding that states do not have Eleventh Amendment immunity from suits filed under the ADA), *cert. denied*, 525 U.S. 1144, 119 S.Ct. 1038, 143 L.Ed.2d 46 (1999); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.) (same), *cert. denied*, 525 U.S. 819, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir.1997) (same), *cert. denied sub. nom* Wilson v. Armstrong, 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). In *Brown*, the dismissal of the case was based on a finding that 28 C.F.R. § 35.130(f) exceeded Congress' powers under Section 5 of the Fourteenth Amendment and that, as a result, Congress could not abrogate state sovereign immunity. *See* Brown, 166 F.3d 698, 706-08. Because neither of the parties in this case raised the issue of sovereign immunity, *Brown* has no bearing on this decision.

III.

[7][8][9] In determining whether the Tax Injunction Act bars federal jurisdiction over *1311 a suit challenging a state assessment, we must determine whether the assessment at issue is a tax or a regulatory fee. *See* Collins Holding, 123 F.3d at 799. If the assessment is a tax, then the Act applies and operates to bar federal jurisdiction unless the state does not provide a plain, speedy and efficient remedy. *See id.* Whether the assessment is a tax or a regulatory fee is a question of federal law. *See* Wright, 835 F.2d at 144. The label given by a state for an assessment or charge is not dispositive. *See id.; accord* Cumberland Farms, Inc. v. Tax Assessor, 116 F.3d 943, 946 (1st Cir.1997). Instead, the critical inquiry focuses on the purpose of the assessment and the ultimate use of the funds. *See* Collins Holding, 123 F.3d at 800 ("[T]he heart of the inquiry centers on function, requiring an analysis of the purpose and ultimate use of the assessment."); Hager v. City of West Peoria, 84 F.3d 865, 870-71 (7th Cir.1996) ("Rather than a question solely of *where* the money goes, the issue is *why* the money is taken."); San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir.1992) (stating that in close cases courts "have tended ... to emphasize the revenue's ultimate use").

[T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1011 (5th Cir.1998) (footnotes omitted) (holding that impact fee imposed by City of Madison constituted a tax for purposes of Tax Injunction Act); *accord* Folio v. City of Clarksburg, W.Va., 134 F.3d 1211, 1217 (4th Cir.1998) ("A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue 'to a general fund, and [is] spent for the benefit of the entire community.' A user fee ... is a 'payment[ ] given in return for a government provided benefit' and is tied in some fashion to the payor's use of the service."(citations omitted)); San Juan Cellular, 967 F.2d at 685 (stating that the classic tax raises money which is contributed to a general fund and spent for the benefit of the whole community while the classic fee serves regulatory purposes and "is imposed by an agency upon those subject to its regulation").

[10] We begin our analysis with the $2.25 portion of the assessment imposed by section 8-145d of the Kansas Statutes. While some part of the funds collected pursuant to section 8-145d may ultimately reach the general fund of the county, *see* Kan. Stat. Ann. § 8-145(b), or the state highway fund, *see id.* § 8-145(c), the governing statute expressly ties these monies to the administration of the motor vehicle registration laws. *See id.* § 8-145(b) (explaining that the "special fund" is "appropriated for the use of the county treasurer in paying for necessary help and expenses incidental to the administration of duties" under this law); *see also* Board of Comm'rs v. Ferguson, 159 Kan. 80, 151 P.2d 694, 697 (1944)

(describing "special fund" under section 8-145 as "created to meet the [county] treasurer's administrative expenses"); XVI Kan. Op. Att'y. Gen. 27 (1982) (stating that the fees collected pursuant to section 8-145 are deposited into a special fund which is used to pay for necessary help and expenses incidental to administering the motor vehicle registration laws). Only if there is a balance remaining at the end of the year will any of these monies reach the general county fund. *See*Kan. Stat. Ann. § 8-145(b)-(c). Because there is no guarantee that any funds will remain in the special fund at the close of any given calendar year, there is no guarantee that any of the monies remitted to the special fund will reach the general county fund or the state highway fund in any given year. The Kansas Supreme Court has confirmed this interpretation of section 8-145 by holding that the legislative intent surrounding the statute demonstrates that "no part of the fees shall be considered as part of the general funds of the county, except as to the balance, if any, remaining in the special fund at the close of the calendar year." *Ferguson,* 151 P.2d at 697 (declining to issue writ of mandamus to county treasurer directing him to deposit fees collected pursuant to section 8-145 into general fund of the county).***1312** Both the relevant statutory language and Kansas case law make clear that the $2.25 portion of the assessment is used primarily to cover the costs of administering the motor vehicle registration laws. Therefore, we cannot say that the dominant purpose of these funds is revenue raising, nor can we conclude that the funds benefit the general public. While the funds may benefit that portion of the public which owns and operates motor vehicles, the essential character of the $2.25 charge is regulatory. Not only are the charges expressly linked to a specific regulatory scheme but also the monies collected pursuant to the charge are used to defray the expenses associated with administering the scheme. As such, we conclude that the assessment constitutes a fee for purposes of the Tax Injunction Act.

The remaining portion of the $5.25 assessment charged for disabled parking placards and identification cards consists of the $3.00 imposed by section 92-51-40 of the Kansas Administrative Regulations. Neither the governing statutes nor the implementing regulations indicates the ultimate use of the monies collected pursuant to section 92-51-40. Further, although the Department of Revenue enacted section 92-51-40, the regulation imposing the $3.00 assessment, it is not clear to whom the funds are remitted. Both the district court and Defendant assert that at least some portion of these monies flows to the state highway fund. *See Marcus,* 980 F.Supp. at 402; Appellee's Br. at 2. Presumably, the court and Defendant base this conclusion on the assumption that the charges at issue constitute either "registration and certificate of title fees" under section 8-145(a) or are deposited into the special fund under section 8-145(b) of the Kansas Statutes.

In our view, the ultimate disposition and use of the funds collected pursuant to section 92-51-40 is an issue that can only be resolved by discovery. However, like the $2.25 portion of the total assessment, these charges are expressly linked to defraying administrative costs. The Kansas statute authorizing the imposition of these charges explicitly mandates that fees imposed by the Department of Revenue "shall not exceed the actual cost of issuance." Kan. Stat. Ann. § 8-1,125(c). Moreover, even if the fees imposed pursuant to section 92-51-40 are appropriated to the special fund and distributed accordingly, then the reasoning we employ above with respect to the $2.25 portion of the assessment also applies to the $3.00 charge. In other words, the assessment is expressly tied to the administrative costs of a specific regulatory scheme and, therefore, its essential character is regulatory. We conclude that the charges imposed pursuant to section 91-52-40 constitute fees for purposes of the Tax Injunction Act.

Because the Tax Injunction Act does not apply to this action, we reverse the judgment of the district court and remand so that the court may proceed with the merits.[FN4]

FN4. Because we hold that the Tax Injunction Act does not apply to this action, we need not reach the question of whether Kansas provides a plain, speedy, and efficient remedy in its courts.

REVERSED and **REMANDED**.

C.A.10 (Kan.),1999.
Marcus v. Kansas Dept. of Revenue
170 F.3d 1305, 9 A.D. Cases 281, 15 NDLR P 20, 1999 CJ C.A.R. 2521

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Pace v. Bogalusa City School Bd.
C.A.5 (La.),2005.

United States Court of Appeals,Fifth Circuit.
Travis PACE, Plaintiff-Appellant,
v.
The BOGALUSA CITY SCHOOL BOARD, Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, Defendants-Appellees.
No. 01-31026.

March 8, 2005.
As Revised March 16, 2005.

Background: Wheelchair-bound developmentally disabled high school student brought claims under, inter alia, Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), and Rehabilitation Act against local school board and state. The United States District Court for the Eastern District of Louisiana, Eldon E. Fallon, J., 137 F.Supp.2d 711, affirmed administrative dismissal of student's IDEA claims and, 2001 WL 969103, granted summary judgment for defendants on claims under ADA and Rehabilitation Act. The Court of Appeals, Edith H. Jones, 325 F.3d 609, affirmed in part, vacated in part and remanded.

Holdings: On rehearing en banc, the Court of Appeals, W. Eugene Davis and Wiener, Circuit Judges, held that:
(1) state waived its sovereign immunity;
(2) evidence supported finding that school had not violated student's IDEA rights; and
(3) student was collaterally estopped from asserting ADA and Rehabilitation Act claims.

Affirmed.

Edith H. Jones, Circuit Judge, concurred in part, dissented in part, and filed opinion in which E. Grady Jolly, Jerry E. Smith, Rhesa Hawkins Barksdale, Emilio M. Garza and DeMoss, Circuit Judges, joined.

West Headnotes

[1] **Constitutional Law 92 ⚷4863**

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4861 Governmental Immunity in General
92k4863 k. Abrogation of Immunity. Most Cited Cases
(Formerly 92k82(6.1))

Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases
In order for federal statute to be valid exercise of Congress's power to enforce Fourteenth Amendment and, consequently, to abrogate states' Eleventh Amendment immunity: (1) statute must contain unequivocal statement of congressional intent to abrogate; (2) Congress must have identified history and pattern of unconstitutional action by states; and (3) rights and remedies created by statute must be congruent and proportional to constitutional violation Congress sought to remedy or prevent. U.S.C.A. Const.Amends. 11, 14.

[2] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
State's consent to suit, i.e., waiver of its Eleventh Amendment immunity, must be both knowing and voluntary. U.S.C.A. Const.Amend. 11.

[3] **United States 393 ⚷82(2)**

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases
Congressional spending programs that are enacted in pursuit of general welfare and unambiguously condition state's acceptance of federal funds on reasonably related requirements are constitutional unless they are either independently prohibited or coercive. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[4] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
In order for state's participation in federal program to result in valid waiver of its Eleventh Amendment immunity, program must be valid exercise of Congress's spending power, waiver condition for participation must satisfy clear-statement rule, and program must be non-coercive. U.S.C.A. Const. Art. 1, § 8, cl. 1; U.S.C.A. Const.Amend. 11.

[5] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases
Louisiana validly waived its Eleventh Amendment immunity from student's suit for violations of Rehabilitation Act and Individuals with Disabilities Education Act (IDEA) when it accepted federal education funds; statutory condition on acceptance of funds was clearly stated, rendering state's waiver "knowing" regardless of whether it subjectively believed it had any immunity to waive, and statutory scheme was not unduly coercive. U.S.C.A. Const.Amend. 11; Individuals with Disabilities Education Act, § 604(a), as amended, 20 U.S.C.A. § 1403(a); Rehabilitation Act Amendments of 1986, § 1003(a)(1), 42 U.S.C.A. § 2000d-7(a)(1).

[6] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

United States 393 ⚷82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases
Congress has power under Spending Clause to condition receipt of federal education funds on state's waiver of Eleventh Amendment immunity. U.S.C.A. Const. Art. 1, § 8, cl. 1; U.S.C.A. Const.Amend. 11.

[7] **Federal Courts 170B ⚷266.1**

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

United States 393 ⚷82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to State and Local Agencies in General. Most Cited Cases
Any role that unconstitutional-conditions doctrine might have in cabining Congress's authority to give funds in exchange for state's waiver of sovereign immunity is subsumed within standard Spending Clause inquiry into whether condition is coercive. U.S.C.A. Const. Art. 1, § 8, cl. 1; U.S.C.A. Const.Amend. 11.

[8] Civil Rights 78 ⚷1021

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1021 k. Physical Access and Mobility; Carriers. Most Cited Cases
When ADA claims are directed at architectural barriers, plaintiff's rights and remedies are exactly same as those provided under Rehabilitation Act. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 201 et seq., 42 U.S.C.A. § 12131 et seq.

[9] Schools 345 ⚷155.5(4)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(4) k. Evidence. Most Cited Cases
Evidence supported administrative determination that high school campus was accessible to wheelchair-bound, developmentally disabled student, and thus that he had received free and appropriate public education (FAPE), as required by Individuals with Disabilities Education Act (IDEA). Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[10] Judgment 228 ⚷715(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k715 Identity of Issues, in General
228k715(1) k. In General. Most Cited Cases

Judgment 228 ⚷720

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k716 Matters in Issue
228k720 k. Matters Actually Litigated and Determined. Most Cited Cases

Judgment 228 ⚷724

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k723 Essentials of Adjudication
228k724 k. In General. Most Cited Cases
"Issue preclusion," or collateral estoppel, is appropriate when: (1) identical issue was previously adjudicated; (2) issue was actually litigated; and (3) previous determination was necessary to decision.

[11] Judgment 228 ⚷715(3)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k715 Identity of Issues, in General
228k715(3) k. What Constitutes Diversity of Issues. Most Cited Cases
Fact issues in two proceedings are not same, for collateral estoppel purposes, if legal standards governing their resolution are significantly different.

[12] Judgment 228 ⚷715(2)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k715 Identity of Issues, in General
228k715(2) k. What Constitutes Identity of Issues. Most Cited Cases
Prior determination that high school campus was sufficiently accessible to wheelchair-bound, developmentally disabled student to satisfy IDEA requirement that he receive free and appropriate public education (FAPE) collaterally estopped student from claiming violations of either ADA or Rehabilitation Act; accessibility standards were same under all three statutes. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 201 et seq., 42 U.S.C.A. § 12131 et seq.

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Claudia Center, Lewis Loy Bossing, The Legal Aid Soc., Employment Law Ctr., San Francisco, CA, for Nat. Ass'n of Protection & Advocacy Systems, Advocacy Ctr., Advocacy Inc., Am. Ass'n of People with Disabilities, Bazelon Ctr. for Mental Health Law, Southern Disability Law Ctr., Western Law Ctr. for Disability Rights, Disability Rights Educ. and Defense Fund and Legal Aid Soc. Employment Law Ctr., Amici Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS and PRADO, Circuit Judges.[FN1]

FN1. Judge Clement recused herself and did not participate in this decision.

W. EUGENE DAVIS and WIENER, Circuit Judges: Travis Pace (Pace) appeals the district court's dismissal of his claim under the Individuals with Disabilities Education Act (IDEA) and the district court's order granting summary judgment in favor of defendants on Pace's claims under Title II of the Americans with Disabilities Act (ADA or Title II) and § 504 of the Rehabilitation Act (§ 504). The panel of this court which considered Pace's appeal concluded that the State of Louisiana, the Louisiana Department of Education and the Louisiana State Board of Elementary and Secondary Education (State Defendants) were entitled to sovereign immunity under the Eleventh Amendment from all of Pace's claims. The panel then affirmed the district court's dismissal of Pace's claims against the Bogalusa City School Board. We took this case en banc, first to consider whether the state defendants were entitled to immunity from Pace's claims under the Eleventh Amendment and, second, to consider the merits of Pace's claims under the IDEA, ADA and § 504. For the reasons discussed below, we now conclude that the State waived its right to immunity under the Eleventh Amendment and therefore the State defendants are not entitled to immunity from Pace's § 504 and IDEA claims. On the merits, we conclude that the district court did not err in dismissing Pace's IDEA claims and that the district court correctly concluded that the dismissal of Pace's IDEA claims precluded his inaccessibility ***275** claims under the ADA and § 504. We reject Pace's argument that because different legal standards control his inaccessibility claims under ADA/504, those claims were not litigated in his IDEA action. A 1997 amendment and implementing regulations to the IDEA expressly require schools to comply with the identical standards for new construction that ADA/504 and their regulations require.

I. FACTUAL AND LEGAL BACKGROUND

The factual and procedural background of this case is accurately and succinctly presented in the panel opinion:

In 1994, at the age of fifteen, Travis Pace (Pace) was enrolled at Bogalusa High School. He is developmentally delayed, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In July 1997, Pace's mother requested a due process hearing under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., as she believed that Pace was denied a "free appropriate public education" (FAPE) due to a lack of handicap accessible facilities at Bogalusa High School and deficiencies in Pace's "individualized education programs" (IEPs). The hearing officer found that the Bogalusa City Schools System[FN2] provided Pace with a FAPE in compliance with the IDEA, and the State Level Review Panel (SLRP) affirmed the hearing officer's decision.

FN2. The hearing examiner made hearings with regard to the Bogalusa City Schools System. In federal court, Pace brought suit against the Bogalusa City School Board. For all practical purposes, these two entities are the same and will be referred to as "BCSB."

In September 1997, Pace filed a complaint with the Office for Civil Rights of the Department of Education (OCR), alleging violations of § 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. The OCR and BCSB resolved allegations that the BCSB operated services, programs, and activities that were physically inaccessible to or unusable by individuals with disabilities by entering into a voluntary written agreement under which the BCSB would identify accessibility barriers and the OCR would oversee the development of a compliance plan.

In March 1999, Pace filed suit in federal district court, seeking damages and injunctive relief against the BCSB, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of the IDEA, the ADA, § 504 of the Rehabilitation Act, 42 U.S.C. § 1983, and various state statutes.[FN3] The district court bifurcated Pace's IDEA and non-IDEA claims. In separate orders, it affirmed the SLRP decision by dismissing Pace's IDEA claims, then granted the defendants' motions for summary judgment on Pace's non-IDEA claims. Pace appeals both decisions.

FN3. We do not consider Pace's § 1983 claim and state law claims because he did not brief them on appeal. *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir.1994); F.R.A.P. 28(a)(9)(A).

II. STATE IMMUNITY UNDER THE ELEVENTH AMENDMENT

We consider first the defendants' arguments that they are entitled to sovereign immunity from Pace's claims under the Eleventh Amendment. At the core of this Eleventh Amendment dispute is the question whether, when Louisiana accepted *276 particular federal funds, it waived the immunity afforded it by the Eleventh Amendment to suits under § 504 and the IDEA.[FN4]

FN4. The waiver argument does not apply to Title II because the ADA does not condition the receipt of federal funds on compliance with the Act or waiver of Eleventh Amendment immunity. Rather, Title II applies to public entities regardless of whether they receive federal funds. *See* 42 U.S.C. § 12132.

A. THE TEXT AND FUNCTION OF THE ELEVENTH AMENDMENT

We start, as always, with the text. The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[FN5]

FN5. U.S. CONST. amend. XI.

These forty-three words-adopted in swift response to the Supreme Court's holding in *Chisholm v. Georgia*[FN6] that Article III permitted a state to be sued in federal court[FN7]-protect states from such litigation.[FN8] The protection thus afforded, however, has long since been expanded beyond the plain text of the Amendment. "Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state," the Supreme Court's interpretation of the Amendment has "recognized that the Eleventh Amendment accomplished much more."[FN9] The immunity afforded to states under the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the States."[FN10] Therefore, at its core, the Eleventh Amendment serves "as an essential component of our constitutional structure."[FN11]

FN6. 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793).

FN7. *See United States ex rel. Foulds v.*

Texas Tech Univ., 171 F.3d 279, 286 n. 9 (5th Cir.1999) ("The Supreme Court's interpretation of Article III powers in *Chisholm*, prompted Congress' 'outraged reversal' of that decision through enactment of the Eleventh Amendment.") (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 99 (1985)).

FN8. For present purposes, we ignore any role the Eleventh Amendment plays in regulating whether states may be sued in state courts.

FN9. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).

FN10. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

FN11. *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989).

Nevertheless, Eleventh Amendment immunity is not absolute. A number of different circumstances may lead to a state's litigating in federal court absent Eleventh Amendment immunity. We begin with an overview of the Court's current framework for assessing when a suit against a state may proceed in federal court.

B. EXCEPTIONS TO ELEVENTH AMENDMENT IMMUNITY

There are two fundamental exceptions to the general rule that bars an action in federal court filed by an individual against a state. First, a state's Eleventh Amendment immunity may be *abrogated* when Congress acts under § 5, the Enforcement Clause of the Fourteenth Amendment.[FN12] *277 Second, a state may *consent* to suit in federal court.[FN13]

FN12. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

FN13. The term "abrogation" is not synonymous with "consent" or "waiver." When a state consents to suit or waives its Eleventh Amendment immunity, it knowingly and voluntarily forfeits the immunity's protections. In contrast, when Congress acts under its Fourteenth Amendment power to *abrogate*, the state has no choice.

1. Abrogation under § 5 of the Fourteenth Amendment

[1] Congress can single-handedly strip the states of their Eleventh Amendment immunity and thereby authorize federal court suits by individuals against the states. When Congress does this, it is exercising its power to abrogate Eleventh Amendment immunity. In *Reickenbacker v. Foster*,[FN14] we examined the Supreme Court's cases concerning congressional abrogation of Eleventh Amendment immunity under § 5 of the Fourteenth Amendment and derived the following test for determining whether a federal statute is a valid exercise of Congress's power to enforce the Fourteenth Amendment and, consequently, whether the statute abrogates Eleventh Amendment immunity: (1) The statute must contain an unequivocal statement of congressional intent to abrogate; (2) Congress must have identified a history and pattern of unconstitutional action by the states; and (3) the rights and remedies created by the statute must be congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent.[FN15] If these three requirements are satisfied, states are subject to federal jurisdiction in suits under the statute adopted pursuant to § 5, regardless of any absence of consent.

FN14. 274 F.3d 974 (5th Cir.2001). The continuing validity of *Reickenbacker* following the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), is uncertain. At the very least, its holding has been overruled as to Title II claims implicating a person's fundamental right of access to the courts. In addition, after *Lane* we do not look solely at the state level for a history and

pattern of unconstitutional action; we also examine discrimination by nonstate government entities. Lane, 124 S.Ct. at 1991 n. 16.

FN15. *Id.* at 977, 981-83.

2. *Waiver of Immunity by Consent*

[2] Either in the absence of § 5 abrogation or in addition to it, a state always has the prerogative of foregoing its protection from federal court jurisdiction under the Eleventh Amendment.[FN16] A state's consent to suit must be both *knowing* and *voluntary*. That consent must always be "knowing and voluntary" follows from *College Savings Bank*, in which the Supreme Court cited *Johnson v. Zerbst*, to define what constitutes effective waiver.[FN17] Waiver is effective when it is the "intentional relinquishment or abandonment of a known right or privilege."[FN18] The first part, ***278** "intentional relinquishment," captures the principle of *voluntariness;* and the second part, "known right or privilege," captures the element of *knowingness*.

FN16. *College Savings Bank*, 527 U.S. at 670, 119 S.Ct. 2219; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) ("[A] State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it."); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121 (1944) ("The immunity may, of course, be waived."); *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.").

FN17. 527 U.S. at 682, 119 S.Ct. 2219 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

FN18. *Id.* (quoting *Zerbst*, 304 U.S. at 464, 58 S.Ct. 1019)

When Congress conditions the availability of federal funds on a state's waiver of its Eleventh Amendment immunity, we employ a five-prong test derived from the Supreme Court's definitive spending power case, *South Dakota v. Dole*,[FN19] to ascertain the validity of the waiver. In *Dole*, South Dakota challenged a congressional statute that conditions the states' receipt of federal highway funds on their adoption of the minimum drinking age of twenty-one. South Dakota argued that the statute exceeded Congress's spending power and violated the Twenty-First Amendment.[FN20] The Court rejected this argument, noting that even though Congress is prohibited by the Twenty-First Amendment from directly regulating the distribution of alcoholic beverages, the Spending Clause authorizes it indirectly to entice states to raise their drinking age by dangling the proverbial carrot of federal dollars.[FN21]

FN19. 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

FN20. *Id.* at 205, 107 S.Ct. 2793.

FN21. *Id.* at 206, 107 S.Ct. 2793. *See also New York v. United States*, 505 U.S. 144, 161-69, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (holding that although the Tenth Amendment prevents Congress from directly commandeering state officials into regulating radioactive waste, Congress can "hold out incentives to the States as a method of influencing a State's policy choices").

Dole embodies an expansive interpretation of Congress's spending authority. Indirect persuasion is constitutional, reasoned the Court, because the spending power "is not limited by the direct grants of legislative power found in the Constitution."[FN22] Congress can, therefore, validly use its spending power to legislate conditions on the disbursement of federal funds *even though* those conditions would be unconstitutional if enacted as direct prohibitions.[FN23] It goes without saying that, because states have the independent power to lay and collect taxes, they retain the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds.

FN22. *Dole*, 483 U.S. at 207, 107 S.Ct. 2793

(quoting United States v. Butler, 297 U.S. 1, 66, 56 S.Ct. 312, 80 L.Ed. 477 (1936)). *See also* United States v. Lipscomb, 299 F.3d 303, 319 (5th Cir.2002) ("Congress's spending power, like its power to tax, is 'to provide for the general welfare,' and is therefore untrammeled by the specific grants of legislative power found elsewhere in Article I, Section 8.") (citation omitted).

FN23. *See* Dole, 483 U.S. at 206-07, 107 S.Ct. 2793; United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.").

[3] Nevertheless, Congress's power to effect policy through the exercise of its spending power is not unlimited. *Dole* announced the restrictions that control such exercise: (1) Federal expenditures must benefit the general welfare; (2) The conditions imposed on the recipients must be unambiguous; (3) The conditions must be reasonably related to the purpose of the expenditure; and (4) No condition may violate any independent constitutional prohibition.[FN24] In addition, the *Dole* Court recognized a fifth requirement that the condition not be coercive: "[I]n some circumstances the financial inducement offered by Congress might be so coercive as ***279** to pass the point at which 'pressure turns into compulsion.' "[FN25]

FN24. *Id.* at 207-08, 107 S.Ct. 2793. *See also* New York, 505 U.S. at 171-72, 112 S.Ct. 2408.

FN25. 483 U.S. at 211, 107 S.Ct. 2793 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)).

Thus, *Dole* makes clear that, as long as its framework is employed, congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive. When the condition requires a state to waive its Eleventh Amendment immunity, *Dole*'s requirement of an unambiguous statement of the condition and its proscription on coercive inducements serve a dual role because they ensure compliance with *College Savings Bank*'s requirement that waiver of Eleventh Amendment immunity must be (a) knowing and (b) voluntary.

i. Clear Statement: "Knowing"

In *Pennhurst State Sch. & Hosp. v. Halderman*,[FN26] the Court analyzed Congress's power to impose conditions on a state's receipt of federal funds and pronounced:

FN26. 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously .... *By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly,* cognizant of the consequences of their participation.[FN27]

FN27. *Id.* at 17, 101 S.Ct. 1531 (emphasis added) (citations omitted).

Thus, we know that this stringent clear-statement rule ensures that when a state foregoes its Eleventh Amendment immunity in exchange for federal funds, it does so "knowingly."[FN28] In our reading of *Pennhurst*, the only "knowledge" that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, *not* a state's knowledge that it has immunity that it could assert. At bottom, we conclude that if Congress satisfies the clear-statement rule, the knowledge prong of the Spending Clause waiver analysis is fulfilled.

FN28. *See also* Dole, 483 U.S. at 207, 107 S.Ct. 2793.

ii. Non-Coercive: "Voluntary"

If the clear-statement rule is satisfied, a state's actual acceptance of clearly conditioned funds is generally

voluntary. The only exception to this presumption arises if the spending program itself is deemed "coercive," for then a state's waiver is, by definition, no longer voluntary.

[4] In summary, the Supreme Court has articulated two ways that a state can be subject to an individual's suit in federal court, regardless of the Eleventh Amendment. First, Congress may abrogate state immunity. Second, the state may waive its Eleventh Amendment immunity by consent. If waiver results from participation in a Spending Clause program, the program must be a valid exercise of Congress's spending power; the waiver condition must satisfy the clear-statement rule (thereby ensuring that the state's waiver is "knowing"); and the program must be non-coercive (automatically establishing that the waiver is "voluntary").

*280 C. WAIVER OF ELEVENTH AMENDMENT IMMUNITY PURSUANT TO CONDITIONAL SPENDING PROGRAMS

[5] Keeping firmly in mind the Court's current framework for analyzing when a state may be subject to suit in federal court, we turn to the particular facts and legal contentions of the instant case. The two statutory provisions at issue purport to have conditioned Louisiana's receipt of federal funds on its waiver of Eleventh Amendment immunity to suits under § 504 and the IDEA. Specifically, 42 U.S.C. § 2000d-7 conditions a state's receipt of federal money on its waiver of Eleventh Amendment immunity to actions under § 504 and other federal anti-discrimination statutes:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[FN29]

FN29. 42 U.S.C. § 2000d-7(a)(1). Congress enacted § 2000d-7 in response to *Atascadero,* in which the Court held that the Rehabilitation Act neither abrogated Eleventh Amendment immunity nor effectively conditioned states' receipt of federal funds on a waiver of that immunity. *Atascadero,* 473 U.S. at 245-47, 105 S.Ct. 3142. According to the Court, the statute did not contain a clear statement of congressional intent either to abrogate or to require a waiver. *Id.*

Similarly, 20 U.S.C. § 1403[FN30] conditions a state's receipt of federal IDEA funds on its consent to suit under that Act.[FN31] Applying the framework set forth in *Dole,* we proceed to determine whether Louisiana validly waived its immunity when it accepted the conditioned federal dollars.

FN30. 20 U.S.C. § 1403(a) reads as follows: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."

FN31. The section was passed by Congress in response to *Dellmuth v. Muth,* 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). In *Dellmuth,* the Supreme Court held that the predecessor to the IDEA (the Education of the Handicapped Act) lacked a sufficiently clear statement of Congressional intent to abrogate Eleventh Amendment immunity to claims under the statute. *Id.* at 232., 109 S.Ct. 2397 The conditional-spending issue was not raised in the case.

Louisiana does not dispute that the first and third prongs of the *Dole* analysis, i.e., whether the Spending Clause statute at issue was enacted in pursuit of the general welfare, and whether the condition is sufficiently related to the federal interest in the program funded,[FN32] are satisfied here. Consequently, we restrict our consideration to the three remaining prongs of the *Dole* test. Following prior panels of this court,[FN33] and every circuit (but one) that has made these inquiries, we conclude that the *281 statutes at issue validly conditioned Louisiana's receipt of these federal funds on its waiver of Eleventh Amendment immunity.[FN34]

FN32. In its en banc brief, Louisiana mentioned a relatedness challenge to § 2000d-7, but that argument was not presented to the panel, and Louisiana's en

banc brief fails to develop it beyond a bare assertion. Thus, Louisiana has waived its relatedness challenge. *See* L & A Contracting Co. v. S. Concrete Servs., Inc., 17 F.3d 106, 113 (5th Cir.1994); FED. R.APP. P. 28(a)(9)(A); *cf.* Koslow v. Pennsylvania, 302 F.3d 161, 175-76 (3d Cir.2002) (rejecting a relatedness challenge to the validity of a state's conditional-spending waiver of immunity to § 504 suits).

FN33. *E.g.*, Pederson v. Louisiana State Univ., 213 F.3d 858, 876 (5th Cir.2000) ("A state may waive its immunity by voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity.") (citation and quotation marks omitted); *id.* at 875 (holding that "in enacting § 2000d-7 Congress permissibly conditioned a state university's receipt of [federal] funds on an unambiguous waiver of the university's Eleventh Amendment immunity, and that, *in accepting such funding, the university has consented to litigate private suits in federal court.*") (internal punctuation and citation omitted) (emphasis added). *Cf.* AT&T Comm. v. BellSouth Telecom, Inc., 238 F.3d 636, 645 (5th Cir.), *reh'g en banc denied*,252 F.3d 437 (2001) ("[A]fter *College Savings*, Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity.").

FN34. Eight circuits have reached this conclusion in § 504 cases. *See* Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 129-30 (1st Cir.2003); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 244-51 (3d Cir.2003); Bruggeman v. Blagojevich, 324 F.3d 906, 912 (7th Cir.2003); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292-93 (11th Cir.2003) (per curiam); Lovell v. Chandler, 303 F.3d 1039, 1051-52 (9th Cir.2002); Koslow, 302 F.3d at 172; Robinson v. Kansas, 295 F.3d 1183, 1189-90 (10th Cir.2002); Nihiser v. Ohio E.P.A., 269 F.3d 626, 628 (6th Cir.2001); Jim C. v. Arkansas Dep't of Educ., 235 F.3d 1079, 1081 (8th Cir.2000) (en banc); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir.2000). Other courts of appeals have reached the same conclusion for the other predicate statutes of § 2000d-7. *See, e.g.*, Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 553-55 (7th Cir.2001) (Title IX); Sandoval v. Hagan, 197 F.3d 484 (11th Cir.1999) (Title VI), *rev'd in part on other grounds*,532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); Litman v. George Mason Univ., 186 F.3d 544 (4th Cir.1999) (Title IX). Circuits have reached this conclusion about the IDEA, as well. *See, e.g.*, M.A. ex rel. E.S. v. State-Operated School Dist., 344 F.3d 335, 351 (3d Cir.2003); Oak Park Bd. of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir.2000).

First, we determine whether the conditions contained in 42 U.S.C. § 2000d-7 and 20 U.S.C. § 1403 are unambiguous and, consequently, whether Louisiana knowingly waived its immunity to actions under § 504 and the IDEA by accepting federal funds.

1. Is the Clear-Statement Rule Satisfied Absent Use of the Words "Waiver" or "Condition"?

In the face of the unequivocal language of § 2000d-7 to the effect that "[a] state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of § 504 of the Rehabilitation Act of 1973,"[FN35] Louisiana argues legalistically that, because Congress did not use the words "waiver" or "condition," the condition fails the clear-statement rule.[FN36] This argument-that absent talismanic incantations of magic words, there can be no waiver-is little more than frivolous.[FN37] The Supreme Court has already noted, albeit in dicta, that in § 2000d-7"Congress sought to provide the sort of unequivocal waiver that our precedents demand."[FN38] More importantly, our decision in *Pederson v. Louisiana State University*, ***282** which we remain convinced was correctly decided, forecloses this line of attack.[FN39]

FN35. 42 U.S.C. § 2000d-7 (2000).

FN36. In its amicus brief, the State of Texas points to other statutes that have used such terms.

FN37. *Cf. Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

FN38. *Lane v. Pena*, 518 U.S. 187, 198, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). *See also id.* at 200, 116 S.Ct. 2092 (noting "the care with which Congress responded to ...*Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity").

FN39. 213 F.3d at 875-76 (adopting the holding and reasoning of *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir.1999)).

2.. Does the Presence of Abrogation Language Preclude a Finding of Waiver?

Louisiana also argues that because § 2000d-7 and § 1403 fail as § 5 attempts by Congress to *abrogate* Eleventh Amendment immunity, the same provisions of those statutes cannot satisfy the clear-statement rule for Spending Clause purposes. We reject Louisiana's attempt to pigeonhole this statutory language in mutually exclusive terms.

We held in *Pederson* that, in § 2000d-7, Congress "successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity."[FN40] And in *Lesage v. Texas*,[FN41] we ruled that "Congress unquestionably enacted 42 U.S.C. § 2000d-7 with the 'intent' to invoke the Fourteenth Amendment's congressional enforcement power. The purpose of the provision, enacted in 1986, was to legislatively overrule the result in *Atascadero*."[FN42] Thus, in *Pederson*, we recognized § 2000d-7 as a clear statement for *waiver* vis-à-vis the Spending Clause, and in *Lesage*, we recognized that the very same provision could satisfy *abrogation* under § 5 of the Fourteenth Amendment.

FN40. 213 F.3d at 876.

FN41. 158 F.3d 213 (5th Cir.1998), *overruled on other grounds*, 528 U.S. 18, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999).

FN42. *Id.* at 218. *See also United States v. Wells*, 519 U.S. 482, 495, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (reiterating the baseline presumption that Congress expects its statutes to be read in conformity with the Supreme Court's precedents).

Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule. As we concluded in *AT&T*, the rule requires only that "the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to federal court suits brought by individuals."[FN43] Congress need not declare in the statute whether it is proceeding under abrogation or waiver, or both. For the purpose of the clear-statement rule, § 2000d-7-janus-faced as it may be-poses no constitutional impediment to our finding valid waiver by consent. We conclude that the conditions contained in § 2000d-7 and § 1403 are unambiguous, as required by *Dole*.

FN43. 238 F.3d at 644.

Undaunted, Louisiana still contends that it did not knowingly waive its Eleventh Amendment immunity. Louisiana and the dissent rely on *Garcia v. S.U.N.Y. Health Sciences Ctr.*,[FN44] which looked to the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*[FN45] to justify departing from the heavy weight of authority supporting waiver based on the clarity of the language in § 2000d-7. *Garrett* examined whether, in Title I of the ADA, Congress could constitutionally abrogate the states' Eleventh Amendment immunity.[FN46] The *Garrett* Court concluded that Title I of the ADA ***283** was outside the scope of valid § 5 legislation; therefore, Congress's attempt at abrogation failed, and private suits against states in federal court were barred by the Eleventh

Amendment.[FN47]

FN44. 280 F.3d 98 (2d Cir.2001).

FN45. 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

FN46. *See id.* at 365-74, 121 S.Ct. 955.

FN47. *Id.* at 374, 121 S.Ct. 955.

The lawsuits in *Garcia* involved disputes that arose between September 1993 and August 1995.[FN48] During that pre-*Garrett* period, it was universally accepted that the ADA validly abrogated Eleventh Amendment immunity. Rather than looking at the clear-statement rule and the state's acceptance of funds, *Garcia* analyzed whether a state would have realized-"known"-that it was abandoning its Eleventh Amendment immunity by accepting federal funds during the period of time applicable to the lawsuits at issue there (and here).[FN49] The *Garcia* court noted that, during the relevant period, "Title II of the ADA was reasonably understood to abrogate [the state's] sovereign immunity under Congress's Commerce Clause authority."[FN50] The court also pointed out that the requirements of Title II and § 504 are "virtually identical."[FN51] Therefore, concluded the court, because the state defendant thought that it could be sued under Title II, it had nothing to lose by accepting federal funds and redundantly waiving immunity to § 504 suits in the process.[FN52]

FN48. *Garcia*, 280 F.3d at 114 n. 4.

FN49. *Id.* at 114.

FN50. *Id.*

FN51. *Id.*

FN52. *Id.*

Louisiana and the dissent maintain that we should follow the panel and apply the "logic" of *Garcia* to the instant case. First, Louisiana contends that, because it "believed" that the Rehabilitation Act had already abrogated its Eleventh Amendment immunity, it "did not and could not know that [it] retained any sovereign immunity to waive by accepting conditioned federal funds."[FN53] Likewise, Louisiana asks us to conclude that § 1403 was an unsuccessful attempt at abrogation; therefore, maintains Louisiana, it could not have "knowingly" waived its immunity under the IDEA when it accepted federal IDEA funds.

FN53. *Pace*, 325 F.3d at 616.

Even though it found that the statutory provisions at issue are unambiguous, [FN54] the panel nevertheless concluded that Louisiana's purported waivers of Eleventh Amendment immunity are invalid because they were not knowing. The panel drew support from the holding in *Garcia*, but its reasoning differed slightly from the Second Circuit's. According to the panel opinion, "[b]elieving that [the Rehabilitation Act and the IDEA] validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds."[FN55]

FN54. *Id.* at 615.

FN55. *Id.* at 616.

The fatal flaw with that syllogism lies in the fact that neither the mandates of the Rehabilitation Act nor the requirements of the IDEA apply to a state agency that has not received either some federal funding (in the case of the Rehabilitation Act) or federal IDEA dollars (in the case of the IDEA).[FN56] Therefore, it is impossible for ***284** Congress to have "abrogated" a state's immunity to § 504 or IDEA suits if the relevant state agency did not receive federal funds during the time period in which it was alleged to have violated an individual's statutory rights. It follows indisputably that Louisiana's Eleventh Amendment immunity to § 504 and IDEA claims was intact before the state accepted federal funds. Thus, Louisiana *did have* Eleventh Amendment immunity to waive by accepting the clearly conditioned federal funds.

FN56. *See* 29 U.S.C. § 794(a) (prohibiting discrimination against the disabled through "any program or activity receiving Federal financial assistance"); 20 U.S.C. §§ 1412, 1415 (conditioning state agencies' receipt of federal funds on compliance with the requirements of the IDEA).

The dissent nevertheless insists that, during the time that § 504 and the IDEA were thought to abrogate Eleventh Amendment immunity, Louisiana could have believed that it lacked immunity to § 504 and IDEA suits even before it received federal funds under those statutes.[FN57] This ignores the conditional-spending nature of the Rehabilitation Act and the IDEA. The Acts' substantive provisions regulate *only* state agencies that have accepted the relevant federal funds. Thus, it makes no sense to say that the State was subject to private actions for damages under § 504 and the IDEA *before* the substantive provisions of those statutes applied to it. Contrary to the dissent's accusation,[FN58] we do not confuse the doctrines of abrogation and waiver; rather, we point out that-even before *Garrett*-Louisiana could have avoided suits under § 504 and the IDEA altogether by declining federal funding. Louisiana clearly had Eleventh Amendment immunity to waive at the time that it accepted the federal funds and expressly obligated itself to comply with the dictates of the Rehabilitation Act and the IDEA.

FN57. *Post* at 301 ("[T]he State acted quite rationally in assuming between 1996 and 1998 that it had no sovereign immunity to waive when it accepted federal education funds under conditions specified by § 504 and IDEA.").

FN58. *Post* at 301 & n.7.

Further, during the relevant time period, §§ 2000d-7 and 1403 put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity. Under *Dole*, if the clear-statement requirement is met, the state is conclusively presumed to have "known" that receipt of clearly conditioned federal funds requires the state to abide by the condition (i.e., waiver of Eleventh Amendment immunity).

In addition, the *Garcia* approach is problematic for a number of reasons, the most fundamental of which is that, by focusing its inquiry on what the state could have believed, the Second Circuit engrafted a subjective-intent element onto the otherwise objective Spending Clause waiver inquiry. In other words, *Garcia*'s approach employs the wrong jurisprudential test, because it distorts what is necessary to show knowledge for Spending Clause waivers. Analytically, the "knowledge" question that we ask when we undertake the Spending Clause waiver inquiry is coextensive with the clear-statement rule; for, when a state *actually* accepts funds that are clearly conditioned on a waiver of Eleventh Amendment immunity, it is held objectively to "know" that it is accepting *all* clearly stated conditions. That it might not "know" subjectively whether it had any immunity to waive by agreeing to those conditions is wholly irrelevant.

The dissent asserts that, by focusing on the clear-statement requirement, we have disregarded *College Savings Bank*'s "clear declaration" requirement. But *College Savings Bank* was not a conditional-spending case. There, the Court invalidated "constructive waivers" of Eleventh Amendment*285 immunity "based upon the State's mere presence in a field subject to congressional regulation."[FN59] Such a constructive waiver is a far cry from a state's acceptance of federal funds that are explicitly conditioned on its waiver of Eleventh Amendment immunity. In fact, the *College Savings Bank* opinion expressly distinguished conditional-spending waivers of Eleventh Amendment immunity, which it said were "fundamentally different from" illegitimate constructive waivers.[FN60] Nothing in *College Savings Bank* indicates that, when the clear-statement requirement is met, a state can be said to lack knowledge that by accepting federal funds it waives its Eleventh Amendment immunity.

FN59. *College Savings Bank*, 527 U.S. at 680, 119 S.Ct. 2219.

FN60. *Id.* at 686, 119 S.Ct. 2219.

In sum, *Garcia* and the dissent would subjugate the bright-line of objective reasoning to the slippery slope of assessing a state's subjective belief.[FN61] If, like the panel, we were to follow that approach, we would be getting into the business of looking past the straightforward objective facts, i.e., (1) the clear statement requiring waiver and (2) the state's actual, uncoerced acceptance of federal funds, in an attempt to fathom what was in a state's "head," a precarious exercise indeed. The clear-statement rule guards against post hoc questions about intent.

FN61. *See* Lapides v. Bd. of Regents, 535 U.S. 613, 621, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear.").

Accordingly, we hold that Louisiana's waiver of Eleventh Amendment immunity to actions under § 504 and the IDEA was knowing.[FN62] Still, we must determine whether an independent constitutional bar prevents Congress from conditioning the receipt of federal funds on a state's waiver of Eleventh Amendment immunity.

FN62. Since the *Pace* panel opinion was issued, five circuits have expressly rejected its approach, which the dissent continues to advocate. *See* Nieves-Marquez, 353 F.3d at 129-30 (First Circuit); *A.W.*, 341 F.3d at 244-52 (Third Circuit); *Shepard v. Irving*, 77 Fed.Appx. 615, 619 n. 2 (4th Cir.2003) (unpublished); *Doe v. Nebraska*, 345 F.3d 593, 600-604 (8th Cir.2003); *Garrett*, 344 F.3d at 1292-93 (Eleventh Circuit). *See also* Koslow, 302 F.3d at 172 n. 12 (explaining that "the 'clear intent to condition participation in the programs funded,' required by *Atascadero*, 473 U.S. at 247, 105 S.Ct. 3142, ensured the Commonwealth of Pennsylvania knew that by accepting certain funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities").

3. Can Congress Condition Waiver of Eleventh Amendment Immunity When It Exercises its Spending Power?

[6] Louisiana challenges Congress's power under the Spending Clause to condition receipt of federal education funds on a state's waiver of Eleventh Amendment immunity. This position is frivolous. We have consistently interpreted Supreme Court guidance as permitting such conditional spending programs, as has every other circuit that has squarely addressed the issue.[FN63] We do not change course today.

FN63. *See, e.g.*, *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir.2001); *Garcia*, 280 F.3d at 113; *Koslow*, 302 F.3d at 172; *Pederson*, 213 F.3d at 875-76; *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir.2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir.2000); *Jim C.*, 235 F.3d at 1081; *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 819, as amended, 271 F.3d 910 (9th Cir.2001); *Robinson*, 295 F.3d at 1189-90; *Sandoval*, 197 F.3d at 493.

***286** *4. Is Conditioning Acceptance of Federal Funds a Violation of the Unconstitutional-Conditions Doctrine?*

[7] Louisiana also attempts to invoke the "unconstitutional-conditions doctrine" to challenge Congress's ability to condition the acceptance of federal funds on waiver of Eleventh Amendment immunity. In the most general sense, the unconstitutional-conditions doctrine examines the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles.[FN64] For at least two reasons, Louisiana's reliance on the unconstitutional-conditions doctrine is misplaced.

FN64. *See* Frost v. Railroad Com. of Cal., 271 U.S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed. 1101 (1926) ("[T]he state ... may not impose conditions which require the relinquishment of constitutional rights.... It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

First, as evidenced by the dearth of cases employing it in this context, [FN65] the unconstitutional-conditions doctrine is most meaningful when the government imposes a condition of questionable constitutional character on an individual right. But here, federal and state sovereigns are on opposite sides of the controversy, and the constitutional "right" at issue is structural rather than personal. Consequently, for the reasons announced in the Third Circuit's analysis in *Koslow v. Commonwealth of Pennsylvania*, the doctrine is inapplicable. The *Koslow* court considered whether the Rehabilitation Act, including § 2000d-7, imposed an unconstitutional condition on Pennsylvania's receipt of federal funds. In refusing to

apply the unconstitutional-conditions doctrine to the conditioning of federal funds on the waiver of Eleventh Amendment immunity, the Third Circuit stated:

> FN65. The only Supreme Court decision that has come close was *United States v. Butler*. In that 1936 decision, the Court invalidated provisions of the Agricultural Adjustment Act of 1933, which paid farmers to reduce their production of crops. 297 U.S. at 74-78, 56 S.Ct. 312. As the Tenth Circuit has explained, though, "that case relied on an overly narrow view of Congress' enumerated powers to determine that Congress had overstepped its authority." *Kansas v. United States*, 214 F.3d 1196, 1201 n. 6 (10th Cir.2000) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-b, at 836 (3d ed. 2000) ("[T]he Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power.")). *Accord Lipscomb*, 299 F.3d at 319 (noting that the Supreme Court "quickly abandoned" the view espoused in *Butler*).

[T]he Supreme Court has not yet applied the "unconstitutional conditions" doctrine to cases between two sovereigns. Unlike private persons, states have the resources to serve their citizens even if the federal government, through economic incentives, encourages a particular result. A state's political powers-not the least of which is the power to levy taxes on its citizens-help ensure the federal government does not "coerce" the state through economic "encouragement." An individual citizen, in contrast, lacks these formidable institutional resources.[FN66]

> FN66. 302 F.3d at 174 (citing *Frost & Frost*, 271 U.S. at 593, 46 S.Ct. 605; *New York*, 505 U.S. at 171-72, 112 S.Ct. 2408; *Dole*, 483 U.S. at 210-11, 107 S.Ct. 2793).

We embrace that reasoning.

Second, the unconstitutional-conditions doctrine, even when applied piecemeal by the Supreme Court, is anchored at least in part in a theory of coercion or compulsion.[FN67] In this context, that concern is *287 subsumed in the non-coercion prong of the *Dole* test.[FN68] In other words, in the Spending Clause context, any role that the unconstitutional-conditions doctrine might have in cabining Congress's authority to give funds in exchange for waiving immunity is already part-and-parcel of the standard Spending Clause analysis. Thus, no independent constitutional bar invalidates Louisiana's waiver of Eleventh Amendment immunity.

> FN67. *See id.* ("The 'unconstitutional conditions' doctrine is based on the proposition that government incentives may be inherently coercive."). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L.REV.. 1415, 1428-55 (1989).

> FN68. *See supra* text accompanying note 24.

5. Are These Programs Coercive?

In light of *Dole*, we must determine whether the conditional-spending schemes at issue are unduly coercive. We hold that they are not. A state can prevent suits against a particular agency under § 504 by declining federal funds for that agency.[FN69] A state can avoid suit under the IDEA merely by refusing IDEA funds. And, to do so in either case, the state would not have to refuse all federal assistance.[FN70] Moreover, no circuit has accepted a coercion challenge to either the Rehabilitation Act or the IDEA.[FN71] Therefore, we refuse to invalidate Louisiana's waiver on coercion grounds.

> FN69. *See* 29 U.S.C. § 794(b)(1).

> FN70. *See* 20 U.S.C. §§ 1411(a)(1), 1412, 1403.

> FN71. *See, e.g.*, *Jim C.*, 235 F.3d at 1082 (rejecting a coercion challenge to the validity of a waiver of state Eleventh Amendment immunity to § 504 claims).

D. ABROGATION OF IMMUNITY

Alternatively, Pace asks this en banc court to rule that Congress-acting under § 5 of the Fourteenth Amendment-in fact abrogated Louisiana's Eleventh

Amendment immunity, leaving Louisiana subject to suit on Pace's ADA, Rehabilitation Act, and IDEA claims. As we hold that Louisiana waived its Eleventh Amendment immunity with respect to the Rehabilitation Act and the IDEA, it is not necessary for us to address Pace's contention that Louisiana's immunity to suit under those statutes was also abrogated. Neither is it necessary for us to consider whether Title II of the ADA abrogates Eleventh Amendment immunity in this case. First, the Supreme Court, in *Tennessee v. Lane,*[FN72] held that Title II abrogates sovereign immunity to the extent that it implicates the accessibility of judicial services, but refused to consider its application to other rights, including those considered to be fundamental under the Constitution.[FN73] Because (1) the Supreme Court has never before recognized access to public education[FN74] or freedom from disability discrimination in education[FN75] to be fundamental rights, and (2) it is unnecessary to address Pace's Title II claims given that its rights and remedies are identical to and duplicative of those provided in § 504, we do not address whether the holding in *Lane* extends to disability discrimination in access to public education.

FN72. 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

FN73. *Id.* at 1993.

FN74. *See Plyler v. Doe,* 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (although important, education is not a fundamental constitutional right).

FN75. *Cf. City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (disability classifications are subject only to rational-basis scrutiny).

[8] Second, when ADA claims are directed at architectural barriers, as they are here, the rights and remedies are exactly the same as those provided under the Rehabilitation Act. This circuit, as well as others, has noted that, because the rights ***288** and remedies under both statutes are the same, case law interpreting one statute can be applied to the other.[FN76] The implementing regulations for § 504 and Title II are, in all material respects, the same. For example, both statutes' implementing regulations prohibit similar types of discrimination.[FN77] In addition, § 504 and Title II's regulations governing new construction and alterations are effectively the same.[FN78] The two statutes are interpreted to provide the same exception: No covered entity is obligated to make a "fundamental alteration" in its programs.[FN79] Finally, the remedies available under § 504 and Title II are one and the same. Specifically, § 203 of Title II states that "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [of the ADA]."[FN80] Section 505(a)(2) of the Rehabilitation Act, in turn, states that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 ... shall be available" for violations of § 504.[FN81] Thus, in *Barnes v. Gorman,*[FN82] the Supreme Court held that "the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI" of the Civil Rights Act.[FN83] For all intents and purposes, therefore, the remedies available to Pace under § 504 and Title II are the same. The sole difference between the statutes lies in their causation requirements.[FN84] This difference ***289** is not implicated, however, where, as here, the challenge is to architectural barriers.

FN76. *See Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.2000) (internal citations omitted) ("The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973, and Congress' intent was that Title II extend the protections of the Rehabilitation Act 'to cover all programs of state or local governments, regardless of the receipt of federal financial assistance' and that it 'work in the same manner as Section 504.' In fact, the statute specifically provides that '[t]he remedies, procedures and rights' available under Section 504 shall be the same as those available under Title II. Jurisprudence interpreting either section is applicable to both."); *Washington v. Indiana High Sch. Athletic Ass'n, Inc.,* 181 F.3d 840, 845 n. 6 (7th Cir.1999) ("Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two

provisions are nearly identical, and precedent under one statute typically applies to the other."); *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir.1998) ("The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and 'cases interpreting either are applicable and interchangeable.' "); *McPherson v. Michigan High Sch. Ath. Ass'n*, 119 F.3d 453, 459-60 (6th Cir.1997) (en banc) (same).

FN77. *Compare*28 C.F.R. § 42.520, *with*28 C.F.R. § 35.149. Similarly, § 504 and Title II's regulations regarding existing facilities are nearly identical. *Compare*28 C.F.R. 42.521(a), *with*28 C.F.R. 35.150(a).

FN78. *Compare*28 C.F.R. 42.522(a), *with*28 C.F.R. 35.151(a).

FN79. *Compare Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1995)(Section 504 does not require covered entities to make fundamental alterations in their programs); *with*28 C.F.R. § 35.150(a)(2)-(3) (Title II does not require public entities to make fundamental alterations in the nature of a program, service, or activity). This requirement, however, does not excuse the failure to make altered or new facilities accessible. *Compare*28 C.F.R. § 35.151(a)-(b), *with*28 C.F.R. § 42.522(a).

FN80. 42 U.S.C. § 12133.

FN81. 29 U.S.C. § 794a(a)(2).

FN82. 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

FN83. *Id.* at 185, 122 S.Ct. 2097.

FN84. *See Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500 (5th Cir.2002).

In conclusion, we hold that for all the foregoing reasons, Louisiana is not entitled to assert sovereign immunity under the Eleventh Amendment in this case. With that issue determined, we proceed to the question of issue preclusion.

III. MERITS

We turn now to the merits of Pace's arguments that the district court erred in denying relief to him under the IDEA, the ADA and § 504.

A. IDEA

[9] We agree with and adopt that portion of the panel opinion affirming the district court's judgment which in turn affirmed the administrative determination that Pace was not entitled to relief under the IDEA.

We pause only to emphasize the somewhat unusual nature of a proceeding under the IDEA. As required by the statute,[FN85] Pace first pursued his administrative claim. He was granted a hearing by a hearing examiner where he had an opportunity to present his evidence demonstrating that the inaccessibility of various portions of the Bogalusa campus prevented him from receiving a free and appropriate public education (FAPE). The hearing examiner, after hearing the evidence and making a personal inspection of the campus, rejected Pace's inaccessibility claims and concluded that the defendants had complied with the IDEA and had provided a FAPE to Pace.[FN86] Pace then challenged the hearing examiner's findings and conclusion in his administrative appeal to the State Level Review Panel (SLRP). The SLRP also rejected Pace's claims and affirmed the hearing examiner in all respects.[FN87]

Pace then filed suit in federal district court as authorized by 20 U.S.C. § 1415(i)(1)(A). A district court in which such an action is filed must receive the record generated by the administrative proceeding and also hear additional evidence presented by the parties.[FN88] The court must then give "due weight" to the hearing officer's finding and make a de novo determination based on a preponderance of the evidence. *Teague Independent School District v. Todd L.*, 999 F.2d 127, 131 (5th Cir.1993). The district court considered all of Pace's claims of inaccessibility that he raised during the administrative proceedings.[FN89] The court considered the administrative record along with the new evidence offered by Pace and gave ***290** "due weight" to the findings of the hearing examiner and SLRP. Ultimately, the district court agreed with the

hearing examiner that Bogalusa High School had provided Pace with a FAPE by complying with the IDEA in all aspects, including that the campus was accessible to the wheelchair-bound Pace. The district court's conclusion is fully supported by the record and we therefore affirm the district court's rejection of Pace's claims under the IDEA.

FN85. *See*20 U.S.C. 1415(*l*).

FN86. The hearing examiner thoroughly reviewed the testimony and physical evidence presented to her and rejected in wholesale fashion Pace's various claims of inaccessibility. R. 94.

FN87. The language used by the SLRP also makes it clear that this review panel found absolutely no merit to Pace's inaccessibility claims. R. 64-65.

FN88. *See*20 U.S.C. § 1415(i)(2)(A) (Any party aggrieved by the findings and decisions ... shall have the right to bring a civil action with respect to the complaint pursuant to this section, which action may be brought ... in a district court of the United States ...).

FN89. Pace sought relief from the district court to remedy the school board's refusal to make the following areas accessible:

· bathroom facilities

· classrooms on the second rather than first floor of the school

· elevator access

· exiting classroom during fire drills

· cafeteria

· school health center

· auditorium

· music room

· insufficient parking spaces

· lack of ramps (accessible entrances)

B. ADA AND SECTION 504

In addition to his IDEA claims, Pace also asserted claims under the ADA and § 504 in his suit. The district court severed the IDEA claims from these non-IDEA claims. After dismissing Pace's IDEA claims, the district court then considered defendants' motion for summary judgment seeking exoneration under § 504 and the ADA. The district court granted the defendants' motion for summary judgment on grounds that the factual bases for the non-IDEA claims were indistinct from the resolved IDEA claims. The district court concluded further that principles of issue preclusion applied to preclude Pace from pursuing his redundant non-IDEA claims. Pace argues that the district court committed legal error in applying principles of issue preclusion to bar his non-IDEA claims.

[10][11] Issue preclusion or collateral estoppel is appropriate when: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision. *See Southmark Corp. v. Coopers & Lybrand (In re: Southmark Corp.)*, 163 F.3d 925, 932 (5th Cir.1999). In *Southmark* we also found that the "relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings." *Id.* (quoting *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir.1995)). Issues of fact are not "identical" or "the same," and therefore not preclusive, if the legal standards governing their resolution are "significantly different."[FN90] Pace argues that the accessibility issues the court litigated under the IDEA were for the limited purpose of determining whether the Bogalusa High School provided Pace with a FAPE under that statute. Thus, Pace contends, because a "significantly different" legal standard applies to his accessibility issues under the ADA and § 504, these latter claims were never litigated and issue preclusion should not apply. We therefore compare the standards of accessibility under the IDEA on the one hand and the ADA and § 504 on the other to determine whether the legal standards are "significantly different."

FN90. *See, e.g.*, 18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE d § 132.02[2][h] (3d ed.2001). Courts have used slightly differing language to express this idea that legal issues are not "identical" for issue preclusion purposes if they are significantly different. *Compare Raytech Corp. v. White*, 54 F.3d 187, 191 (3d Cir.1995) (the differences in the standards must be "substantial") *with Talcott v. Allahabad Bank, Ltd.*, 444 F.2d 451, 460 (5th Cir.1971) (the legal standards are not identical for issue preclusion purposes only when there is a "demonstrable difference" in the legal standards by which the facts are evaluated). For purposes of this appeal, these distinctions are irrelevant.

As indicated above, the IDEA requires states and local educational agencies receiving federal IDEA funds to make a FAPE available to children with certain disabilities between the ages of 3 and 21. The IDEA imposes extensive requirements on schools to safeguard the disabled child's right to a FAPE. 20 U.S.C. §§ 1414, 1415. In determining whether a school has provided a student with a FAPE, the focus is on the Individualized ***291** Education Plan (IEP), a written statement prepared by a team consisting of a representative of the local school district, the disabled child's teachers, the child's parents and the child. 20 U.S.C. § 1414(d). The IEP includes the child's educational performance, his goals, the nature of his disabilities, and a description of the educational and related services that will be provided for the child to meet the stated objectives. The objective is always to tailor the FAPE to the particular needs of the child. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 247 (5th Cir.1997).

The goal of the IDEA is to require a FAPE that will permit the child "to benefit" from the educational experience. It need not be the best possible education nor one that will maximize the child's educational potential. *Bd. of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Admittedly different from those underlying the IDEA, the Congressional objective of both the ADA and § 504 is the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Title II of the ADA, which applies to public entities including public schools, provides 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 or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *See also*28 C.F.R. § 35.130(a). Section 504 contains virtually identical language. *See*29 U.S.C. § 784(a). Mandating physical accessibility and the removal and amelioration of architectural barriers is an important purpose of each statute. [FN91]

FN91. *See*42 U.S.C. § 12101(a)(5) ("The Congress finds that ... individuals with disabilities continually encounter various forms of discrimination, including ... the discriminatory effects of architectural ... barriers, ... failure to make modifications to existing facilities[,] ... segregation, and relegation to lesser services, programs, [and] activities ..."); *Id.* § 12101(a)(4) ("The Congress finds that ... discrimination against individuals with disabilities persists in such critical areas as education ..."); *Alexander v. Choate*, 469 U.S. 287, 297, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (noting that the "elimination of architectural barriers was one of the central aims of the Rehabilitation Act").

The primary difference between the ADA and § 504 is that § 504 applies only to recipients of federal funds. 29 U.S.C. § 794(a). This difference does not concern us in this case because no defendant argues that it does not receive federal money. Thus, as we stated in section II-D above, for the purposes of this appeal, the ADA and § 504 and their implementing regulations impose identical obligations on the defendants and grant identical rights to Pace.[FN92]

FN92. *See* note 78, *supra*.

In Pace's brief to us on his non-IDEA claims brought under § 504 and the ADA he complains only that parts of the Bogalusa High School campus are inaccessible to him. The only § 504 regulations dealing with accessibility in education are found in subpart C of the § 504 regulations. 34 C.F.R. §§ 104.21-104.23. Section 104.23 of § 504's regulations deals with new construction on school campuses, the

basis of Pace's complaints in this suit. Subpart D of the § 504 regulations deals with preschool, elementary, and secondary education and those regulations do not purport to cover accessibility in schools.[FN93] *292 Rather, 34 C.F.R. § § 104.21-23, the general education regulations on accessibility found in subpart C of § 504 apply to new construction on high school campuses such as Bogalusa High.[FN94] The ADA has no specific section on education, so the general regulations governing accessibility to public buildings also control accessibility to school buildings.

FN93. Subpart D in the regulations to § 504 includes general regulations for preschool, elementary, and secondary education regarding placement (34 C.F.R. § 104.35), procedural requirements (34 C.F.R. § 104.36) and the general FAPE requirement (34 C.F.R. § 104.33).

FN94. Although it is illogical to do so, one can read the § 504 regulations to say that a school need not comply with accessibility requirements in Subpart C to provide a § 504 FAPE under 104.33 when a student complains that part of a school's campus is inaccessible. In such a situation, it is more sensible to read these regulations as requiring a school's compliance with subpart C's accessibility requirements before it can be said to provide a § 504 FAPE. Regardless of whether the accessibility requirements must be met before a § 504 FAPE is provided, subpart C of the § 504 regulations clearly requires new construction in the school to meet the regulation's accessibility requirements.

[12] With this background, we turn to Pace's specific argument that his accessibility claims under the ADA/504 are not precluded by the district court's rejection of his accessibility claims under the IDEA. He argues that his non-IDEA accessibility claims are not precluded because different legal standards apply to his ADA and § 504 accessibility claims, and these claims have never been litigated or decided. When we consider the equivalent standards for accessibility in schools under the IDEA on the one hand and the ADA/504 on the other, it becomes clear that we should reject this argument.

Congress required in a 1997 amendment to the IDEA that any construction of new facilities must comply with either (1) The Americans with Disabilities Accessibility Guidelines for Buildings and Facilities (ADAAG); or (2) The Uniform Federal Accessibility Standards (UFAS). 20 U.S.C. § 1404(b).[FN95] Thus, with respect to a physically disabled child such as the wheelchair-bound Pace, the school can comply with the IDEA's accessibility requirements by satisfying either the ADAAG or UFAS.[FN96]

FN95. 20 U.S.C. § 1404(b) provides in pertinent part:

... Any construction of new facilities or alteration of existing facilities under subsection (a) of this section shall comply with the requirements of-

(1) appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the "Americans with Disabilities Accessibility Guidelines for Buildings and Facilities"); or

(2) appendix A of part 101-19.6 of title 41, Code of Federal Regulations (commonly known as the "Uniform Federal Accessibility Standards").

FN96. The corresponding regulation to 20 U.S.C. § 1404 is found at 34 C.F.R. § 300.756 and is identical.

Pace presents no argument that the accessibility standards for new construction of school buildings under the ADA or § 504 are more demanding or even different from the standards required under the 1997 amendment to the IDEA. This is understandable, because the regulations governing accessibility in schools under the ADA/504 require a school engaged in new construction to conform to the same standards as the IDEA, either the ADAAG or UFAS.

New construction and alterations of public facilities under Title II of the ADA are governed by the regulations found in 28 C.F.R. § 35.151.[FN97] Like the IDEA, the *293 ADA accessibility regulations require a school conducting new construction to

comply with either the ADAAG or UFAS. Section 504's accessibility regulations are virtually identical to the ADA's,[FN98] and also demand that schools engaging in new construction comply with the same federal guidelines required by the IDEA. Thus, Pace's argument that the accessibility standards are different under IDEA and ADA/504 is meritless.

FN97. 38 C.F.R. 35.151(c) provides in pertinent part:

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) ... or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) ... shall be deemed to comply with the requirements of this section with respect to those facilities ...

FN98. One minor difference between the accessibility regulations under § 504 and the ADA is that, because § 504 preceded the ADA and the ADA-specific accessibility regulations (ADAAG), § 504 does not give schools the option of complying with either the ADAAG or UFAS (as do both the ADA and IDEA), but requires compliance with the UFAS.

In summary, under the IDEA, when, as here, a child complains that his disability renders a portion of the campus inaccessible, this triggers the application of the 1997 amendments to the IDEA. In determining whether the school has met its obligations under the amendment and provided the disabled student with a FAPE, the hearing examiner, the SLRP, and the district court must determine whether the area of the school in question complies with either the ADAAG or UFAS. These are the same federal guidelines the school must comply with to satisfy the accessibility requirements of the ADA and § 504.

Pace, as he was required to do by the IDEA, presented his accessibility claims in his administrative claim. In their administrative findings, both the hearing examiner and the SLRP discussed the 1997 amendment to the IDEA. This makes it clear that both were aware that new or existing construction to Bogalusa High School must meet either the ADAAG or UFAS standards before the school could fully comply with the IDEA.[FN99]

FN99. Page five of the State Level Review Panel's opinion, under the heading "Applicable Law and Regulations," provides:

Section 605 of the Individuals with Disabilities Education Act Amendments of 1997, states that any construction of new facilities or alteration of existing facilities with use of program funds shall comply with the requirements of Americans with Disabilities Accessibility Guidelines (Appendix A of Part 36 of Title 28, Code of Federal Regulations) or Uniform Federal Accessibility Standards (Appendix A of Part 101-19.6 of Title 41, Code of Federal Regulations). (R. 63).

The only significant summary judgment evidence Pace presented to the district court on his ADA/504 claims was the report and deposition testimony of Donald MaGinnis, an architectural expert. The point of his testimony is that structural changes to the Bogalusa campus failed to comply with the ADAAG. Although this same standard applied to Pace's claim under the IDEA, he did not introduce this evidence before the hearing examiner. Further, Pace failed to offer the expert evidence to the district court to support his appeal of the administrative determination under the IDEA. Because the accessibility standards under the IDEA and the ADA/504 are identical for new construction of school buildings, Pace has not demonstrated that the defendants owed him any greater or even different obligation in this respect under § 504/ADA than he was entitled to under the IDEA. Thus, the accessibility issue Pace litigated in his IDEA case and lost is the same issue he sought to litigate in his ADA/504 claim. The district court correctly concluded that Pace was precluded from relitigating this issue.

The only argument Pace presents to us on the applicability of the 1997 amendment was presented for the first time in his *294 petition for en banc review. He argued in that petition and argues to the en banc court that the amendment was not triggered because no evidence was presented that "IDEA

funds" were used to make the improvements to the Bogalusa campus. Pace relies on the following language in the 1997 amendment to 20 U.S.C. § 1404:

§ 1404. Acquisition of equipment; construction or alteration of facilities

(a) In general

If the Secretary determines that a program authorized under this chapter would be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary is authorized to allow the use of those funds for those purposes.

Neither the amendment nor the existing statute purports to require a plaintiff to prove the use of IDEA funds or any other fact as a predicate to seeking relief under the IDEA against a school for failing to make its campus accessible in response to a student's IEP. We have found no cases interpreting this amendment or its predecessor. Subsection (a) is simply a restyled version of the existing statute.[FN100] The change is found in Subsection (b), which incorporates into the IDEA for the first time the ADAAG and UFAS construction standards. The amended § 1404(a), like the existing statute, authorizes the Secretary to allow the use of IDEA funds for construction or alterations.

FN100. The pre-amended version of 20 U.S.C. 1404(a) provided as follows:

(a) Authorization for use of funds

In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, the Secretary may authorize the use of such funds for such purposes. (West 1996).

To support Pace's argument that the amended version of § 1404 does not apply in this case, amicus seems to argue that structural alterations to meet accessibility demands in a student's IEP are not part of the calculus in determining whether a student has received a FAPE.

In Weber's *Special Education Law and Litigation Treatise,* he rejects this suggestion in his cogent discussion of the interplay between the IDEA, § 504 and ADA:

Schools covered by Title II and Section 504 owe obligations not only to students with disabilities but to all persons with disabilities whom they serve. In this sense, the laws are more inclusive than the Individuals with Disabilities Education Act (IDEA), whose beneficiaries are children with disabilities who need special education. Nevertheless, by requiring school districts to provide an appropriate education in the least restrictive environment, IDEA overlaps with Section 504 and Title II in terms of the children it covers. *Thus, IDEA may require a school district to modify programs or facilities to achieve these ends for an individual student. IDEA funds may be used for removal of architectural barriers or other improvements to accessibility in order to promote appropriate education for children with disabilities.*(Footnotes omitted)[FN101] (emphasis added)

FN101. MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 7.1 (2D ED.2002).

Weber further describes a school's duty under the IDEA to address accessibility concerns in the IEP as "a component of appropriate special education and related services in the least restrictive environment."*295 [FN102] This discussion makes it clear that when a student's IEP raises concerns of accessibility to the school's campus, the determination of whether these concerns have been met is a necessary component in resolving whether the student has received a FAPE.

FN102. Weber, note 3 at 7.2. (Footnotes omitted). Weber concludes that "modifications [to the campus] may include wheelchair ramps, handrails, accessible toilets, and water fountains."

The Hearing Examiner tried this controversy on the premise that the entire IDEA statute, including the

1997 amendment, applied to Pace's claims, and no one argued to the contrary. The Hearing Examiner did not require the parties to file extensive pre-trial papers. However, she did require each party to list the issues they wanted the hearing examiner to address. Neither Pace nor the school board asserted that an issue was presented with respect to the expenditure of IDEA funds or any other issue relating to the applicability of the 1997 amendment to § 1404. Considering the strict duty that the ADAAG and UFAS construction guidelines impose on the school, it was also reasonable for the Hearing Examiner to assume that the school board would object if there was some basis for it to argue that these guidelines did not apply to the architectural improvements ordered by Pace's IEP. It is not surprising that Pace did not object to the Hearing Examiner's application of such rigorous standards; it was in his interest at the time to require the school to meet the toughest standards possible in making the architectural improvements.

After three hearings, the Hearing Examiner issued her report finding that Bogalusa High had provided Pace with a FAPE. The Hearing Examiner explicitly found that the ADAAG guidelines applied, meaning that she concluded that Pace's accessibility concerns regarding improvements made to the campus triggered the application of the 1997 amendment to § 1404 of the IDEA. Otherwise, the ADAAG guidelines would be irrelevant. In making her findings, the Hearing Examiner relied on the voluminous administrative record, which shows that Bogalusa received substantial federal IDEA funds during 1996 and 1997, the relevant time period.[FN103] IDEA regulations make it clear that federal IDEA funds cannot be co-mingled with state funds.[FN104] The Hearing examiner also had the benefit of Pace's IEP and the testimony of the School Board's Maintenance Supervisor that the construction changes were made in response to Pace's IEP facilitator's instructions. Even if a showing of the use of IDEA funds was required, it was reasonable for the Hearing Examiner to conclude that IDEA funds were used and that under the amended version of 20 U.S.C. § 1404 the school provided Pace with a FAPE.

FN103. For the 1996-97 fiscal year, the record shows that Bogalusa was the recipient of $164,213 in federal funds for its "Special Education" program.

FN104. 34 CFR § 300.152.

Pace appealed the Hearing Examiner's order to the State Level Review Panel (SLRP). Again, the record reflects no argument from any party to that appeal that the entire IDEA statute, including the 1997 amendment to § 1404, did not apply. The SLRP in its opinion explicitly applied the 1997 amendment, discussed Pace's arguments, and after rejecting them, affirmed the Hearing Examiner.

Pace then filed suit in federal district court seeking relief under the IDEA, § 504 and the ADA. He specifically alleged in his petition that the state received *296 federal IDEA funds.[FN105] His core claim was that the school had failed to comply with the ADAAG.

FN105. R. 192.

The primary evidence Pace presented to the district court was the deposition testimony and report of architect Donald MaGinnis, who testified that the structural changes to the campus failed to meet ADAAG standards. Thus, Pace's federal claim was predicated on these guidelines, made applicable to the IDEA by the 1997 amendment to § 1404. Because the Hearing Examiner and the SLRP had rejected Pace's accessibility claims based on application of these same standards (the ADAAG and UFAS), the district court concluded that Pace was precluded from relitigating his accessibility issues.

Suffering summary judgment in the district court on both his IDEA and non-IDEA claims, Pace sought appellate relief from this court. In his initial brief to the panel, Pace argued that the district court erred in accepting the Hearing Examiner and SLRP's findings of accessibility to preclude his non-IDEA accessibility claims. However, Pace did not base his argument on the inapplicability of the 1997 amendment to § 1404 or that the Hearing Examiner erred in applying the ADAAG guidelines to the structural changes. The School Board did argue to the panel that the amendment applied and that the Hearing Examiner and SLRP had used the very same federal guidelines in deciding Pace's IDEA claims that Pace sought to litigate in his non-IDEA action.[FN106]

FN106. Appellee Bogalusa City School Board's Brief at 32.

Faced with the appellee's argument that his non-IDEA claims were precluded due to the previous application of the 1997 amended version of § 1404, Pace filed a reply brief with the panel. Again, he made no effort to refute the School Board's argument that the 1997 amendment to § 1404 applied.

Without any opposition from Pace as to the proper application of § 1404 to the improvements to Bogalusa High's campus, the panel accepted the School Board's unchallenged argument and relied on the 1997 amendment to affirm the district court's judgment.[FN107] The panel specifically cited the 1997 amended version of § 1404 to support its conclusion that issue preclusion was proper because accessibility to the campus had already been litigated under the same federal standards.[FN108]

FN107. *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir.2003).

FN108. *Id.* at 614.

In response to the panel's decision, Pace sought en banc review, where he argued for the first time that § 1404 did not apply to the improvements he demanded in his IEP, because "[t]here is no proof that construction in this case would be covered by this provision."[FN109]

FN109. Appellant Travis Pace's En Banc Brief at 22.

In sum, we do not read the 1997 amendment to require proof that IDEA funds were used for improvements to trigger the amendment. Even if the statute can be read in this manner, there is evidence to support an inference that IDEA funds were used to make the structural changes. More importantly, we cannot permit Pace to change his position at will. He was obviously happy to have the administrative bodies and the trial court apply the 1997 amendment to § 1404 (and the strict ADAAG guidelines) when it was helpful to him. He cannot at this late date reverse his position when he finds that application *297 of those guidelines are not in his best interest.

Pace has one remaining argument in support of his position that issue preclusion should not apply to his claims under the ADA and § 504. He argues that the IDEA's "savings clause," gives him the right to maintain a cause of action under the ADA and § 504.[FN110] We agree that Pace is not limited to a claim under the IDEA and that he can assert claims under the ADA and § 504. But his ability to assert non-IDEA claims does not mean that general principles of issue preclusion do not apply to preclude his redundant claims.[FN111] Because Pace's claims under the ADA and § 504 are factually and legally indistinct from his IDEA claims, issue preclusion is proper in this case.

FN110. The IDEA's "savings clause" is found in 20 U.S.C 1415(*l*), and provides in pertinent part:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies under ... the Americans with Disabilities Act of 1990 ... title V of the Rehabilitation Act of 1973 ... or other Federal laws protecting the rights of children with disabilities ...

FN111. *See, e.g.*, *Burilovich v. Bd. of Educ.*, 208 F.3d 560 (6th Cir.2000) (issue preclusion may apply to redundant ADA and § 504 claims), *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.1996) (principles of issue preclusion and claim preclusion may properly be applied to short-circuited redundant claims under other laws) *and Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir.1996) (issue preclusion proper to dismiss § 504 placement claim when identical issue already litigated under the IDEA).

Because Pace is precluded from litigating the question of whether the defendants have any obligation under the ADA and § 504 to make further architectural or structural changes in the buildings on the Bogalusa campus, his claim for an injunction ordering such changes must also fail.

In conclusion, we AFFIRM the district court's dismissal of Pace's claims under the IDEA and also

AFFIRM the district court's dismissal of Pace's claims for damages and injunctive relief under the ADA and § 504.

EDITH H. JONES, Circuit Judge, with whom E. GRADY JOLLY, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA and DeMOSS, Circuit Judges, join, concurring in part and dissenting in part:

I concur in the court's discussion of the merits of Pace's claims, but I respectfully dissent from the majority's conclusion that the State of Louisiana, by accepting federal education funds from 1996 to 1998 (the period here at issue), validly waived its Eleventh Amendment immunity from suit for violations of § 504 and the IDEA statute. Instead, we should hold that under these limited and unusual circumstances, the State did not knowingly waive its constitutional right to be free from suit by private citizens.[FN1]

FN1. The panel opinion observed that the State's victory in this case would be Pyrrhic because only during a three-year period could the panel conclude that the State did not "knowingly" waive its Eleventh Amendment immunity. The majority apparently believe that a Pyrrhic victory is one too many.

Alexander Hamilton wrote:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.

THE FEDERALIST NO. 81, at 487-88 (Clint Rossiter ed., 1961). The Eleventh Amendment protects States from suit in federal ***298** court precisely out of the recognition of their continued status as co-sovereigns. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 689, 121 L.Ed.2d 605 (1993). For over one hundred years, the Supreme Court has "extended a State's [constitutional] protection from suit to suits brought by the State's own citizens." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997) (referring to *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)).

There are two carefully construed exceptions whereby States may become subject to suits by private citizens. Congress may abrogate state sovereign immunity pursuant to § 5 of the Fourteenth Amendment, or the State may waive its sovereign immunity and give its consent to suit. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999). However, "[b]ecause abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, ... and because States are unable directly to remedy a judicial misapprehension of that abrogation, the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990) (citations and quotations omitted). "Similar solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived that immunity." *Id.*

Travis Pace advances both abrogation and waiver theories in support of his claims against Louisiana. The majority agrees with Pace that Louisiana waived its sovereign immunity as a condition of accepting federal funds under § 504 of the Rehabilitation Act and IDEA. In so doing, the majority has forsaken the "particularly strict standard" the Eleventh Amendment demands, ignored the Supreme Court's settled test for evaluating a waiver of constitutional rights, and inexplicably discounted the unique factual context from which this case arose.

I. WAIVER

As a fundamental constitutional component, "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *Coll. Sav. Bank*, 527 U.S. at 682, 119 S.Ct. at 2229. The same test used in evaluating waiver of other fundamental constitutional rights must be employed in the Eleventh Amendment context as well. As the Court held, there is no justification for creating a separate and distinct test for Eleventh Amendment waiver purposes. Thus, "[t]he classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a

known right or privilege." *Id.* (citations and quotations omitted) (emphasis added). According to the sole applicable test, therefore, "waiver must have been made with a full awareness of both the *nature of the right* being abandoned and the *consequences* of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) (emphasis added). Moreover, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). This circuit, at least until today, adhered to this uniform approach. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of* ***299** *the relevant circumstances and likely consequences*[.]" United States v. Newell, 315 F.3d 510, 519 (5th Cir.2002)(quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)) (emphasis added). A valid waiver requires "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver.*" *Id.* (quoting Hatfield v. Scott, 306 F.3d 223, 230 (5th Cir.2002)) (emphasis in original).

The test for a State's waiver of Eleventh Amendment immunity is no different because Congress sought to effect waiver under the Spending Clause. The Supreme Court "has repeatedly characterized ... Spending Clause legislation as 'much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.' " Barnes v. Gorman, 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). "Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] *voluntarily* and *knowingly* accepts the terms of the contract." Barnes, 536 U.S. at 186, 122 S.Ct. 2097 (citations and quotations omitted) (emphasis added); *see also* Pennhurst, 465 U.S. at 99, 104 S.Ct. at 907 (the State's consent to suit must be "unequivocally expressed"). As a result, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985).

Despite this clear authority, the majority has crafted a novel waiver test for Spending Clause cases. Relying on South Dakota v. Dole, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the majority draws two conclusions: (1) a State's waiver is knowing so long as Congress satisfies the "clear statement rule," and (2) the State's waiver is voluntary so long as it is "non-coercive." Although I agree with the latter conclusion, the former is incorrect.[FN2] *College Savings Bank* controls the Eleventh Amendment waiver inquiry and demands more than a congressional "clear statement"-it also requires the State to make a "clear declaration" of its intent to waive its immunity. In *College Savings Bank*, the Supreme Court recognized that for a State "knowingly" to waive its sovereign immunity, not only must Congress make clear its intention to so condition federal funds, but the State must expressly ***300** and unequivocally waive its immunity. "There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have that immunity." Coll. Sav. Bank, 527 U.S. at 680-81, 119 S.Ct. at 2228. "In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals." *Id.*

FN2. *Dole's* "non-coercive" requirement is a satisfactory proxy for the "voluntariness" prong of the waiver inquiry. Thus, under the current state of the law, § 2000d-7(a) is not unconstitutionally coercive. As a result, the State of Louisiana acted voluntarily for purposes of the constitutional waiver test. But, with due regard for precedent, I am compelled to raise the following question: "If not now, and on this showing, when, and on what showing" will federal grants be deemed unconstitutionally coercive? *Cf.* Spangler v. Pasadena City Bd. of Ed., 611 F.2d 1239, 1240 (9th Cir.1979). The Rehabilitation Act, pursuant to 29 U.S.C. § 794(a), requires non-consenting States to forfeit *all* federal funds. For the Louisiana Department of Education, renouncing all federal funds would cut its budget by $804,269,621, or 75%. *Dole* counseled that

"in some circumstances the financial inducement offered by Congress might be *so coercive as to pass the point at which pressure turns into compulsion.*" 483 U.S. at 211, 107 S.Ct. 2793 (emphasis added). To date, the Supreme Court has not found a case that warranted vindication of this principle. Nevertheless, Louisiana and its children would suffer extreme consequences here if the State were to lose massive federal assistance by asserting its constitutional right to sovereign immunity.

Despite the majority's assertion to the contrary, *College Savings Bank* confirms that *Dole* 's "clear statement" requirement is only half of the waiver equation. *See Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn,* 280 F.3d 98, 113-14 (2d Cir.2001) (concluding that "a clear expression of Congress's intent ... alone is not sufficient ... to find that [the State] actually waived its sovereign immunity by accepting federal funds"). "The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit." *Coll. Sav. Bank,* 527 U.S. at 680, 119 S.Ct. at 2228 (emphasis in original). "Whether Congress clearly required that a State waive its immunity before accepting federal funds (the first inquiry) is *not* the same thing, however, as whether the State clearly declared its knowing waiver (the second inquiry)." *Douglas v. Cal. Dep't of Youth Auth.,* 285 F.3d 1226, 1228 (O'Scannlain, J., dissenting from denial of petition for rehearing en banc)(emphasis in original). "The mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero,* 473 U.S. at 246-47, 105 S.Ct. 3142.[FN3]

FN3. Furthermore, the majority's reliance on the precedents of other circuits is unpersuasive. Those circuits, like our court today, focused exclusively on whether Congress clearly expressed its intention to condition acceptance of federal funds on waiver of immunity-not whether the State reasonably believed it was waiving immunity by accepting federal funds.

For a State to evince its "clear declaration" of intent to waive sovereign immunity, it must possess "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver.*" *Newell,* 315 F.3d at 519 (citations and quotations omitted) (emphasis in original). In all but the rarest of circumstances, acceptance of federal funds offered in accordance with the "clear statement rule" will meet this test. This case represents an exception to the general rule.

The majority ignores the fact that until the mid-1990's, it was assumed that Congress could abrogate state sovereign immunity in legislation enacted pursuant to its Article I enumerated powers. The Supreme Court held otherwise in *Seminole Tribe v. Florida,* 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), while reaffirming that abrogation remained permissible through a proper exercise of power under § 5 of the Fourteenth Amendment. *Id.* at 59, 116 S.Ct. 1114. In the statutes here at issue-ADA, § 504 and IDEA-abrogation was enacted under the Commerce Clause. Since, however, all three statutes enhance the rights of the disabled, and all three express a clear congressional intent to abridge the States' Eleventh Amendment immunity, federal courts routinely permitted suits by private individuals to proceed against the States. As late as 1998, while applying the Supreme Court's narrow construction of the § 5 abrogation authority,[FN4] this court still held that the ADA validly abrogated state ***301** sovereign immunity. *Coolbaugh v. Louisiana,* 136 F.3d 430 (5th Cir.1998), *cert. denied,*525 U.S. 819, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998)*overruled by*Reickenbacker *v. Foster,* 274 F.3d 974 (5th Cir.2001).[FN5]

FN4. *See City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

FN5. *Reickenbacker*'s holding flows from the Supreme Court's decision in *Bd. of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 368, 121 S.Ct. 955, 964, 148 L.Ed.2d 866 (2001), which held that Title I of the ADA did not validly abrogate state sovereign immunity pursuant to § 5 of the Fourteenth Amendment. Because Title II of the ADA and § 504 of the Rehabilitation Act offer virtually identical protections, the abrogation analysis with regard to the two

statutes is the same. Reickenbacker, 274 F.3d at 977 n. 17; *see also* Garcia, 280 F.3d at 114; *Hoekstra v. Indep. Sch. Dist.*, 103 F.3d 624, 626 (8th Cir.1996).

Surely Louisiana should not be penalized for construing the ADA-and counterpart abrogation language in § 504 and IDEA-just as this court subsequently did in *Coolbaugh*. Instead, the State acted quite rationally in assuming between 1996 and 1998 that it had no sovereign immunity to waive when it accepted federal education funds under conditions specified by § 504 and IDEA. The State voluntarily accepted federal funds, but its acceptance was not a "knowing" waiver of immunity. As the Second Circuit put it, since "the proscriptions of Title II [of the ADA] and § 504 are virtually identical, a State accepting federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, since by all reasonable appearances state sovereign immunity had already been lost." Garcia, 280 F.3d at 114 (citations omitted).[FN6]

FN6. Conversely, after *Garrett* was decided, the State defendants could knowingly waive their immunity because they could have reasonably anticipated the ability to preserve sovereign immunity by declining federal funds under the Rehabilitation Act and the IDEA. *See* *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (invalidating an abrogation of Eleventh Amendment immunity pursuant to Title I of ADA).

The majority offers two principal arguments against this result. First, the majority conflates abrogation and waiver when positing that "Louisiana *did have* Eleventh Amendment immunity to waive by accepting the clearly conditioned federal funds." *See* Majority Op., at 285. (emphasis in original). On the contrary, *Coolbaugh* confirmed, until *Garrett* and *Reickenbacker* overruled it, that Congress had validly exercised its abrogation authority, rendering Louisiana amenable to suit notwithstanding the Eleventh Amendment. The majority's suggestion that Congress can abrogate sovereign immunity, but still permit the States to retain their Eleventh Amendment immunity, misapprehends the import of abrogation.[FN7]

FN7. The unmistakable difference between abrogation and waiver is complicated by statutes, like § 2000d-7(a), that attempt to achieve both in the same provision. Nevertheless, the circuit courts and the panel opinion here agree that statutory language may, in fact, constitute both an attempted abrogation and conditional waiver provision. *See, e.g.*, *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir.2000); *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir.2002). However, a statute's capacity to serve dual purposes does not justify the majority's confusion of the two concepts.

Still, Congress may, in its discretion, choose to trigger enforcement of any federal statute, even after it has abrogated sovereign immunity, on the receipt of federal funds. In response, a State, by refusing federal funds, may reject the terms of the "contract" and potentially avoid statutory liability to private individuals. But whether it can avoid liability based upon a contractual/waiver theory is a different question from whether it retained Eleventh*302 Amendment sovereign immunity post-abrogation.[FN8]

Thus, the relevant Eleventh Amendment inquiry remains whether Louisiana reasonably believed, based on objective evidence, that the Rehabilitation Act and the IDEA validly abrogated its sovereign immunity-not whether it could have chosen to reject the federal funds anyway.

FN8. The majority implies that Louisiana's self-interested acceptance of funds should prevent the State from arguing that it might have chosen to forego the funds for the sake of maintaining sovereign immunity. Louisiana's mistaken (though eminently reasonable) belief that abrogation had occurred distorted this calculation, however. That the State *does* have immunity to waive now throws into high relief the potential coercion inherent in the federal government's funding condition. The "cost" of Louisiana's resting on its constitutional right is over $800 million annually!

Second, the majority contends that requiring the State to make a "clear declaration" problematically "engraft[s] a subjective-intent element onto an

otherwise objective Spending Clause waiver inquiry." *See* Majority Op. at 284. Unfortunately, the majority misunderstands the nature of the "clear declaration" requirement, a requirement consonant with the Supreme Court's longstanding objective approach to waiver. The Supreme Court uniformly applies a "totality of the circumstances" test to waiver questions involving fundamental constitutional rights. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). "Only if the totality of the circumstances ... reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the ... rights have been waived." *See Burbine*, 475 U.S. at 421, 106 S.Ct. at 1135. Hence, the Supreme Court considers a variety of *objective* factors, not subjective intent, to determine whether a constitutional right has validly been waived. *Fare*, 442 U.S. at 725, 99 S.Ct. at 2572; *see also United States v. Sonderup*, 639 F.2d 294, 298 (5th Cir.1981) (relying on the objective indicia to determine whether a voluntary, knowing and intelligent waiver was made). *College Savings Bank*'s "clear declaration" requirement reiterates the Supreme Court's waiver test in the Eleventh Amendment context, and so would I.[FN9]

FN9. The majority's approach unquestionably achieves a bright-line rule that the Supreme Court's traditional waiver inquiry cannot. However, this approach is impermissible in the context of waiver of fundamental constitutional rights.

> An express written statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. *The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights* delineated in the *Miranda* case.
>
> *North Carolina v. Butler*, 441 U.S. 369, 374, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979).

Given this court's ruling in *Coolbaugh* that the State had no immunity to waive, followed by an unsuccessful en banc poll and the Supreme Court's denial of *certiorari* in that case, it is inconceivable that Louisiana somehow, based on the "straightforward objective facts," knowingly chose to waive a right that was non-existent when it acted. In a sense, the State of Louisiana is being forced, by today's majority, to bear the burden of this court's mistake of law in *Coolbaugh*. Consider this analogy: the police instruct a criminal defendant, "for his own good," to sign a waiver of counsel form, while telling him that the waiver is "meaningless, because you have no counsel rights to waive." Who would argue that the waiver is knowing, especially if the police showed him a court decision confirming this view? That the dupe is an individual defendant rather ***303** than the State does not, per *College Savings*, make this a different case, nor does the fact that the waiver falls under the Spending Clause rather than some other type of enactment. The majority's opinion violates *College Savings Bank*.

In this rare instance, Louisiana could not have knowingly waived its sovereign immunity in the relevant time period before the *Garrett* decision. The majority's approach strangely counsels States to disregard governing caselaw when Supreme Court doctrine is evolving. Such an argument makes no more sense in this unusual context than it would in any other.

II. ABROGATION

Pace alternatively argues, and this dissent must determine, whether Congress abrogated Louisiana's sovereign immunity with respect to claims brought under Title II, § 504, and the IDEA. Pace would extend the Court's recent decision in *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), which held that Title II of the ADA validly abrogates State sovereign immunity insofar as it implicates the physical accessibility of the fundamental constitutional right of access to the courts. The majority here, having found a waiver of the State's immunity, declares it unnecessary to opine on abrogation. The majority goes on, however, to observe that, in *Lane*, the Supreme Court "refused to consider [whether Title II abrogates] other rights, including those considered to be fundamental under the Constitution." *See* Majority Op. at 287, citing 124 S.Ct. at 1993. The majority also comments that the Court "has never before recognized access to public education or freedom from disability

discrimination in education as fundamental rights." *Id.*, citing *Plyler v. Doe*, 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 2396-98, 72 L.Ed.2d 786 (1982); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313 (1985).

I agree with the majority's *dicta* that suggests *Lane* is currently of limited application. Moreover, because *Lane* was written very narrowly, I conclude that this court's decision in *Reickenbacker* remains valid in holding that ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity. *See Reickenbacker*, 274 F.3d at 983. The fate of § 504 abrogation was also sealed in *Reickenbacker* based on the court's conclusion that Title II and § 504 impose "virtually identical" obligations. *Id.* For the reasons stated in *Reickenbacker* and in the panel opinion, I would hold that Congress could not constitutionally abrogate state sovereign immunity in § 504 or the similarly structured IDEA statute pursuant to § 5 of the Fourteenth Amendment. The remedies imposed by those laws "far exceed [ ] [those] imposed by the Constitution, and [I] cannot conclude that they are congruent and proportional to the legislative findings of unconstitutional discrimination against the disabled by the states." *Reickenbacker*, 274 F.3d at 983.

III. CONCLUSION

For the foregoing reasons, I conclude that during a narrow period of time, based on uncertainty in the Supreme Court's evolving Eleventh Amendment doctrine, the State of Louisiana did not knowingly waive its Eleventh Amendment sovereign immunity when it accepted federal funds under § 2000d-7(a).

I respectfully dissent.

C.A.5 (La.),2005.
Pace v. Bogalusa City School Bd.
403 F.3d 272, 196 Ed. Law Rep. 791, 17 A.D. Cases 25, 29 NDLR P 242

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CRogers v. Bennett
C.A.11 (Ga.),1989.

United States Court of Appeals,Eleventh Circuit.
Dr. Werner ROGERS, in his official capacity as the State School Superintendent, State Board of Education of State of Georgia, DeKalb County School District and School District of the City of Savannah and the County of Chatham, Plaintiffs-Appellants,
v.
Dr. William BENNETT, in his official capacity as Secretary of the United States Department of Education, and The United States Department of Education, Defendants-Appellees.
No. 87-8904.

March 23, 1989.
As Amended May 5, 1989.

Georgia Board of Education and local school districts brought action against the United States Department of Education, alleging the Department's Office of Civil Rights was acting beyond its jurisdiction in investigating parental complaints concerning educational opportunities available to handicapped students in Georgia programs. The United States District Court for the Northern District of Georgia, No. C86-1304A, Charles A. Moye, Jr., J., dismissed the action for failure to exhaust administrative remedies, and Georgia educators appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) exhaustion of administrative remedies was necessary precondition to adjudication of Georgia educators' claims; (2) Department was not plainly without authority to issue regulations under Rehabilitation Act section authorizing Department reviews of state and local educational institutions to assure compliance with section's provisions, so as to preclude requiring exhaustion of administrative remedies prior to judicial review; and (3) Department's exercise of supervisory powers over Georgia special education programs was not plainly outside of the Department's jurisdiction, so as to preclude requiring exhaustion of administrative remedies prior to judicial review.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A ⚷229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
One primary purpose in requiring plaintiffs to exhaust their administrative remedies before seeking judicial review is to assure that courts review ripe controversies presenting concrete injuries.

[2] Schools 345 ⚷155.5(3)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(2) Judicial Review or Intervention
345k155.5(3) k. Exhaustion of Remedies. Most Cited Cases
Georgia state Board of Education and local school districts would be required to exhaust administrative remedies as precondition to adjudication of their challenge to jurisdiction of United States Department of Education's Office of Civil Rights to investigate parental complaints concerning education of handicapped children under regulations implementing Rehabilitation Act section. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[3] Administrative Law and Procedure 15A ⚷229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Exhaustion doctrine denies judicial relief to party

challenging agency action until that party has exhausted all its available administrative remedies.

[4] Schools 345 ⚷155.5(3)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(2) Judicial Review or Intervention
345k155.5(3) k. Exhaustion of Remedies. Most Cited Cases
Regulations implementing Rehabilitation Act section by authorizing federal agency reviews of state and local educational institutions to assure compliance did not plainly require affirmative action outside scope of Rehabilitation Act section, as cooperation with investigatory efforts did not plainly constitute affirmative action, so as to preclude requiring exhaustion of administrative remedies prior to judicial review. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[5] Schools 345 ⚷155.5(3)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(2) Judicial Review or Intervention
345k155.5(3) k. Exhaustion of Remedies. Most Cited Cases
United States Department of Education was not plainly without authority to issue under Rehabilitation Act section regulations authorizing Department to conduct reviews of state and local educational institutions to assure compliance with section's provisions, so as to preclude requiring exhaustion of administrative remedies prior to judicial review challenging regulations. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[6] Schools 345 ⚷155.5(3)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(2) Judicial Review or Intervention
345k155.5(3) k. Exhaustion of Remedies. Most Cited Cases
United States Department of Education's Office of Civil Rights was not plainly without jurisdiction to investigate state and local institutions to assure compliance with Rehabilitation Act section's provisions, so as to preclude requiring exhaustion of administrative remedies prior to judicial review. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

*1388 Al Evans, Asst. Atty. Gen., Atlanta, Ga., for plaintiffs-appellants.
Griffin B. Bell, Jr., Fisher & Phillips, Atlanta, Ga., for Savannah-Chatham Co.
Julie J. Jennings, Weeks & Candler, Charles L. Weatherly, Atlanta, Ga., for DeKalb County School Dist.
*1389 U.S. Dept. of Justice, Civil Rights Div. Jessica Dunsay Silver, William Bradford Reynolds, Washington, D.C., for U.S. Dept. of Educ.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and FAY, Circuit Judges, and FAWSETT [FN*], District Judge.

FN* Honorable Patricia C. Fawsett, U.S. District Judge for the Middle District of Florida, sitting by designation.

TJOFLAT, Circuit Judge:
In this case, the Georgia State Board of Education and two local school districts challenge the jurisdiction of the United States Department of Education's Office of Civil Rights to investigate parental complaints concerning the education of their handicapped children. The district court dismissed the Georgia educators' suit for failure to exhaust administrative remedies, and they now appeal. We affirm.

I.

The dispute between the appellants and the Office of Civil Rights (the OCR) centers on the proper interpretation of section 504 of the Rehabilitation Act of 1973, Pub.L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (Supp. IV 1986)) [hereinafter section 504], and on the intended interplay between section 504 and the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1982 & Supp. IV 1986). We therefore briefly sketch the relevant provisions of these acts and the facts giving rise to the parties' dispute.

In 1970, Congress enacted the Education of the Handicapped Act (the EHA). *See*Pub.L. No. 91-230, § 601, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400-1485 (1982 & Supp. IV 1986)). The purpose of the EHA is:

to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c) (1982). The EHA is comprehensive in scope, providing for the federal funding of local special education programs, resource centers and other special services, programs to train special education teachers, and research projects.[FN1] In exchange for these funds, states agree to adhere to federal regulations regarding the education of the handicapped. In 1975, Congress amended the EHA to provide a specific, exclusive administrative procedure by which parents can challenge the adequacy of the educational programs designed for their children. *See* Education for All Handicapped Children Act of 1975, Pub.L. No. 94-142, § 5(a), 89 Stat. 776 (codified as amended at 20 U.S.C. § 1415 (1982 & Supp. IV 1986)); *see also* *Smith v. Robinson*, 468 U.S. 992, 1009, 104 S.Ct. 3457, 3467, 82 L.Ed.2d 746 (1984) (holding that if available, parental administrative remedies under the EHA are exclusive).[FN2]

FN1. The EHA is administered by the Department of Education's Office of Special Education Programs. *See*20 U.S.C. § 1401 (Supp. IV 1986). Among its other powers, this office can terminate federal funding to state and local handicapped educational programs for failure to comply with the provisions of the EHA. *See id.* § 1416 (1982 & Supp. IV 1986).

FN2. We note that aggrieved parents who have exhausted their administrative remedies under the EHA may seek judicial review of the agency's determination. In *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), the Supreme Court determined that the EHA was the exclusive basis for such review, precluding parents from bringing suit under section 504 or the fourteenth amendment in addition to the EHA. In response to this decision, Congress amended the EHA specifically to overrule this aspect of *Robinson* and to allow parents to avail themselves of all appropriate statutory and constitutional remedies when seeking judicial review of their child's educational opportunities. *See* Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, § 3, 100 Stat. 796, 797 (codified at 20 U.S.C. § 1415(f) (Supp. IV 1986)); *see also* Sen. R. No. 112, 99th Cong., 2d Sess. at 2-3, *reprinted in*1986 U.S.Code Cong. & Admin.News 1798, 1799-1800.

***1390** In the period between the original enactment of the EHA and its amendment in 1975, Congress passed the Rehabilitation Act of 1973. *See*Pub.L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.). The main purpose of the Rehabilitation Act was to provide funding for the vocational rehabilitation of handicapped individuals. *See id.*, § 2, 87 Stat. at 357. A miscellaneous provision at the end of the Act, however, also provided handicapped individuals with general protection against discrimination, stating that:

No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id., § 504, 87 Stat. at 394. Significantly, section 504 only prevents discrimination against the handicapped; unlike the EHA, it does not require that states devote extra resources to meeting the needs of handicapped individuals. *See* Robinson, 468 U.S. at 1018-19, 104 S.Ct. at 3471-72; Southeastern Community College v. Davis, 442 U.S. 397, 410-11, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979). To implement the provisions of section 504, the Department of Education (the Department) [FN3] issued regulations that prohibit state and local officials from discriminating against the handicapped in the provision of a free and appropriate public education to school-aged children. *See*34 C.F.R. § 104.33 (1988).[FN4] These regulations are administered by the OCR.[FN5]

FN3. The Department of Education was at that time a part of the Department of Health, Education, and Welfare. In 1979, the Department of Health, Education, and Welfare was split into two separate agencies: the Department of Health and Human Services and the Department of Education. *See generally* Department of Education Organization Act, Pub.L. No. 96-88, 93 Stat. 668 (1979). This opinion uses the term "the Department" both to refer to the Department of Education as it existed after 1979 and to refer to the education functions exercised by the Department of Health, Education, and Welfare before 1979.

FN4. These regulations were promulgated in 1977. *See*42 Fed.Reg. 22,67 6, 22,677 (1977) (codified at 45 C.F.R. pt. 84 (1978)). These regulations, as originally promulgated, authorized the Department to conduct the compliance reviews that are the subject of the instant dispute. *See*45 C.F.R. §§ 80.7, 84.61 (1978). These regulations were eventually transferred on the creation of the Department of Education in 1979 to 34 C.F.R. §§ 100.7 and 104.61. *See*45 Fed.Reg. 30,802, 30,918 (1980).

FN5. As noted *supra* note 3, the Department of Education was a part of the Department of Health, Education, and Welfare until 1979. At that time, all functions of HEW's Office of Civil Rights that related to education were transferred to the new Office of Civil Rights created within the Department of Education. *See*20 U.S.C. § 3441(a)(3) (1982) (transferring functions); *id.* § 3413(a) (creating Office of Civil Rights within the Department of Education). These responsibilities included administration of the regulations implementing section 504. *See*S.Rep. No. 49, 96th Cong., 1st Sess. 36, *reprinted in*1979 U.S.Code Cong. & Admin.News 1514, 1550.

Two parallel procedures enforce these antidiscrimination regulations. First, parents are afforded certain procedural rights in a dispute with a local educational authority regarding the education of their handicapped children. *See id.* § 104.36. Upon exhausting these procedures, aggrieved parents can take advantage of the remedial provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1, 2000d-2 (1982), and bring suit in federal court to remedy the alleged violation of section 504. *See*29 U.S.C. § 794a(a)(2) (1982).[FN6] In 1984, ***1391** however, the Supreme Court held that this administrative procedure for parental complaints is largely supplanted by the more comprehensive remedial scheme established by the 1975 amendments to the EHA. *See* Robinson, 468 U.S. at 1021, 104 S.Ct. at 3473.[FN7]

FN6. We note that the Supreme Court's decision in *Robinson* did not render these procedures moribund. Section 504 is much broader in scope than is the EHA, prohibiting discrimination against otherwise qualified handicapped individuals in all federal programs and programs receiving federal funding. Thus, section 504 regulates many activities-even within the limited field of education-that are not a primary concern of the regulations promulgated pursuant to the EHA. For example, the regulations to section 504 prohibit educational institutions from discriminating against the handicapped in hiring, *see*34 C.F.R. §§ 104.11-.14 (1988), and require that educational institutions provide the handicapped access to the institutions' physical facilities, *see id.* §§ 104.21-.23. With regard to these areas and others, the administrative hearing

mechanisms of 34 C.F.R. §§ 100.9 and 100.10 are still a vital part of the administration of section 504.

FN7. We note that the Congressional response to the *Robinson* decision described *supra* note 2 codified this aspect of the Court's decision. *See* Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, § 3, 100 Stat. 796, 797 (codified at 20 U.S.C. § 1415(f) (Supp. IV 1986)). Therefore, under the current version of 20 U.S.C. § 1415, parents must exhaust all administrative remedies that are available under the EHA before they can seek judicial review of their child's educational program.

As a second enforcement mechanism for section 504, the Department promulgated certain regulations that authorized it to conduct reviews of state and local educational institutions to assure compliance with the provisions of section 504. *See*34 C.F.R. §§ 104.61, 100.7 (1988). The OCR initiates these compliance reviews on a periodic basis or in response to information that indicates a possible failure to comply with section 504. *See id.*§ 100.7(a), (c). A parental complaint is the typical source of such information.[FN8] If the state or local educational institution fails or refuses to cooperate with the OCR's investigation, the Department of Education may seek to effect the institution's compliance with 34 C.F.R. § 100.7 by initiating proceedings to terminate federal financial assistance to that institution. *See id.* § 100.8.[FN9]

FN8. We note that the administrative procedures of the EHA for reviewing parental complaints are largely designed to focus on the propriety of an individual handicapped child's educational program. This is not ordinarily the focus of an OCR investigation that may result from the receipt of a parental complaint. Thus, the OCR has noted that:

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

34 C.F.R. pt. 104 app. A, at 492-93 (1988). Such forms of discrimination against the handicapped may escape detection under other regulatory provisions.

FN9. We note that such termination cannot take place until thirty days after the Secretary reports to Congress that such a termination has been ordered. *See*42 U.S.C. § 2000d-1 (1982); 34 C.F.R. § 100.8(c) (1988).

Acting in response to several parental complaints under section 504, the OCR initiated individual investigations of the special education programs in Chatham County (Georgia), DeKalb County (Georgia), and of the State of Georgia's Department of Education. Both the administrators of the county special education programs and officials in the Georgia Department of Education refused to cooperate with the OCR's investigation. As a result, the OCR began administrative proceedings to terminate federal funding of these three institutions' handicapped programs.

In response to these administrative proceedings, the Georgia State Board of Education and the DeKalb and Chatham County school districts brought suit against the United States Department of Education in federal district court, alleging that the OCR was acting beyond its jurisdiction in investigating parental complaints concerning the educational opportunities available to handicapped students in the Georgia programs.[FN10] The Georgia educators therefore sought a declaration that such investigations were beyond the agency's jurisdiction and an order enjoining the OCR from investigating the complaints. The OCR subsequently moved for dismissal, arguing that the plaintiffs had failed to exhaust their administrative remedies. The district court granted the motion, dismissing the action. The Georgia

educators now appeal, contending that exhaustion of administrative remedies is not a necessary precondition to the adjudication of their claims. We disagree.

FN10. Jurisdiction in this suit was based on 28 U.S.C. § 1331 (1982), as a suit arising under the laws of the United States.

*1392 II.

[1] One of the primary purposes in requiring plaintiffs to exhaust their administrative remedies is to assure that the courts review ripe controversies, presenting concrete injuries. Thus, the Supreme Court has stated that:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) (footnote omitted). In the instant case, the Department has not yet terminated federal funding for the appellants' special education programs. Nevertheless, the appellants argue that their suit is ripe, citing our decision as part of the former Fifth Circuit in *Florida v. Weinberger*, 492 F.2d 488 (5th Cir.1974).[FN11]

FN11. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit, including Unit B, handed down prior to October 1, 1981.

In *Weinberger*, the Department of Health, Education, and Welfare promulgated final regulations that reversed the agency's previous policy, to which Florida had conformed its laws. Faced with the prospect of either amending its statutes or losing federal funding, Florida brought suit asserting that the regulations exceeded the Secretary's authority. Although the Secretary had not initiated proceedings to terminate Florida's federal funding, we held that:

We are unable to see the reason, especially where the confrontation has been the result of the Secretary's adoption of a regulation at variance with his former policy upon which the state presumably relied in constructing its statutory agency, in placing the sovereign state of Florida at such risk when so little would be gained by doing so and so much might be lost. The lines are drawn, the positions taken, and the matter is ripe for judicial review.

Id. at 493.

[2] Under *Weinberger*, we could hold that appellants' complaint presents a cognizable injury, even though the OCR has not yet succeeded in terminating federal funding to the Georgia programs. Nevertheless, we stress the unique factual circumstances in that case: both parties had taken final, dispositive, and contrary legal positions, thus making the future injurious agency action inevitable. In the instant case, however, such a crystallization of legal positions has not yet occurred. As our discussion below indicates, we believe that the merits of this dispute may hinge on the OCR's interpretation and explanation of the Department's regulations. Until the appellants exhaust their administrative remedies, thereby allowing the agency officially to formulate its approach to the relevant regulations, we believe that the issues presented by this action will not be ripe for adjudication.

III.

[3] An examination of the exhaustion doctrine confirms our conclusion that this case is not ripe for adjudication. That doctrine denies judicial relief to a party challenging agency action until that party has exhausted all of its available administrative remedies. *See, e.g.*, *Patsy v. Florida Int'l University*, 634 F.2d 900, 902-04 (5th Cir.1981) (en banc) (explaining doctrine and exceptions thereto), *rev'd on other grounds*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). This court has applied this doctrine to a suit challenging an agency's jurisdiction to act, holding that the agency ordinarily should be given the first opportunity to consider the challenge. *See*

Deltona Corp. v. Alexander, 682 F.2d 888, 893 (11th Cir.1982); *see also* Imperial Carpet Mills, Inc. v. Consumer Prods. Safety Comm'n, 634 F.2d 871, 874 (5th Cir. Unit B Jan.1981) ("Questions of an agency's authority*1393 and jurisdiction have long been held by the courts to be particularly appropriate for initial agency determination."). Thus, we would ordinarily require the appellants first to exhaust their administrative remedies with the OCR before allowing them to bring a judicial challenge to the authority of the OCR to investigate the Georgia special education programs.

In some circumstances, however, this court will not require a party challenging an agency's jurisdiction to exhaust its administrative remedies. Thus, we will excuse a litigant's failure to exhaust its administrative remedies if:

(1) there is clear evidence that exhaustion of administrative remedies will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise will be of no help on the question of its jurisdiction.

Marshall v. Burlington Northern, Inc., 595 F.2d 511, 513 (9th Cir.1979); *see also* Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir.1981) (adopting same test); 4 K. Davis, Administrative Law Treatise § 26:5 (2d ed.1983) (explaining test, first proposed in 1958 edition of the Treatise).[FN12] We note that the first element of this test simply states a basic prerequisite for the granting of equitable relief: before a court can enjoin a party from acting, a plaintiff must first establish that his legal remedy is inadequate and that he will be irreparably harmed if the court does not intervene. We further note that the second and third elements of the test are intertwined: if the intricacies of the regulatory scheme are so murky that the court feels that it would benefit from the agency's expertise, the court will be unable to conclude that the agency *plainly* lacks jurisdiction. We examine the three elements of this test in turn.

FN12. Our decision in Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir.1982), cited the decisions in *Marshall* and *Shawnee Coal* with approval, thus giving implicit support to our approach in this case. *See* id. at 893. We note, of course, that the standard we adopt in this case acts only as a general guide as to when a court should exercise its discretion to excuse a litigant challenging an agency's jurisdiction from exhausting the available administrative remedies.

A.

As an initial matter, we must determine whether requiring appellants to exhaust their administrative remedies will cause them irreparable injury. We conclude that it will not. Requiring exhaustion will not preclude the appellants from having an opportunity to dispute the OCR's jurisdiction to investigate alleged violations of section 504: should the Department eventually terminate federal funding for the Georgia special education programs, the educators can appeal the agency's action by refiling this suit in the district court. Nor would handicapped children in Georgia be deprived of funding pending the adjudication of the termination's validity. Assuming that the Department wrongfully terminated the Georgia programs' funding, any injury that might be caused to handicapped children pending such adjudication could be avoided by invoking the court's equity powers. The court would be able to stay the funding's termination by entering a temporary restraining order, and, if necessary, a preliminary injunction. *See generally* Fed.R.Civ.P. 65. The possibility that the court might erroneously refuse to grant such interim relief, thus resulting in injury to the children, does not constitute the sort of irreparable harm that would authorize us to excuse appellants from exhausting their administrative remedies.

B.

[4] We next examine whether the OCR is *plainly* without jurisdiction to investigate state special education programs under section 504 in response to a parent's complaint. In arguing that the OCR is without jurisdiction, the appellants make two arguments worthy of discussion.[FN13]

FN13. Appellants also argue that the regulations implementing section 504 require affirmative action on the part of the state, and thus are outside the scope of authority granted by section 504. *See, e.g.,* Southeastern Community College v. Davis,

442 U.S. 397, 410-13, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979) (Section 504 does not require a state to devote extra resources to accommodate admission of hearing-impaired nursing candidate.). We do not believe cooperation with the OCR's investigatory efforts *plainly* constitutes "affirmative action" that is outside the scope of section 504.

*1394 [5] Appellants first make a broad attack on the validity of the Department's regulations implementing the mandate of section 504. *See*34 C.F.R. pt. 104 (1988). Appellants argue that Congress never authorized the Department to promulgate these regulations, and that they are therefore invalid. We agree that the Department's authority to issue regulations under section 504 is not entirely clear.[FN14] Nevertheless, we conclude that the Department was not *plainly* without authority in so acting.

FN14. The OCR gives the following authority for the promulgation of its regulations implementing section 504:

Sec. 504, Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub.L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub.L. 94-142, 89 Stat. 795.

34 C.F.R. pt. 104, at 467 (1988). None of these provisions contains an unambiguous or explicit authorization for the regulations contained in 34 C.F.R. pt. 104.

When section 504 was originally enacted, it contained no language expressly authorizing the promulgation of implementing regulations. As a result, the Department initially refused to promulgate regulations implementing section 504, believing the section to be self-executing. *See Southeastern Community College v. Davis*, 442 U.S. 397, 404 n. 4 & 411 n. 11, 99 S.Ct. 2361, 2366 n. 4 & 2370 n. 11, 60 L.Ed.2d 980 (1979). Congress, however, clarified its intent in the legislative history accompanying the Rehabilitation Act Amendments of 1974, Pub.L. No. 93-516, 88 Stat. 1617. The report accompanying that Act indicates that Congress intended federal agencies to implement section 504 by means of appropriate regulations:

[Section 504] constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. *It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.*

The language of section 504 ... further envisions the implementation of a compliance program ...*including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance,* attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. *Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient* or other means otherwise authorized by law.

Sen. R. No. 1297, 93d Cong., 2d Sess. at 39-40, *reprinted in*1974 U.S.Code, Cong. & Admin.News 6373, 6390 (emphasis added). The Report also indicates that Congress envisioned that the Department would coordinate the promulgation of these regulations. *See id.* at 40,*reprinted in* 1974 U.S.Code Cong. & Admin.News at 6391.

Faced with this evidence regarding the intent of Congress, the President issued Executive Order No. 11,914. That Order provided in relevant part:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America ... and in order to provide for consistent implementation within the Federal Government of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it is hereby ordered as follows:

Section 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended, hereinafter referred to as section 504, by

*1395 all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity....

Sec. 2. In order to implement the provisions of section 504, each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

Exec. Order No. 11,914, 3 C.F.R. 117, 117-18 (1977) (1976 compilation of executive orders).[FN15] In 1980, President Carter revoked Executive Order No. 11,914 in order to transfer oversight of section 504's implementation to the Attorney General. *See*Exec. Order No. 12,250§ 1-502, 3 C.F.R. 298, 300 (1981) (1980 compilation of executive orders), *reprinted in*42 U.S.C. § 2000d-1 app. at 24 (1982). Executive Order No. 12,250 nevertheless provided that all "[e]xisting agency regulations implementing the nondiscrimination provisions [of section 504 and the EHA, among others] shall continue in effect until revoked or modified." *Id.*§ 1-504, 3 C.F.R. at 300 (1981), *reprinted in*42 U.S.C. § 2000d-1 app. at 24 (1982).

FN15. Although we note that section 2 of Executive Order No. 11,914 specifically authorizes the promulgation of regulations implementing section 504, the Department apparently does not view the Order as the source of its authority to promulgate those regulations. See authority for regulations cited *supra* note 14. Instead, the Department interprets the Order as imposing a duty to promulgate guidelines distinct from its own section 504 regulations. These guidelines would coordinate the implementation of non-discrimination regulations throughout all affected government programs. The Department noted, however, that its section 504 regulations would be the basis for those guidelines. *See generally*42 Fed.Reg. 22,677 (1977).

Based on this information regarding the Congressional and executive interpretation of section 504, we conclude that the OCR is not *plainly* without authority to enforce regulations implementing section 504 of the Rehabilitation Act of 1973. We therefore conclude that the OCR is not acting *plainly* outside its jurisdiction when it investigates the Georgia special education programs pursuant to 34 C.F.R. § 100.7 (1988).

[6] In their second attack on the OCR's jurisdiction to investigate the Georgia programs, appellants contend that the OCR's powers under section 504 were restricted by the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). In *Robinson*, parents of handicapped children brought suit against the Rhode Island Commissioner of Education, protesting the commissioner's decision denying responsibility for their children's education. They complained that the commissioner's decision violated the EHA, section 504 of the Rehabilitation Act, and the fourteenth amendment. After an extensive discussion of the relationships between the statutes and constitutional provision involved, the Supreme Court held that the enforcement mechanisms provided by the EHA were the exclusive method by which *parents* could challenge state denial of educational benefits to handicapped children. *See id.* at 1009, 104 S.Ct. at 3467.

Robinson leads us to conclude that in the ordinary case, a *parent's* private remedy under EHA is exclusive. In the instant case, however, the parent is not bringing a suit against the appellants; instead, the federal government itself is investigating the Georgia programs-albeit in response to a parental complaint. We do not believe that such federal supervisory action is *plainly* precluded by the EHA's detailed scheme for the processing of parental complaints. Thus, in examining the interrelation between section 504 of the Rehabilitation Act of 1973 and the 1975 amendments to the EHA, we conclude that law may allow-and Congress and the President may have intended-two overlapping, complementary schemes of enforcement: one exercised by private litigants through the provisions of the EHA, the other provided by the Department's supervisory investigations of state programs as authorized under the regulations implementing section 504.[FN16] We therefore conclude that the *1396 OCR's exercise of supervisory powers over the Georgia special education programs is not *plainly* outside of the agency's jurisdiction.

FN16. In *Robinson,* the Supreme Court noted that:

> Regulations under § 504 and the EHA were being formulated at the same time.... The Secretary of HEW and the Commissioner of Education emphasized the coordination of effort behind the two sets of regulations and the Department's intent that the § 504 regulations be consistent with the requirements of the EHA.

468 U.S. at 1017 n. 20, 104 S.Ct. at 3471 n. 20 (citations to the Federal Register omitted). Thus, the contemporaneous regulatory history supports the Department's current position that a coordinated enforcement scheme was anticipated.

C.

As a final matter we conclude that the Department of Education's expertise in this area will greatly aid judicial review of the issues presented in this case. As our discussion has indicated, the appellants' claims challenge the OCR's authority to promulgate and administer a very complex regulatory scheme-a scheme that coordinates and seeks to implement the provisions of numerous statutes and executive orders. Appellants' exhaustion of their administrative remedies will allow a reviewing court to examine the official agency explanation and interpretation of the regulations and statutes involved.

IV.

In sum, we conclude that the district court acted properly in dismissing the appellants' suit for failure to exhaust administrative remedies. The decision of the district court is

AFFIRMED.

C.A.11 (Ga.),1989.
Rogers v. Bennett
873 F.2d 1387, 53 Ed. Law Rep. 456

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Southeastern Community College v. Davis
U.S.N.C.,1979.

Supreme Court of the United States
SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,
v.
Frances B. DAVIS.
No. 78-711.

Argued April 23, 1979.
Decided June 11, 1979.

An action under the Civil Rights Act of 1871 and the Rehabilitation Act of 1973 was brought against a college by licensed practical nurse who, because of hearing disability, was denied admission to college's nursing program. The United States District for the Eastern District of North Carolina, at Fayetteville, Robert W. Hemphill, J., 424 F.Supp. 1341, entered judgment for defendant, and plaintiff appealed. The Court of Appeals, K. K. Hall, Circuit Judge, 574 F.2d 1158, affirmed in part, vacated in part and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that provision of Rehabilitation Act prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" did not compel college to undertake affirmative action that would dispense with need for effective oral communication in the college's nursing program so that student with a bilateral, sensori-neural hearing loss could be included in that program; it appeared unlikely that student could benefit from any affirmative action that regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters.

Reversed and remanded.

West Headnotes

[1] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1, 78k127, 78k9.5)

Colleges and Universities 81 ⚷9.10

81 Colleges and Universities
81k9 Students
81k9.10 k. In General. Most Cited Cases
(Formerly 81k9)

United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Provision of the Rehabilitation Act prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" does not by its terms compel educational institutions to disregard disability of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate; language of statute indicates only that mere possession of handicap is not permissible ground for assuming an inability to function in a particular context. Rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; 42 U.S.C.A. § 1983.

[2] Civil Rights 78 ⚷1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k107(1), 78k9.5)

United States 393 ⚷82(1)

393 United States

393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
For purposes of provision of the Rehabilitation Act prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," an "otherwise qualified person" is one who is able to meet all of the program's requirements in spite of his handicap. Rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; 42 U.S.C.A. § 1983.

[3] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1, 78k127, 78k9.5)

Colleges and Universities 81 ⚷9.10

81 Colleges and Universities
81k9 Students
81k9.10 k. In General. Most Cited Cases
(Formerly 81k9)

United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Provision of Rehabilitation Act prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" did not compel college to undertake affirmative action that would dispense with need for effective oral communication in the college's nursing program so that student with a bilateral, sensori-neural hearing loss could be included in that program; it appeared unlikely that student could benefit from any affirmative action that regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters. Rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; 42 U.S.C.A. § 1983.

[4] Statutes 361 ⚷184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⚷217.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.1 k. History of Act in General. Most Cited Cases

Statutes 361 ⚷219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
Although agency's interpretation of statute under which it operates is entitled to some deference, such deference is constrained by courts' obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.

[5] Civil Rights 78 ⚷1069

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k1060, 78k107(1), 78k9.5)

Colleges and Universities 81 ⚷9.10

81 Colleges and Universities
81k9 Students
81k9.10 k. In General. Most Cited Cases
(Formerly 81k9)

United States 393 ⚷82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Provision of Rehabilitation Act prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" imposes no requirement upon educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person. Rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; 42 U.S.C.A. § 1983.

***2362 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***397** Respondent, who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied ****2363** admission to the nursing program of petitioner Southeastern Community College, a state institution that receives federal funds. An audiologist's report indicated that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and petitioner rejected respondent's application for admission because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. Respondent then filed suit against petitioner in Federal District Court, alleging, *inter alia*, a violation of § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap." The District Court entered judgment in favor of petitioner, confirming the audiologist's findings and concluding that respondent's handicap prevented her from safely performing in both her training program and her proposed profession. On this basis, the court held that respondent was not an "otherwise qualified handicapped individual" protected by § 504 and that the decision to exclude her was not discriminatory within the meaning of § 504. Although not disputing the District Court's factfindings, the Court of Appeals reversed, holding that in light of intervening regulations of the Department of Health, Education, and Welfare (HEW), § 504 required petitioner to reconsider respondent's application for admission without regard to her hearing ability, and that in determining whether respondent was "otherwise qualified," petitioner must confine its inquiry to her "academic and technical qualifications." The Court of Appeals also suggested that § 504 required "affirmative conduct" by petitioner to modify its program to accommodate the disabilities of applicants.

Held: There was no violation of § 504 when petitioner concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 limits the freedom of an educational institution to require reasonable physical qualifications for admission to ***398** a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in petitioner's program would render unreasonable the qualifications it imposed. Pp. 2366-2371.

(a) The terms of § 504 indicate that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context, but do not mean that a person need not meet legitimate physical requirements in order to be "otherwise qualified." An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. HEW's regulations reinforce, rather than contradict, this conclusion. Pp. 2366-2367.

(b) Section 504 does not compel petitioner to undertake affirmative action that would dispense with the need for effective oral communication, such as by giving respondent individual supervision whenever she attends patients directly or by dispensing with certain required courses for respondent and training her to perform some but not all of the tasks a registered nurse is licensed to perform. On the record, it appears unlikely that respondent could benefit from any affirmative action that HEW regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters. Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. Neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds, and thus even if HEW has attempted to create such an obligation itself, it lacks the authority to do so. Pp. 2367-2370.

(c) The line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons **2364 will not always be clear, and situations may arise where a refusal to modify an existing program to accommodate the needs of a disabled person amounts to discrimination against the handicapped. In this case, however, petitioner's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. Uncontroverted testimony established that the purpose of petitioner's program was to train persons who could serve the nursing profession in all customary ways, and this type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial *399 modifications of standards to accommodate a handicapped person. P. 2370.

574 F.2d 1158, reversed and remanded.

Eugene Gressman, Chapel Hill, N. C., for petitioner.
Marc P. Charmatz, Washington, D. C., for respondent.

*400 Mr. Justice POWELL delivered the opinion of the Court.

This case presents a matter of first impression for this Court: Whether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I

Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973-1974 academic year she was enrolled in the College Parallel program of Southeastern Community College, a state institution that receives federal funds. Respondent hoped to progress to Southeastern's Associate Degree Nursing program, completion of which would make her eligible for state certification as a registered nurse. In the course of her application to the nursing program, she was interviewed by a member of the nursing faculty. It became apparent that respondent had difficulty understanding questions asked, and on inquiry she acknowledged a history of hearing problems and dependence on a hearing aid. She was advised to consult an audiologist.

*401 On the basis of an examination at Duke University Medical Center, respondent was diagnosed as having a "bilateral, sensori-neural hearing loss." App. 127a. A change in her hearing aid was recommended, as a result of which it was expected that she would be able to detect sounds "almost as well as a person would who has normal hearing." *Id.*, at 127a-128a. But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for effective communication: "While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." *Id.*, at 128a.

Southeastern next consulted Mary McRee, Executive

Director of the North Carolina Board of Nursing. On the basis of the audiologist's report, McRee recommended that respondent not be admitted to the nursing program. In McRee's view, respondent's hearing disability made it unsafe for her to practice as a nurse.[FN1] In **2365 addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from *402 realizing the benefits of the program: "To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs." *Id.*, at 132a-133a.

FN1. McRee also wrote that respondent's hearing disability could preclude her practicing safely in "any setting" allowed by "a license as L [icensed] P[ractical] N[urse]." App. 132a. Respondent contends that inasmuch as she already was licensed as a practical nurse, McRee's opinion was inherently incredible. But the record indicates that respondent had "not worked as a licensed practical nurse except to do a little bit of private duty,"*id.*, at 32a, and had not done that for several years before applying to Southeastern. Accordingly, it is at least possible to infer that respondent in fact could not work safely as a practical nurse in spite of her license to do so. In any event, we note the finding of the District Court that "a Licensed Practical Nurse, unlike a Licensed Registered Nurse, operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." 424 F.Supp. 1341, 1342-1343 (EDNC 1976).

After respondent was notified that she was not qualified for nursing study because of her hearing disability, she requested reconsideration of the decision. The entire nursing staff of Southeastern was assembled, and McRee again was consulted. McRee repeated her conclusion that on the basis of the available evidence, respondent "has hearing limitations which could interfere with her safely caring for patients." *Id.*, at 139a. Upon further deliberation, the staff voted to deny respondent admission.

Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging both a violation of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794 (1976 ed., Supp. II),[FN2] *403 and a denial of equal protection and due process. After a bench trial, the District Court entered judgment in favor of Southeastern. 424 F.Supp. 1341 (1976). It confirmed the findings of the audiologist that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and further found:

FN2. The statute, as set forth in 29 U.S.C. § 794 (1976 ed., Supp. II), provides in full:
"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 italicized portion of the section was added by § 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, 92 Stat. 2982. Respondent asserts no claim under this portion of the statute.

"[I]n many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lip reading impossible. Additionally, in many situations a Registered Nurse would be required to

instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." *Id.*, at 1343.
Accordingly, the court concluded:

"[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where [respondent's] particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential of danger to future patients in such situations." *Id.*, at 1345.

Based on these findings, the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by § 504. In its view, "[o]therwise qualified, can only be read to mean otherwise able to **2366 function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F.Supp., at 1345. Because respondent's disability would prevent her from functioning "sufficiently" in Southeastern's nursing program, the court *404 held that the decision to exclude her was not discriminatory within the meaning of § 504.[FN3]

FN3. The District Court also dismissed respondent's constitutional claims. The Court of Appeals affirmed that portion of the order, and respondent has not sought review of this ruling.

On appeal, the Court of Appeals for the Fourth Circuit reversed. 574 F.2d 1158 (1978). It did not dispute the District Court's findings of fact, but held that the court had misconstrued § 504. In light of administrative regulations that had been promulgated while the appeal was pending, see 42 Fed.Reg. 22676 (1977),[FN4] the appellate court believed that § 504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." 574 F.2d, at 1160. It concluded that the District Court had erred in taking respondent's handicap into account in determining whether she was "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." *Id.*, at 1161. The Court of Appeals also suggested that § 504 required "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive." 574 F.2d, at 1162.

FN4. Relying on the plain language of the Act, the Department of Health, Education, and Welfare (HEW) at first did not promulgate any regulations to implement § 504. In a subsequent suit against HEW, however, the United States District Court for the District of Columbia held that Congress had intended regulations to be issued and ordered HEW to do so. *Cherry v. Mathews*, 419 F.Supp. 922 (1976). The ensuing regulations currently are embodied in 45 CFR pt. 84 (1978).

Because of the importance of this issue to the many institutions covered by § 504, we granted certiorari. 439 U.S. 1065, 99 S.Ct. 830, 59 L.Ed.2d 30 (1979). We now reverse.[FN5]

FN5. In addition to challenging the construction of § 504 by the Court of Appeals, Southeastern also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not § 504 provides a private action, she may maintain her suit under 42 U.S.C. § 1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them. See *Norton v. Mathews*, 427 U.S. 524, 529-531, 96 S.Ct. 2771, 2774, 2775, 49 L.Ed.2d 672 (1976); *Moor v. County of Alameda*, 411 U.S. 693, 715, 93 S.Ct. 1785, 1798, 36 L.Ed.2d 596 (1973); *United States v. Augenblick*, 393 U.S. 348, 351-352, 89 S.Ct. 528, 531, 21 L.Ed.2d 537 (1969).

***405 II**

[1] As previously noted, this is the first case in which this Court has been called upon to interpret § 504. It is elementary that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring); see *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239 (1978); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472, 97 S.Ct. 1292, 1300, 51 L.Ed.2d 480 (1977). Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[FN6]

FN6. The Act defines "handicapped individual" as follows:
"The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." § 7(6) of the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 88 Stat. 1619, 89 Stat. 2-5, 29 U.S.C. § 706(6).
This definition comports with our understanding of § 504. A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified." See S.Rep.No. 93-1297, pp. 38-39 (1974), U.S.Code Cong. & Admin.News, p. 6373.

**2367 [2] *406 The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F.2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations promulgated by the Department of HEW to interpret § 504 reinforce, rather than contradict, this conclusion. According to these regulations, a "[q]ualified handicapped person" is, "[w]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity . . . ." 45 CFR § 84.3(k)(3) (1978). An explanatory note states:

"The term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." 45 CFR pt. 84, App. A, p. 405 (1978) (emphasis supplied).

*407 A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.[FN7] We think it clear, therefore, that HEW interprets the "other" qualifications which a handicapped person may be required to meet as including necessary physical qualifications.

FN7. The note states:
"Paragraph (k) of § 84.3 defines the term 'qualified handicapped person.' Throughout the regulation, this term is used instead of

the statutory term 'otherwise qualified handicapped person.' The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms 'qualified' and 'otherwise qualified' are intended to be interchangeable." 45 CFR pt. 84, App. A, p. 405 (1978).

III

[3] The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. As the District Court found, this ability also is indispensable for many of the functions that a registered nurse performs.

**2368 Respondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not *408 necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make § 504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.[FN8]

FN8. The court below adopted a portion of this argument:

"[Respondent's] ability to read lips aids her in overcoming her hearing disability; however, it was argued that in certain situations such as in an operating room environment where surgical masks are used, this ability would be unavailing to her.

"Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly [respondent] could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

"If [respondent] meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N.C.Gen.Stat. §§ 90-158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." 574 F.2d 1158, 1161 n. 6 (1978).

Respondent finds support for this argument in portions of the HEW regulations discussed above. In particular, a provision applicable to postsecondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped persons, and to provide "auxiliary aids" such as sign-language interpreters.[FN9]

Respondent *409 argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

FN9. This regulation provides:

"(a) *Academic requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by

such student or to any directly related licensing requirement not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

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

"(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." 45 CFR § 84.44 (1978).

We note first that on the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. Section 84.44(d)(2), for example, explicitly excludes "devices or services of a personal nature" from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient**2369 safety if respondent took part in the clinical phase of the nursing program. See 424 F.Supp., at 1346. Furthermore, it also is reasonably clear that § 84.44(a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could *410 allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501(b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarly, § 503(a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals . . . ." The President is required to promulgate regulations to enforce this section.

Under § 501(c) of the Act, by contrast, state agencies such as Southeastern are only "encourage[d] . . . to adopt and implement such policies and procedures." Section 504 does not refer at all to affirmative action, and except as it applies to *411 federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood

accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[FN10]

FN10. Section 115(a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 added to the 1973 Act a section authorizing grants to state units for the purpose of providing "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." 92 Stat. 2971, 29 U.S.C. § 775(a) (1976 ed., Supp. III). This provision recognizes that on occasion the elimination of discrimination might involve some costs; it does not imply that the refusal to undertake substantial changes in a program by itself constitutes discrimination. Whatever effect the availability of these funds might have on ascertaining the existence of discrimination in some future case, no such funds were available to Southeastern at the time respondent sought admission to its nursing program.

[4] Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 800 n. 20, 58 L.Ed.2d 808 (1979). Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients**2370 of federal funds.[FN11] Accordingly, we hold that even if *412 HEW has attempted to create such an obligation itself, it lacks the authority to do so.

FN11. The Government, in a brief *amicus curiae* in support of respondent, cites a Report of the Senate Committee on Labor and Public Welfare on the 1974 amendments to the 1973 Act and several statements by individual Members of Congress during debate on the 1978 amendments, some of which indicate a belief that § 504 requires affirmative action. See Brief for United States as *Amicus Curiae* 44-50. But these isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment. *Quern v. Mandley*, 436 U.S. 725, 736 n. 10, 98 S.Ct. 2069, 2075 n. 10, 56 L.Ed.2d 658 (1978); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 714, 98 S.Ct. 1370, 1378, 55 L.Ed.2d 657 (1978). Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent "legislation" such as this Court might weigh in construing the meaning of an earlier enactment. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969).

The Government also argues that various amendments to the 1973 Act contained in the Rehabilitation Act Amendments of 1978 further reflect Congress' approval of the affirmative-action obligation created by HEW's regulations. But the amendment most directly on point undercuts this position. In amending § 504, Congress both extended that section's prohibition of discrimination to "any program or activity conducted by any Executive agency or by the United States Postal Service" and authorized administrative regulations to implement only *this amendment*. See n. 2, *supra*. The fact that no other regulations were mentioned supports an inference that no others were approved.

Finally, we note that the assertion by HEW of the authority to promulgate any regulations under § 504 has been neither consistent nor longstanding. For the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued. It altered its stand only after having been enjoined to do so. See n. 4, *supra*. This fact substantially diminishes the deference to be given to HEW's present interpretation of the statute. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976).

IV

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a ***413** refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

[5] In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. See, *e. g.*, App. 35a, 52a, 53a, 71a, 74a. This type of purpose, far from reflecting any animus against handicapped individuals is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications ****2371** of standards to accommodate a handicapped person.[FN12]

FN12. Respondent contends that it is unclear whether North Carolina law requires a registered nurse to be capable of performing all functions open to that profession in order to obtain a license to practice, although McRee, the Executive Director of the State Board of Nursing, had informed Southeastern that the law did so require. See App. 138a-139a. Respondent further argues that even if she is not capable of meeting North Carolina's present licensing requirements, she still might succeed in obtaining a license in another jurisdiction.

Respondent's argument misses the point. Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast. Even if the licensing requirements of North Carolina or some other State are less demanding, nothing in the Act requires an educational institution to lower its standards.

***414** One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

V

Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion.

So ordered.

U.S.N.C.,1979.
Southeastern Community College v. Davis
442 U.S. 397, 99 S.Ct. 2361, 20 Empl. Prac. Dec. P 30,003, 60 L.Ed.2d 980, 2 A.D. Cases 1, 1 A.D.D. 60

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Tennessee v. Lane
U.S.,2004.

Supreme Court of the United States
TENNESSEE, Petitioner,
v.
George LANE et al.
No. 02-1667.

Argued Jan. 13, 2004.
Decided May 17, 2004.

Background: Disabled citizens brought action against state under Title II of the Americans with Disabilities Act (ADA), seeking to vindicate their right of access to the courts. The United States District Court for the Middle District of Tennessee, Thomas A. Higgins, J., denied state's motion to dismiss. State appealed. On petition for rehearing, the Court of Appeals, 315 F.3d 680, affirmed and remanded. Certiorari was granted.

Holding: The United States Supreme Court, Justice Stevens, held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment.

Affirmed.

Justice Souter filed a concurring opinion in which Justice Ginsburg joined.

Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined.

Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined.

Justices Scalia and Thomas filed dissenting opinions.

West Headnotes

[1] Constitutional Law 92 ⚷4850

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(A) In General
92k4850 k. In General. Most Cited Cases
(Formerly 92k82(6.1))

Constitutional Law 92 ⚷4852

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(A) In General
92k4852 k. Deterring, Preventing, or Remedying Violations. Most Cited Cases
(Formerly 92k82(6.1))
Congress' enforcement power under the Fourteenth Amendment is broad, and includes the authority both to remedy and to deter violation of rights guaranteed by the Fourteenth Amendment by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚷4851

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(A) In General
92k4851 k. Substantive Rights or Legislation. Most Cited Cases
(Formerly 92k82(6.1))
While Congress must, pursuant to its enforcement power under the Fourteenth Amendment, have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a substantive change in the governing law. U.S.C.A. Const.Amend. 14.

[3] Civil Rights 78 ⚷1005

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions

78k1005 k. Power to Enact and Validity. Most Cited Cases

Civil Rights 78 ⚷1056

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1056 k. Courts and Judicial Proceedings. Most Cited Cases

Constitutional Law 92 ⚷4866

92 Constitutional Law
92XXVIII Enforcement of Fourteenth Amendment
92XXVIII(B) Particular Issues and Applications
92k4866 k. Disabled Persons. Most Cited Cases
(Formerly 92k299.2)

Federal Courts 170B ⚷265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases
Title II of the Americans with Disabilities Act (ADA), prohibiting discrimination by a public entity, validly abrogated Eleventh Amendment immunity through enforcement of the Fourteenth Amendment, as applied to cases implicating the fundamental right of access to the courts. U.S.C.A. Const.Amends. 11, 14, §5; Americans with Disabilities Act of 1990, §§ 201, 502, 42 U.S.C.A. §§ 12131, 12202.

***1979 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990(ADA), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity,"42 U.S.C. § 12132. After the District Court denied the State's motion to dismiss on Eleventh Amendment immunity grounds, the Sixth Circuit held the appeal in abeyance pending *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866. This Court later ruled in *Garrett* that the Eleventh Amendment bars private money damages actions for state violations of ADA Title I, which prohibits employment discrimination against the disabled. The en banc Sixth Circuit then issued its *Popovich* decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II established,**1980 *inter alia*, that physical barriers in courthouses and courtrooms have had the effect of denying disabled people the opportunity for such access.

Held: As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Pp. 1984-1994.

(a) Determining whether Congress has constitutionally abrogated a State's Eleventh Amendment immunity requires resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of

*510 constitutional authority. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522. The first question is easily answered here, since the ADA specifically provides for abrogation. See § 12202. With regard to the second question, Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. E.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614. That power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." City of Boerne v. Flores, 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624. In *Boerne*, the Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: Section 5 legislation is valid if it exhibits "a congruence and proportionality" between an injury and the means adopted to prevent or remedy it. Id., at 520, 117 S.Ct. 2157. Applying the *Boerne* test in *Garrett*, the Court concluded that ADA Title I was not a valid exercise of Congress' § 5 power because the historical record and the statute's broad sweep suggested that Title I's true aim was not so much enforcement, but an attempt to "rewrite" this Court's Fourteenth Amendment jurisprudence. 531 U.S., at 372-374, 121 S.Ct. 955. In view of significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 power, id., at 360, n. 1, 121 S.Ct. 955.Pp. 1985-1988.

(b) Title II is a valid exercise of Congress' § 5 enforcement power. Pp. 1988-1994.

(1) The *Boerne* inquiry's first step requires identification of the constitutional rights Congress sought to enforce when it enacted Title II.Garrett, 531 U.S., at 365, 121 S.Ct. 955. Like Title I, Title II seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination. Id., at 366, 121 S.Ct. 955. But it also seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336-337, 92 S.Ct. 995, 31 L.Ed.2d 274. Whether Title II validly enforces such constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." E.g., South Carolina v. Katzenbach, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769. Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of **1981 public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their disabilities.*511 A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs, including failure to make courtrooms accessible to witnesses with physical disabilities. The sheer volume of such evidence far exceeds the record in last Term's Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 728-733, 123 S.Ct. 1972, 155 L.Ed.2d 953, in which the Court approved the family-care leave provision of the Family and Medical Leave Act of 1993 as valid § 5 legislation. Congress' finding in the ADA that "discrimination against individuals with disabilities persists in such critical areas as ... access to public services," § 12101(a)(3), together with the extensive record of disability discrimination that underlies it, makes clear that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation. Pp. 1988-1992.

(2) Title II is an appropriate response to this history and pattern of unequal treatment. Unquestionably, it is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination at issue, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The long history of unequal treatment of disabled persons in the administration of

judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult and intractable problem of disability discrimination warranted added prophylactic measures. *Hibbs*, 538 U.S., at 737, 123 S.Ct. 1972. The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. § 12132. But Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State ***512** must afford to all individuals a meaningful opportunity to be heard in its courts. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780. A number of affirmative obligations flow from this principle. Cases such as *Boddie*, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, make clear that ordinary considerations of ****1982** cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end. Pp. 1992-1994.

315 F.3d 680, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 1995. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 1996. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 1997. SCALIA, J., *post*, p. 2007, and THOMAS, J., *post*, p. 2013, filed dissenting opinions.

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Paul G. Summers, Attorney General & Reporter for the State of Tennessee, Michael E. Moore, Counsel of Record, Solicitor General, S. Elizabeth Martin, Mary Martelle Collier, Senior Counsel Office of the Attorney General & Reporter for the State of Tennessee, Nashville, Tennessee, for Petitioner.
Theodore B. Olson, Solicitor, General Counsel of Record, R. Alexander Acosta, Assistant Attorney General, Paul D. Clement, Deputy, Solicitor General, Patricia A. Millett, Assistant to the Solicitor General, Jessica Dunsay Silver, Sarah E. Harrington, Kevin Russell, Attorneys Department of Justice, Washington, D.C., for the United States.
Samuel R. Bagenstos, Cambridge, MA, Thomas C. Goldstein, Goldstein & Howe, P.C., Washington, DC, William J. Brown, Counsel of Record, William J. Brown & Assocs., Cleveland, TN, for private respondents.For U.S. Supreme Court briefs, see:2003 WL 22137324 (Pet.Brief)2003 WL 22733904 (Resp.Brief)2003 WL 23010747 (Reply.Brief)2003 WL 22733904 (Appellant.Brief)

Justice STEVENS delivered the opinion of the Court.
***513** Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, provides 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, or be subjected to discrimination by any such entity."§ 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court

system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator.***514** At his first appearance, Lane crawled up two flights of stairs to get to the courtroom.****1983** When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed.[FN1] The United States intervened to defend Title II's abrogation of the States' Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

FN1. In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), we held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Id.*, at 147, 113 S.Ct. 684.

In *Garrett*, we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. *Id.*, at 360, n. 1, 121 S.Ct. 955.Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State's failure to accommodate his disability in a child custody proceeding. *Popovich v. Cuyahoga County Court*, 276 F.3d 808 (C.A.6 2002). A divided court permitted the suit to proceed ***515** despite the State's assertion of Eleventh Amendment immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. 276 F.3d, at 811-816. The minority concluded that Congress had not validly abrogated the States' Eleventh Amendment immunity for any Title II claims, *id.*, at 821, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims, *id.*, at 818.

Following the en banc decision in *Popovich*, a panel of the Court of Appeals entered an order affirming the District Court's denial of the State's motion to dismiss in this case. Judgt. order reported at 2002 WL 1580210 (C.A.6 2002). The order explained that respondents' claims were not barred because they were based on due process principles. In response to a petition for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due process violations, the panel filed an amended opinion. It explained that the Due Process Clause protects the right of access to the courts, and that the evidence before Congress when it enacted Title II "established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." 315 F.3d 680, 682 (2003). Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities ****1984** may result directly from unconstitutional animus and impermissible stereotypes." *Id.*, at 683. The panel did not, however, categorically reject the State's submission. It instead noted that the case presented difficult questions that "cannot be clarified absent a factual record," and remanded for further proceedings. *Ibid.* We granted certiorari, 539 U.S. 941, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003), and now affirm.

***516** II

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons

with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute.[FN2] Central among these conclusions was Congress' finding that

> FN2. See 42 U.S.C. § 12101; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (Oct. 12, 1990); S.Rep. No. 101-116 (1989); H.R.Rep. No. 101-485 (1990), U.S.Code Cong. & Admin.News 1990, p. 267; H.R. Conf. Rep. No. 101-558 (1990); H.R. Conf. Rep. No. 101-596 (1990), U.S.Code Cong. & Admin.News 1990, p. 565; cf. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 389-390, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (App. A to opinion of BREYER, J., dissenting) (listing congressional hearings).

> "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." 42 U.S.C. § 12101(a)(7).

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."§§ 12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public ***517** services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II, §§ 12131-12134, prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. § 12131(1). Persons with disabilities are "qualified" if they, "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, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."§ 12131(2). Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U.S.C. § 794a, which ****1985** authorizes private citizens to bring suits for money damages. 42 U.S.C. § 12133.

III

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted ... by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms ... applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett*, 531 U.S., at 363, 121 S.Ct. 955; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id.*, at 73, 120 S.Ct. 631.

***518** The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. As in *Garrett*, see 531 U.S., at 363-364, 121 S.Ct. 955, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh

Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

[1] In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Id.*, at 456, 96 S.Ct. 2666. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), citing *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1880).[FN3] It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S., at 81, 120 S.Ct. 631. We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727-728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). See also ***519***City of Boerne v. Flores*, 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).[FN4] The ****1986** most recent affirmation of the breadth of Congress' § 5 power came in *Hibbs*, in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat. 6, 29 U.S.C. § 2601 *et seq.* We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of ***520***Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 1979). When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

FN3. In *Ex parte Virginia*, we described the breadth of Congress' § 5 power as follows:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U.S., at 345-346. See also *City of Boerne v. Flores*, 521 U.S. 507, 517-518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

FN4. In *Boerne*, we observed:

> "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach*, *supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan*, [384 U.S. 641, 86 S.Ct. 1717,

16 L.Ed.2d 828 (1966)] (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States*, 446 U.S. 156, 161, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); see also *James Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes)." *Id.*, at 518,117 S.Ct. 2157.

[2] Congress' § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne*, 521 U.S., at 519, 117 S.Ct. 2157. In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." *Id.*, at 519-520, 117 S.Ct. 2157. But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S.Ct. 2157.

In *Boerne*, we held that Congress had exceeded its § 5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), for the stated purpose of "restor[ing]" a constitutional rule that *Smith* had rejected. **1987521 U.S., at 512, 515, 117 S.Ct. 2157 (internal quotation marks omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise Clause as interpreted in *Smith*, we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." 521 U.S., at 529, 532, 117 S.Ct. 2157. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne's* "congruence and proportionality" test in *521*Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid*, 527 U.S., at 631-632, 119 S.Ct. 2199. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and ... plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. *Id.*, at 647-648, 119 S.Ct. 2199. See also *Kimel*, 528 U.S. 62, 120 S.Ct. 631 (finding that the Age Discrimination in Employment Act exceeded Congress' § 5 powers under *Boerne*); *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (Violence Against Women Act).

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' § 5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. As in *Florida Prepaid*, we concluded Congress' exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. 531 U.S., at 368, 374, 121 S.Ct. 955. Although the dissent pointed out that Congress had

before it a great deal of evidence of discrimination by the States against persons with disabilities, *id.*, at 379, 121 S.Ct. 955 (opinion of BREYER, J.), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I, *id.*, at 371, n. 7, 121 S.Ct. 955. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of ***522** unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on " '[d]iscrimination [in] ...*employment in the private sector,*' " and made no mention of discrimination in public employment. *Id.*, at 371-372, 121 S.Ct. 955 (quoting S.Rep. No. 101-116, p. 6 (1989), and H.R.Rep. No. 101-485, pt. 2, p. 28 (1990), U.S.Code Cong. & Admin.News 1990, pp. 303, 310) (emphasis in *Garrett*). Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment****1988** jurisprudence. 531 U.S., at 372-374, 121 S.Ct. 955.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 enforcement power. It is to that question that we now turn.

IV

The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. *Garrett*, 531 U.S., at 365, 121 S.Ct. 955. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett*, 531 U.S., at 366, 121 S.Ct. 955 (citing *Cleburne*, 473 U.S., at 446, 105 S.Ct. 3249).

Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial ***523** review. See, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336-337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *M.L.B. v. S.L. J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 8-15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). See

also *Florida Prepaid*, 527 U.S., at 639-640, 119 S.Ct. 2199; *Boerne*, 521 U.S., at 530, 117 S.Ct. 2157. While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. ***524** "Difficult and intractable problems often ****1989** require powerful remedies,"*Kimel*, 528 U.S., at 88, 120 S.Ct. 631, but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one,"*Boerne*, 521 U.S., at 530, 117 S.Ct. 2157.

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States ... categorically disqualified 'idiots' from voting, without regard to individual capacity." [FN5] The majority of these laws remain on the books,[FN6] and have been the subject of legal challenge as recently as 2001.[FN7] Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying [FN8] and serving as jurors.[FN9] The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled ***525** persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); [FN10] and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system,[FN11] public education, [FN12] and voting.[FN13] Notably, ****1990** these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.[FN14]

FN5. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 464, and n. 14, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979)).

FN6. See Schriner, Ochs, & Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 456-472, tbl. II (2000) (listing state laws concerning the voting rights of persons with mental disabilities).

FN7. See *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me.2001).

FN8. *E.g.*, D.C.Code § 46-403 (West 2001) (declaring illegal and void the marriage of "an idiot or of a person adjudged to be a lunatic"); Ky.Rev.Stat. Ann. § 402.990(2) (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); Tenn.Code Ann. § 36-3-109 (1996) (forbidding the issuance of a marriage license to "imbecile[s]").

FN9. *E.g.*, Mich. Comp. Laws Ann. § 729.204 (West 2002) (persons selected for inclusion on jury list may not be "infirm or decrepit"); Tenn.Code Ann. § 22-2-304(c) (1994) (authorizing judges to excuse "mentally and physically disabled" persons from jury service).

FN10. The undisputed findings of fact in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), provide another example of such mistreatment. See *id.*, at 7, 101 S.Ct. 1531 ("Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded").

FN11. *E.g.*, *LaFaut v. Smith*, 834 F.2d 389, 394 (C.A.4 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt v. Odell*, 64 F.Supp.2d 1014 (D.Kan.1999) (double amputee forced to crawl around the floor of jail). See also, *e.g.*, *Key v. Grayson*, 179 F.3d 996 (C.A.6 1999) (deaf inmate denied

access to sex offender therapy program allegedly required as precondition for parole).

FN12. *E.g.*, *New York State Assn. for Retarded Children, Inc. v. Carey*, 466 F.Supp. 487, 504 (E.D.N.Y.1979) (segregation of mentally retarded students with hepatitis B); *Mills v. Board of Ed. of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972) (exclusion of mentally retarded students from public school system). See also, *e.g.*, *Robertson v. Granite City Community Unit School Dist. No. 9*, 684 F.Supp. 1002 (S.D.Ill.1988) (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas v. Atascadero Unified School Dist.*, 662 F.Supp. 376 (C.D.Cal.1986) (kindergarten student with AIDS excluded from class).

FN13. *E.g.*, *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me.2001) (disenfranchisement of persons under guardianship by reason of mental illness). See also, *e.g.*, *New York ex rel. Spitzer v. County of Delaware*, 82 F.Supp.2d 12 (N.D.N.Y.2000) (mobility-impaired voters unable to access county polling places).

FN14. *E.g.*, *Ferrell v. Estelle*, 568 F.2d 1128, 1132-1133 (C.A.5) (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, 573 F.2d 867 (C.A.5 1978); *State v. Schaim*, 65 Ohio St.3d 51, 64, 600 N.E.2d 661, 672 (1992) (same); *People v. Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984) (same). See also, *e.g.*, *Layton v. Elder*, 143 F.3d 469, 470-472 (C.A.8 1998) (mobility-impaired litigant excluded from a county quorum court session held on the second floor of an inaccessible courthouse); *Matthews v. Jefferson*, 29 F.Supp.2d 525, 533-534 (W.D.Ark.1998) (wheelchair-bound litigant had to be carried to the second floor of an inaccessible courthouse, from which he was unable to leave to use restroom facilities or obtain a meal, and no arrangements were made to carry him downstairs at the end of the day); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1289 (C.A.9 1982) (blind persons categorically excluded from jury service); *Galloway v. Superior Court of District of Columbia*, 816 F.Supp. 12 (D.D.C. 1993) (same); *DeLong v. Brumbaugh*, 703 F.Supp. 399, 405 (W.D.Pa.1989) (deaf individual excluded from jury service); *People v. Green*, 148 Misc.2d 666, 669, 561 N.Y.S.2d 130, 133 (Cty.Ct.1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

***526** This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S.Rep. No. 101-116, at 18. See also H.R.Rep. No. 101-485, pt. 2, at 47, U.S.Code Cong. & Admin.News 1990, pp. 303, 329.[FN15] It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett*, 531 U.S., at 379, 121 S.Ct. 955 (BREYER, J., dissenting). See also *id.*, at 391, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id.*, at 371, n. 7, 121 S.Ct. 955; Government's Lodging in *Garrett*, O.T.2000, No. 99-1240 (available in Clerk of Court's case file).

FN15. For a comprehensive discussion of the shortcomings of state disability discrimination statutes, see Colker & Milani, The Post-*Garrett* World: Insufficient State Protection against Disability Discrimination, 53 Ala. L.Rev. 1075 (2002).

***527** With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by

reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs **1991 might be restructured or relocated to other parts of the buildings. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett*, O.T.2000, No. 99-1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990).[FN16]

FN16. THE CHIEF JUSTICE dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. *Post*, at 1999-2000 (dissenting opinion). This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. To operate on that premise in this case would be particularly inappropriate because this case concerns the provision of judicial services, an area in which local governments are typically treated as "arm [s] of the State" for Eleventh Amendment purposes, *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and thus enjoy precisely the same immunity from unconsented suit as the States. See, *e.g.*, *Callahan v. Philadelphia*, 207 F.3d 668, 670-674 (C.A.3 2000) (municipal court is an "arm of the State" entitled to Eleventh Amendment immunity); *Kelly v. Municipal Courts*, 97 F.3d 902, 907-908 (C.A.7 1996) (same); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (C.A.9 1995) (same). Cf. *Garrett*, 531 U.S., at 368-369, 121 S.Ct. 955.

In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry. To be sure, evidence of constitutional violations by the States themselves is particularly important when, as in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett*, the sole purpose of reliance on § 5 is to place the States on equal footing with private actors with respect to their amenability to suit. But much of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312-315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), to which THE CHIEF JUSTICE favorably refers, *post*, at 2003, involved the conduct of county and city officials, rather than the States. Moreover, what THE CHIEF JUSTICE calls an "extensive legislative record documenting States' gender discrimination in employment leave policies" in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), *post*, at 2003, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government. See *Hibbs*, 538 U.S., at 730-735, 123 S.Ct. 1972. See also *id.*, at 745-750, 123 S.Ct. 1972 (KENNEDY, J., dissenting).

*528 Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with

disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct. **1992538 U.S., at 728-733, 123 S.Ct. 1972.[FN17] We explained that *529 because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review. 538 U.S., at 735-737, 123 S.Ct. 1972. Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case-including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services-far exceeds the record in *Hibbs*.

FN17. Specifically, we relied on (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill to the FMLA, that public-sector parental leave polices " 'diffe[r] little' " from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would " 'leav[e] Federal employees open to discretionary and possibly unequal treatment,' " H.R.Rep. No. 103-8, pt. 2, p. 11 (1993). *Hibbs*, 538 U.S., at 728-733, 123 S.Ct. 1972.

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as ... education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*." 42 U.S.C. § 12101(a)(3) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

*530 V

[3] The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II-unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under § 5-reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.[FN18] Whatever might be said **1993 about Title II's other applications, the question presented in this case is not whether Congress can *531 validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States v. Raines*, 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).[FN19]

FN18. Contrary to THE CHIEF JUSTICE, *post*, at 2005, neither *Garrett* nor *Florida*

Prepaid lends support to the proposition that the *Boerne* test requires courts in all cases to "measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." In fact, the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine "the full breadth of the statute" all at once. Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case.

Nor is THE CHIEF JUSTICE's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks-whether a piece of legislation attempts substantively to redefine a constitutional guarantee-logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.

FN19. In *Raines*, a State subject to suit under the Civil Rights Act of 1957 contended that the law exceeded Congress' power to enforce the Fifteenth Amendment because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." 362 U.S., at 24-25, 80 S.Ct. 519.

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs*, 538 U.S., at 737, 123 S.Ct. 1972 (internal quotation marks omitted).

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U.S.C. § 12131(2). But Title II does not require States to employ any and all means to make judicial ***532** services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 CFR § 35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if ****1994** these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to

be heard" in its courts. *Boddie*, 401 U.S., at 379, 91 S.Ct. 780 (internal quotation marks and citation omitted).[FN20] Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive ***533** filing fees in certain family-law and criminal cases,[FN21] the duty to provide transcripts to criminal defendants seeking review of their convictions,[FN22] and the duty to provide counsel to certain criminal defendants.[FN23] Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S., at 532, 117 S.Ct. 2157; *Kimel*, 528 U.S., at 86, 120 S.Ct. 631.[FN24] It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

FN20. Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne's* prohibition on irrational discrimination. See *Garrett*, 531 U.S., at 372, 121 S.Ct. 955.

FN21. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (divorce filing fee); *M.L.B. v. S.L. J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (record fee in parental rights termination action); *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (filing fee for habeas petitions); *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (filing fee for direct appeal in criminal case).

FN22. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

FN23. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (trial counsel for persons charged with felony offenses); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (counsel for direct appeals as of right).

FN24. THE CHIEF JUSTICE contends that Title II cannot be understood as remedial legislation because it "subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*" *Post*, at 2006 (emphasis in original). But as we have often acknowledged, Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," and may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S., at 81, 120 S.Ct. 631. Cf. *Hibbs*, 538 U.S. 721, 123 S.Ct. 1972 (upholding the FMLA as valid remedial legislation without regard to whether failure to provide the statutorily mandated 12 weeks' leave results in a violation of the Fourteenth Amendment).

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access***534** to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

****1995** Justice SOUTER, with whom Justice GINSBURG joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the Eleventh Amendment and § 5 of the Fourteenth that I noted in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 740, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SOUTER, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as THE CHIEF JUSTICE suggests, *post*, at 2005 (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under

§ 5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5. *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id.*, at 207, 47 S.Ct. 584 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind .... Three generations of imbeciles are enough"). Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. ***535** One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie v. Board of Ed. of Antigo*, 169 Wis. 231, 232, 172 N.W. 153 (1919) (approving his exclusion from public school).[FN1]

FN1. See generally *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 463-464, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara Law. 855 (1975); Brief for United States 17-19.

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit.[FN2] See U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 19-20 (1983). Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

FN2. As the majority opinion shows, some of them persist to this day, *ante*, at 1989-1990, to say nothing of their lingering effects on society.****1996** Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, concurring.

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities ***536** Act-the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life-I join the Court's opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), 42 U.S.C. §§ 12101-12213, is a measure expected to advance equal-citizenship stature for persons with disabilities. See Bagenstos, Subordination, Stigma, and "Disability," 86 Va. L.Rev. 397, 471 (2000) (ADA aims both to "guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents"). As the Court's opinion relates, see *ante*, at 1984, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing "We the People," Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, § 12132 (Title II), and required "reasonable modifications to [public actors'] rules, policies, or practices," §§ 12131(2)-12132 (Title II). See also § 12112(b)(5) (defining discrimination to include the

failure to provide "reasonable accommodations") (Title I); § 12182(b)(2)(A)(ii) (requiring "reasonable modifications in [public accommodations'] policies, practices, or procedures") (Title III); Bagenstos, *supra*, at 435 (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the requirements***537** of individualized accommodation and modification fill in the gaps on the micro level."(footnote omitted)).

In *Olmstead v. L. C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), this Court responded with fidelity to the ADA's accommodation theme when it held a State accountable for failing to provide community residential placements for people with disabilities. The State argued in *Olmstead* that it had acted impartially, for it provided no community placements for individuals without disabilities. *Id.*, at 598, 119 S.Ct. 2176. Congress, the Court observed, advanced in the ADA "a more comprehensive view of the concept of discrimination,"*ibid.*, one that embraced failures to provide "reasonable accommodations," *id.*, at 601, 119 S.Ct. 2176. The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. ****1997** But see *post*, at 2012 (SCALIA, J., dissenting) ("Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 743, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (to be controlled by § 5 legislation, State "can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment" (emphasis in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an ***538** adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante*, at 1989-1992, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.

Chief Justice REHNQUIST, with whom Justice KENNEDY and Justice THOMAS join, dissenting.
In *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 42 U.S.C. §§ 12111-12117. Today, the Court concludes that Title II of that Act, §§ 12131-12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante*, at 1994. Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The Eleventh Amendment bars private lawsuits in federal court against an unconsenting State. *E.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *Garrett*, *supra*, at 363, 121 S.Ct. 955; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs*, *supra*, at 726, 123 S.Ct. 1972. While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at 1985, I disagree with its conclusion that Title II is valid § 5 enforcement legislation.

***539** Section 5 of the Fourteenth Amendment grants

Congress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in § 1 of that Amendment. U.S. Const., Amdt. 14, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact " 'appropriate' " enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett, supra,* at 365, 121 S.Ct. 955. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs,* 538 U.S., at 727, 123 S.Ct. 1972 (internal quotation**1998 marks omitted). Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.' " *Id.,* at 727-728, 123 S.Ct. 1972 (quoting *Kimel, supra,* at 88, 120 S.Ct. 631); *City of Boerne v. Flores,* 521 U.S. 507, 525, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (enforcement power is "corrective or preventive, not definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the Fourteenth Amendment, valid § 5 legislation must exhibit " 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Hibbs, supra,* at 728, 123 S.Ct. 1972 (quoting *City of Boerne, supra,* at 520, 117 S.Ct. 2157). While the Court today pays lipservice to the " 'congruence and proportionality' " test, see *ante,* at 1986, it applies it in a manner inconsistent with our recent precedents.

In *Garrett,* we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title II reveals that it too " 'substantively redefine[s],' " rather than permissibly enforces, the rights protected by the Fourteenth Amendment. *Hibbs, supra,* at 728, 123 S.Ct. 1972.

***540** The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett, supra,* at 365, 121 S.Ct. 955. This task was easy in *Garrett, Hibbs, Kimel,* and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett,* for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. 531 U.S., at 365, 121 S.Ct. 955. See also *Hibbs, supra,* at 728, 123 S.Ct. 1972 ("The [Family and Medical Leave Act of 1993 (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel, supra,* at 83, 120 S.Ct. 631 (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra,* at 529, 117 S.Ct. 2157 (right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett, supra,* at 366-368, 121 S.Ct. 955 (discussing *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)); see also *ante,* at 1988.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. *Ante,* at 1988. However, because the Court ultimately upholds Title II"as it applies to the class of cases implicating the fundamental right of access to the courts,"*ante,* at 1994, the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); (3) the right of the criminal defendant to trial by a jury composed ***541** of a fair cross section of the community, ****1999***Taylor v. Louisiana,* 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); and (4) the public right of access to criminal proceedings, *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 8-15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). *Ante,* at 1988.

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the

congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett*, 531 U.S., at 368, 121 S.Ct. 955. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' § 5 authority is appropriately exercised *only* in response to state transgressions." *Ibid.* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. *Ante*, at 1988-1990. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry.[FN1] We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of ***542** Title I's ban on employment discrimination. 531 U.S., at 368-372, 121 S.Ct. 955; see also *City of Boerne*, 521 U.S., at 530, 117 S.Ct. 2157 (noting that the "legislative record lacks ... modern instances of ... religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of due process access-to-the-courts rights.

FN1. For further discussion of the propriety of this approach, see *infra*, at 2004-2005.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves.[FN2] We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. *Garrett, supra*, at 368-369, 121 S.Ct. 955; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Kimel*, 528 U.S., at 89, 120 S.Ct. 631. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*. ****2000** *Ante*, at 1990 (citing *Garrett, supra*, at 379, 121 S.Ct. 955 (BREYER, J., dissenting), and 531 U.S., at 391-424, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett*, this "unexamined, anecdotal" evidence does not suffice. 531 U.S., at 370, 121 S.Ct. 955. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional under our decision in *Cleburne*. *Garrett, supra*, at 370-371, 121 S.Ct. 955. ***543** Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.[FN3]

FN2. *E.g.*, *ante*, at 1989 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (irrational discrimination by city zoning board)); *ante*, at 1990, n. 13 (citing *New York ex rel. Spitzer v. County of Delaware*, 82 F.Supp.2d 12 (N.D.N.Y.2000) (ADA lawsuit *brought by State* against a county)); *ante*, at 1989-1990, n. 12 (citing four cases concerning local school boards' unconstitutional actions); *ante*, at 1989, n. 11 (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante*, at 1990 (referring to "hundreds of examples of unequal treatment ... by States *and their political subdivisions*" (emphasis added)).

FN3. The majority obscures this fact by repeatedly referring to congressional findings of "discrimination" and "unequal treatment." Of course, generic findings of discrimination and unequal treatment *vel non* are insufficient to show a pattern of *constitutional* violations where rational-

basis scrutiny applies. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.[FN4]

FN4. Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante*, at 1982.Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ante*, at 1982.The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, *e.g.*, *Garrett*, 531 U.S., at 368, 121 S.Ct. 955 ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.*("The *legislative record* (3)27 fails to show that *Congress* did in fact identify ***544** a pattern" of constitutional violations (emphases added)). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated.[FN5] See *ante*, at 1990, n. 14 (citing *Ferrell v. Estelle*, 568 F.2d 1128, 1132-1133 (C.A.5), opinion withdrawn as moot, 573 F.2d 867 (1978); *People v. Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984)).[FN6]

FN5. As two Justices noted in *Garrett*, if the States were violating the due process rights of disabled persons, "one would have expected to find in decisions of the courts ... extensive litigation and discussion of the constitutional violations." 531 U.S., at 376, 121 S.Ct. 955 (KENNEDY, J., joined by O'CONNOR, J., concurring).

FN6. The balance of the Court's citations refer to cases arising *after* enactment of the ADA or do not contain findings of federal constitutional violations. *Ante*, at 1990, n. 14 (citing *Layton v. Elder*, 143 F.3d 469 (C.A.8 1998) (post-ADA case finding ADA violations only); *Matthews v. Jefferson*, 29 F.Supp.2d 525 (W.D.Ark.1998) (same); *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993) (same); *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661 (1992) (remanded for hearing on constitutional issue); *People v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d 130 (Cty. Ct.1990) (finding violation of state constitution only); *DeLong v. Brumbaugh*, 703 F.Supp. 399 (W.D.Pa.1989) (statute upheld against facial constitutional challenge; Rehabilitation Act of 1973 violations only); *Pomerantz v. Los Angeles County*, 674 F.2d 1288 (C.A.9 1982) (Rehabilitation Act of 1973 claim; challenged jury-service statute later amended)). Accordingly, they offer no support whatsoever for the notion that Title II is a valid response to documented constitutional violations.

****2001** Lacking any real evidence that Congress was responding to actual due process violations, the majority relies primarily on three items to justify its decision: (1) a 1983 U.S. Civil Rights Commission Report showing that 76% of "public services and programs housed in state-owned buildings were inaccessible" to persons with disabilities, *ante*, at 1990; (2) testimony before a House subcommittee

regarding the "physical inaccessibility" of local courthouses, *ante,* at 1991; and (3) evidence submitted to Congress' designated ADA task ***545** force that purportedly contains "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." *Ibid.*

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of *two* witnesses, neither of whom reported being denied the right to be present at constitutionally protected court proceedings.[FN7] Indeed, the witnesses' testimony, like the U.S. Commission on Civil Rights Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf. n. 4, *supra* (describing alternative means of access offered to respondent Lane).

FN7. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40-41 (1988) (statement of Emeka Nwojke) (explaining that he encountered difficulties appearing in court due to physical characteristics of the courthouse and courtroom and the rudeness of court employees); *id.,* at 48 (statement of Ellen Telker) (blind attorney "know[s] of at least one courthouse in New Haven where the elevators do not have tactile markings").

Based on the majority's description, *ante,* at 1990-1991, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett,* O.T.2000, No. 99-1240, which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternative means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made no ***546** findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett,* 531 U.S., at 370-371, 121 S.Ct. 955 (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett,* "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of ****2002** that conclusion in the Act's legislative findings." *Id.,* at 371, 121 S.Ct. 955. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts.[FN8] Cf. *ibid.;* *Florida Prepaid,* 527 U.S., at 641, 119 S.Ct. 2199 (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S.Rep. No. 101-116, p. 92 (1989).

FN8. The majority rather peculiarly points to Congress' finding that " 'discrimination against individuals with disabilities persists in such critical areas as ...*access to public services* ' " as evidence that Congress sought to vindicate the due process rights of disabled persons. *Ante,* at 1992 (quoting 42 U.S.C. § 12101(a)(3) (emphasis added by the Court)). However, one does not usually refer to the right to attend a judicial proceeding as "access to [a] public servic[e]." Given the lack of any concern over courthouse accessibility issues in the legislative history, it is highly unlikely that this legislative finding obliquely refers to state violations of the due process rights of disabled persons to attend judicial proceedings.

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse-*i.e.,* one a disabled person cannot utilize without assistance-does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given

judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any ***547** external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett*, 531 U.S., at 372, 121 S.Ct. 955 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein we found that the same type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which § 5 legislation must be based." *Id.*, at 370, 121 S.Ct. 955. See also *Kimel*, 528 U.S., at 91, 120 S.Ct. 631 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); *Florida Prepaid*, *supra*, at 645, 119 S.Ct. 2199 ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation" (quoting *City of Boerne*, 521 U.S., at 526, 117 S.Ct. 2157)).

****2003** The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation***548** that we have sustained as valid § 5 enforcement legislation. See, *e.g.*, *Hibbs*, 538 U.S., at 729-732, 123 S.Ct. 1972 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach*, 383 U.S. 301, 312-313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional attempt to "rewrite the Fourteenth Amendment law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett*, *supra*, at 374, 121 S.Ct. 955.[FN9]

FN9. The Court correctly explains that " 'it [i]s easier for Congress to show a pattern of state constitutional violations' " when it targets state action that triggers a higher level of constitutional scrutiny. *Ante*, at 1992 (quoting *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003)). However, this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 645-646, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (invalidating Patent Remedy Act, which purported to enforce the Due Process Clause, because Congress failed to identify a record of constitutional violations); *City of Boerne v. Flores*, 521 U.S. 507, 530-531, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (same with respect to Religious Freedom Restoration Act of 1993 (RFRA)). As the foregoing discussion demonstrates, that is precisely what the Court has sanctioned here. Because the record is utterly devoid of proof that Congress was responding to state violations of due process access-to-the-courts rights, this case is controlled by *Florida Prepaid* and *City of Boerne*, rather than *Hibbs*.

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid § 5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Hibbs*, *supra*, at 737-739, 123 S.Ct. 1972; *Garrett*, *supra*,

at 372-373, 121 S.Ct. 955.

Title II provides 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, or be subjected to discrimination***549** by any such entity." 42 U.S.C. § 12132. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*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.*"§ 12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effects" of "architectural, transportation, and communication barriers." §§ 12101(a)(3), (a)(5). In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II"d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid*, 527 U.S., at 646, 119 S.Ct. 2199. By requiring ****2004** special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U.S., at 368, 121 S.Ct. 955; *id.*, at 372-373, 121 S.Ct. 955 (contrasting Title I's reasonable accommodation and disparate-impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel, supra*, at 88, 120 S.Ct. 631.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause- ***550** in addition to access to the courts-that are subject to heightened Fourteenth Amendment scrutiny. *Ante*, at 1988 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336-337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (voting); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to move to a new jurisdiction); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in *Florida Prepaid*, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely "that many of the [state actions] affected by [Title II] have [any] likelihood of being unconstitutional." *City of Boerne, supra*, at 532, 117 S.Ct. 2157. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.[FN10]

FN10. Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored laws we have upheld as legitimate prophylactic § 5 legislation. In *Hibbs*, for example, the FMLA was "narrowly targeted" to remedy widespread gender discrimination in the availability of family leave. 538 U.S., at 738-739, 123 S.Ct. 1972 (distinguishing *City of Boerne*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett* on this ground). Similarly, in cases involving enforcement of the Fifteenth Amendment, we upheld "limited remedial scheme[s]" that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett*, 531 U.S., at 373, 121 S.Ct. 955 (discussing *South Carolina v. Katzenbach*,

383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). Unlike these statutes, Title II's "indiscriminate scope ... is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid*, 527 U.S., at 647, 119 S.Ct. 2199.

551** The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante*, at 1993*2005** (citing *United States v. Raines*, 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). I have grave doubts about importing an "as applied" approach into the § 5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate *legislation* " at all, U.S. Const., Amdt. 14, § 5 (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against ***552** the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority cited by the majority is *Raines*, *supra*, a case decided long before we enunciated the congruence-and-proportionality test.[FN11]

FN11. *Raines* is inapposite in any event. The Court there considered the constitutionality of the Civil Rights Act of 1957-a statute designed to enforce the Fifteenth Amendment-whose narrowly tailored substantive provisions could "unquestionably" be applied to state actors (like the respondents therein). 362 U.S., at 25, 26, 80 S.Ct. 519. The only question presented was whether the statute was facially invalid because it might be read to constrain nonstate actors as well. *Id.*, at 20, 80 S.Ct. 519. The Court upheld the statute as applied to respondents and declined to entertain the facial challenge. *Id.*, at 24-26, 80 S.Ct. 519. The situation in this case is much different: The very question presented is whether Title II's indiscriminate substantive provisions can constitutionally be applied to the petitioner State. *Raines* thus provides no support for avoiding this question by conjuring up an imaginary statute with substantive provisions that might pass the congruence-and-proportionality test.

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority's as-applied approach****2006** simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

*553 Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett*, 531 U.S., at 368, 121 S.Ct. 955 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, *inter alia*, they fail to make "reasonable modifications" to facilities, such as removing "architectural ... barriers." 42 U.S.C. §§ 12131(2), 12132. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation-*i.e.*, the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"-a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. § 12132.

The majority's reliance on *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and other cases in which we held that due process requires the State to waive filing fees for indigent litigants, is unavailing. While these cases support the principle that the State must remove financial requirements that in fact prevent an individual from exercising his constitutional rights, they certainly do not support a statute that subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*

*554 In this respect, Title II is analogous to the Patent Remedy Act at issue in *Florida Prepaid*. That statute subjected States to monetary liability for any act of patent infringement. 527 U.S., at 646-647, 119 S.Ct. 2199. Thus, "Congress did nothing to limit" the Patent Remedy Act's coverage "to cases involving arguable [due process] violations," such as when the infringement was nonnegligent or uncompensated. *Ibid.* Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual due process violations. *Id.*, at 647, 119 S.Ct. 2199.[FN12]

FN12. The majority's invocation of *Hibbs* to justify Title II's overbreadth is unpersuasive. See *ante*, at 1994, n. 24. The *Hibbs* Court concluded that "in light of the evidence before Congress" the FMLA's 12-week family-leave provision was necessary to "achiev[e] Congress' remedial object." 538 U.S., at 748, 123 S.Ct. 1972. The Court found that the legislative record included not only evidence of state constitutional violations, but evidence that a provision merely enforcing the Equal Protection Clause would actually perpetuate the gender stereotypes Congress sought to eradicate because employers could simply eliminate family leave entirely. *Ibid.* Without comparable evidence of constitutional violations and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II's special-accommodation requirements.

**2007 For the foregoing reasons, I respectfully dissent.

Justice SCALIA, dissenting.
Section 5 of the Fourteenth Amendment provides that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment-including, of course, the Amendment's Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we *555 decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though

those tests were not themselves in violation of the Fourteenth Amendment, we held that § 5 authorizes prophylactic legislation-that is, "legislation that proscribes facially constitutional conduct,"*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), when Congress determines such proscription is desirable " 'to make the amendments fully effective,' "*Morgan, supra*, at 648, 86 S.Ct. 1717 (quoting *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1880)). We said that "the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment" is the flexible "necessary and proper" standard of *M'Culloch v. Maryland*, 4 Wheat. 316, 342, 421, 4 L.Ed. 579 (1819). *Morgan*, 384 U.S., at 651, 86 S.Ct. 1717. We described § 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Ibid.*

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), which had upheld prophylactic application of the similarly worded "enforce" provision of the Fifteenth Amendment (§ 2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we confronted Congress's inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination.[FN1] There Congress had sought, in the Religious Freedom Restoration ***556** Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, to impose upon the States an interpretation of the First Amendment's Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." 521 U.S., at 533, 117 S.Ct. 2157.

FN1. Congress had previously attempted such an extension in the Voting Rights Act Amendments of 1970, 84 Stat. 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra*, at 2012.

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because ****2008** they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, *e.g.*, *Ewing v. California*, 538 U.S. 11, 31-32, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (SCALIA, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); *Stenberg v. Carhart*, 530 U.S. 914, 954-956, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (SCALIA, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (SCALIA, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause). Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a), were " 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,' "527 U.S., at 646, 119 S.Ct. 2199 (quoting *Boerne, supra*, at 532, 117 S.Ct. 2157); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), where we held that ***557** the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act,"528 U.S., at 83, 120 S.Ct. 631; *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), where we held that a provision of the Violence Against Women Act of

1994, 42 U.S.C. § 13981, lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe,"529 U.S., at 626, 120 S.Ct. 1740; and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), where we said that Title I of the Americans with Disabilities Act of 1990(ADA), 104 Stat. 330, 42 U.S.C. §§ 12111-12117, raised "the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*,"531 U.S., at 372, 121 S.Ct. 955.

But these cases were soon followed by *Nevada Dept. of Human Resources v. Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U.S.C. § 2612 *et seq.*, which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." 538 U.S., at 740, 123 S.Ct. 1972 (internal quotation marks omitted). I joined Justice KENNEDY's dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by THE CHIEF JUSTICE's dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a ****2009** ***558** standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

I would replace "congruence and proportionality" with another test-one that provides a clear, enforceable limitation supported by the text of § 5.Section 5 grants Congress the power "to *enforce*, by appropriate legislation," the other provisions of the Fourteenth Amendment. U.S. Const., Amdt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit-even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see *ante*, at 1993, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State, 42 U.S.C. § 12132. That is simply not what the power to enforce means-or ever ***559** meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." *Id.*, at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law' "). Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power ... to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."

384 U.S., at 648-649, 86 S.Ct. 1717. That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, Government By Judiciary 247 (2d ed.1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate **2010 his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's § 5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" Section 1 of that Act, later codified as Rev. Stat. § 1979, 42 U.S.C. § 1983, authorized a cause of action against "any person who, under *560 color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13. Section 5 would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of "enforcement"-for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.[FN2] But what § 5 does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

FN2. Professor Tribe's treatise gives some examples of such measures that facilitate enforcement in the context of the Fifteenth Amendment:

> "The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts...." L. Tribe, American Constitutional Law 931, n. 5 (3d ed.2000).

The major impediment to the approach I have suggested is *stare decisis*. A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*. As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of section 5 may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L.Rev. 91, 110-111 (1966).

*561 However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in § 5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*. See *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (see discussion *infra*); *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia*, 100 U.S. 303, 311-312, 25 L.Ed. 664 (1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1880) (dictum in a racial discrimination case involving the same statute). See also **2011 *City of Rome v. United States*, 446 U.S. 156, 173-178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding as valid legislation under § 2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act of 1965); *Jones*

v. Alfred H. Mayer Co., 392 U.S. 409, 439-441, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (upholding a law, 42 U.S.C. § 1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under § 2 of the Thirteenth Amendment).

Giving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases*, 16 Wall. 36, 81, 21 L.Ed. 394 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to ***562** come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of § 5. See 384 U.S., at 648, 86 S.Ct. 1717 (citing *Ex parte Virginia*); 384 U.S., at 651, 86 S.Ct. 1717 (citing *Strauder v. West Virginia* and *Virginia v. Rives*).[FN3] In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan v. Louisiana*, 391 U.S. 145, 147-148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)) and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally***563** *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of ****2012** congressional power to interpret § 5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*.

> FN3. A later case cited in *Morgan*, *James Everard's Breweries v. Day*, 265 U.S. 545, 558-563, 44 S.Ct. 628, 68 L.Ed. 1174 (1924), applied the more flexible standard of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), to the Eighteenth Amendment, which, in § 1, forbade "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States ... for beverage purposes" and provided, in § 2, that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Congress had provided, in the Supplemental Prohibition Act of 1921, § 2, 42 Stat. 222, that "only spirituous and vinous liquor may be prescribed for medicinal purposes." That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond "enforcement." In an opinion citing none of the Thirteenth, Fourteenth, and Fifteenth Amendment cases discussed in text, the Court held that the *M'Culloch v. Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government's going beyond "enforcement" narrowly defined was its arguable incursion upon powers left to the States-which is essentially the same issue that *M'Culloch* addressed.

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to § 5. In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), the Court upheld, under § 2 of the Fifteenth Amendment, that provision

of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements-classic tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be *beyond* the § 5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. See 400 U.S., at 124-130, 91 S.Ct. 260 (opinion of Black, J.); *id.*, at 153-154, 91 S.Ct. 260 (Harlan, J., concurring in part and dissenting in part); *id.*, at 293-296, 91 S.Ct. 260 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld-but only a minority of the Justices believed that § 5 was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." *Id.*, at 130, 91 S.Ct. 260. And of course the *results* reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional ***564** regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs*, 538 U.S., at 741-743, 123 S.Ct. 1972 (SCALIA, J., dissenting); *Morrison*, 529 U.S., at 626-627, 120 S.Ct. 1740; *Morgan*, 384 U.S., at 666-667, 669, 670-671, 86 S.Ct. 1717 (Harlan, J., dissenting).[FN4] I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison*, *supra*, at 625-626, 120 S.Ct. 1740. And I would not, of course, permit any congressional measures that violate other ****2013** provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

FN4. Dicta in one of our earlier cases seemed to suggest that even *nonprophylactic* provisions could not be adopted under § 5 except in response to a State's constitutional violations:

> "When the State has been guilty of no violation of [the Fourteenth Amendment's] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." *United States v. Harris*, 106 U.S. 629, 639, 1 S.Ct. 601, 27 L.Ed. 290 (1883).

I do not see the textual basis for this interpretation.

***565** I shall also not subject to "congruence and proportionality" analysis congressional action under § 5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the

principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.' " *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U.S. 123, 127, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) (Burger, C. J., for the Court) (footnote omitted). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

Justice THOMAS, dissenting.
I join THE CHIEF JUSTICE's dissent. I agree that Title II of the Americans with Disabilities Act of 1990 cannot be a ***566** congruent and proportional remedy to the States' alleged practice of denying disabled persons access to the courts. Not only did Congress fail to identify any evidence of such a practice when it enacted the ADA, *ante*, at 1998-2003,Title II regulates far more than the provision of access to the courts, *ante*, at 2003-2006. Because I joined the dissent in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), and continue to believe that *Hibbs* was wrongly decided, I write separately only to disavow any reliance on *Hibbs* in reaching this conclusion.

U.S.,2004.
Tennessee v. Lane
541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820, 15 A.D. Cases 865, 28 NDLR P 65, 04 Cal. Daily Op. Serv. 4207, 2004 Daily Journal D.A.R. 5854, 17 Fla. L. Weekly Fed. S 299, 17 Fla. L. Weekly Fed. S 997

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Wong v. Regents of University of California C.A.9 (Cal.),1999.

United States Court of Appeals,Ninth Circuit.
Andrew H.K. WONG, Plaintiff-Appellant,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.
No. 98-15757.

Argued and Submitted Feb. 10, 1999
Filed Sept. 16, 1999
As Amended Nov. 19, 1999.

Dismissed medical student sued university, alleging that it discriminated against him in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., granted summary judgment to university, and student appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) Court of Appeals would not defer to medical school's determinations that accommodations requested by disabled student were not reasonable and that he could not meet the school's academic requirements even with reasonable accommodation, absent evidence of adequate inquiry by the school; (2) there was issue of fact, precluding summary judgment, as to whether the requested accommodation of an eight-week reading period prior to next clinical clerkship was reasonable; and (3) there was also an issue of fact as to whether student could not meet the school's academic requirements even with reasonable accommodation.

Reversed and remanded.

West Headnotes

[1] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
To establish a prima facie case of discrimination based upon his disability in violation of the Rehabilitation Act and the ADA, dismissed medical student had to produce evidence that: (1) he was "disabled" as the Acts define that term; (2) he was qualified to remain a student at the medical school, meaning that he could meet the essential eligibility requirements of the school with or without reasonable accommodation; (3) he was dismissed solely because of his disability; and (4) the school received federal financial assistance (for the Rehabilitation Act claim) or was a public entity (for the ADA claim). Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[2] Civil Rights 78 ⚷1020

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1020 k. Accommodations in General. Most Cited Cases
(Formerly 78k107(1))
"Reasonable modification" as used in the ADA does not create a different standard than "reasonable accommodation" used in the Rehabilitation Act. Rehabilitation Act of 1973, § 504(d), 29 U.S.C.A. § 794(d); Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

[3] Civil Rights 78 ⚷1402

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1402 k. Education. Most Cited Cases
(Formerly 78k240(1))
In suit under the Rehabilitation Act and the ADA, dismissed medical student bore the initial burden of producing evidence both that a reasonable accommodation existed and that this accommodation would enable him to meet the educational institution's

essential eligibility requirements; production of such evidence shifts the burden to the university to produce rebuttal evidence that either (1) the suggested accommodation was not reasonable because it would substantially alter the academic program, or (2) that the student was not qualified because even with the accommodation, the student could not meet the institution's academic standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[4] **Federal Courts 170B ⚷776**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Federal Courts 170B ⚷802

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary Judgment. Most Cited Cases
Court of Appeals reviews the district court's order granting summary judgment de novo, construing all evidence and reasonable inferences it creates in the light most favorable to the non-moving party.

[5] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
An educational institution's academic decisions are entitled to deference, but this deference is not absolute, and courts still hold the final responsibility for enforcing the Rehabilitation Act and the ADA, including determining whether an individual is qualified, with or without accommodation, for the program in question; court must ensure that educational institutions are not disguising truly discriminatory requirements as academic decisions, and will defer to the institution's academic decisions only after it determines that the school has fulfilled it obligation to seek reasonable accommodation. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[6] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Educational institution has a real obligation under the Rehabilitation Act and the ADA to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation, and subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability, to explore alternatives for accommodating the student, and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[7] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Though an academic institution must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, the Rehabilitation Act and the ADA Acts do not require the institution to make fundamental or substantial modifications to its programs or standards.

Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

[8] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Determination of whether an academic institution has made reasonable accommodation of a student's disability, under the Rehabilitation Act and the ADA, requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[9] Civil Rights 78 ⚷1020

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1020 k. Accommodations in General. Most Cited Cases
(Formerly 78k107(1))
Mere speculation that a suggested accommodation is not feasible falls short of the "reasonable accommodation" requirement of the Rehabilitation Act and the ADA; the Acts create a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary to enable the individual to meet the standards in question. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[10] Federal Courts 170B ⚷766

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk766 k. Summary Judgment. Most Cited Cases

Federal Courts 170B ⚷776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
In the typical disability discrimination case in which a plaintiff appeals a district court's entry of summary judgment in favor of the defendant, Court of Appeals undertakes the reasonable accommodation analysis itself, but in a case involving assessment of the standards of an academic institution, Court abstains from an in-depth, de novo analysis of suggested accommodations that the school rejected, if the institution demonstrates that it conducted such an inquiry itself and concluded that the accommodations were not feasible or would not be effective. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[11] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Court of Appeals would not defer to medical school's determinations that accommodations requested by disabled student were not feasible or would not be effective, where the university failed to present a record undisputedly showing that dean investigated the proposed accommodation to determine whether the medical school feasibly could implement it, or some alternative modification, without substantially altering the school's standards; dean denied student's request without consulting student or any person at the university whose job it was to formulate appropriate accommodations, and reasons given for denying requested extra reading period, that student wanted to graduate on time and that dean did not

believe student needed additional time off, were not relevant to the school's curriculum or standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[12] Civil Rights 78 ⚷1418

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1418 k. Education. Most Cited Cases
(Formerly 78k242(2))
In suit by dismissed medical student against university under the Rehabilitation Act and the ADA, both parties met their burdens of production as to whether the requested accommodation of an eight-week reading period prior to next clinical clerkship was reasonable; student showed, inter alia, that the university granted this accommodation in the past, while the university produced the testimony of dean that the break required the medical school to alter its curriculum because the schedule was designed for students to complete consecutively to allow them to practice skills consistently and frequently and to allow the faculty to evaluate the steady development of those skills. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[13] Federal Civil Procedure 170A ⚷2491.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases
In suit by dismissed medical student against university under the Rehabilitation Act and the ADA, there was issue of fact, precluding summary judgment, as to whether the requested accommodation of an eight-week reading period prior to next clinical clerkship was reasonable. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 34 C.F.R. § 104.44(a).

[14] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
While an institution's past decision to make a concession to a disabled individual does not obligate it to continue to grant that accommodation in the future, nor does it render the accommodation reasonable as a matter of law, the fact that a medical school previously made the exact modification for a student's surgery and medicine clerkships, consisting of extra reading periods, that student requested for the pediatrics clerkship was persuasive evidence from which a jury could conclude that the accommodation was reasonable, and fact that student had earned "B's" and received generally positive comments when granted the decelerated schedule in the medicine and surgery clerkships indicated that it might have been reasonable for student to continue receiving this same accommodation. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132.

[15] Federal Courts 170B ⚷766

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk766 k. Summary Judgment. Most Cited Cases
Under the summary judgment standard, Court of Appeals does not consider whether a jury could find in favor of the defendant whose motion was granted, but affirms the entry of summary judgment only if a jury could not find for the plaintiff.

[16] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases

(Formerly 78k127.1)
Where record evidence indicates that an educational institution determined that certain modifications to its program were acceptable as reasonable accommodations under the Rehabilitation Act and the ADA,, courts may not as a matter of law disregard that evidence in favor of their own ideas about what constitutes "appropriate academic standards." Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[17] **Civil Rights 78 ⚷1069**

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Before Court of Appeals will defer to a university's decision to dismiss a disabled student for failure to meet the academic standards, the academic institution bears the burden of presenting Court with a factual record that shows it conscientiously considered all pertinent and appropriate information in making its decision that student could not meet the school's academic requirements even with reasonable accommodation. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 34 C.F.R. § 104.3(k)(3).

[18] **Civil Rights 78 ⚷1069**

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Court of Appeals would not defer to medical school's decision that student with learning disability could not meet the school's academic requirements even with reasonable accommodation, where the record contained evidence that the university eschewed its obligation to consider possible modifications it could make in the program to accommodate student and the past and potential effects of such accommodations and lack thereof on student's performance, and there was evidence that at least two promotions board members believed that dean had given student accommodations and erroneously believed that student had been unable to perform adequately even with those modifications. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 34 C.F.R. § 104.3(k)(3).

[19] **Civil Rights 78 ⚷1402**

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1402 k. Education. Most Cited Cases
(Formerly 78k240(1))
Dismissed medical student produced enough evidence that he could meet the university's eligibility requirements with reasonable accommodation to shift the burden of production to the university; his final grade sheets from the medicine and surgery clerkships for which he received the accommodation of extra reading periods showed that he received satisfactory grades and generally positive comments from his evaluators, which was marked improvement over prior attempts at those clerkships without accommodation for his learning disability; fact performance in some areas of the clerkship program were less than ideal did not establish as a matter of law that he was unqualified to continue participating in the medical program. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 34 C.F.R. § 104.3(k)(3).

[20] **Federal Civil Procedure 170A ⚷2491.5**

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases
In suit by dismissed medical student against university under the Rehabilitation Act and the ADA, there was issue of fact, precluding summary judgment, as to whether student, who requested a decelerated schedule, could not meet the school's academic requirements even with reasonable

accommodation of his learning disability, affecting the way he processed verbal information and expressed himself verbally. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 34 C.F.R. § 104.3(k)(3).

*811 Dan Siegel and Hunter Pyle, Siegel & Yee, Oakland, California, for the plaintiff-appellant.
Michael T. Lucey, Diane R. Crowley, and Greta W. Schnetzler, Gordon & Rees, San Francisco, California, for the defendant-appellee.

Appeal from the United States District Court for the Eastern District of California. Lawrence K. Karlton, District Judge, Presiding, D.C. No. CV-96-00965-LKK GGH.

Before: PHYLLIS A. KRAVITCH,[FN1] STEPHEN REINHARDT, and THOMAS G. NELSON, Circuit Judges.

FN1. The Honorable Phyllis A. Kravitch, Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

KRAVITCH, Circuit Judge:
Plaintiff-appellant Andrew H.K. Wong appeals the district court's order granting summary judgment in favor of defendant-appellee Regents of the University of California ("the University") on Wong's claim that the University discriminated against him in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("the ADA") and section 504 of the Rehabilitation Act, 29 U.S.C. § 794.[FN2] Wong alleges that the University violated the Acts when, after refusing to grant his request for accommodation of his learning disability, it dismissed him for failing to meet its academic requirements. The district court ruled that summary judgment was appropriate on two grounds: (1) the accommodation Wong requested was not reasonable, and (2) Wong was not qualified to continue his course of study in the School of Medicine because with or without accommodation, he could not perform the tasks required of an effective medical doctor. We conclude, however, that Wong created a question of fact with respect to both of these issues and that the district court therefore erred in granting the University's motion.

FN2. The ADA and the Rehabilitation Act, as they apply to the parties in this case, create the same rights and obligations. *See Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir.1999). In the remainder of this opinion, we sometimes refer to these two statutes jointly as "the Acts."

I. FACTS [FN3]

FN3. For purposes of summary judgment, we interpret the facts in the light most favorable to Wong, the non-moving party. *See Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484 (9th Cir.1998). In this case, however, the facts are largely undisputed, and unless otherwise noted, the parties concur that the relevant events occurred as we describe them in the text.

After excelling in his undergraduate and master's degree programs, Wong entered the School of Medicine at the University of California at Davis in the fall of 1989. The School of Medicine consists of a four-year curriculum: typically, in the first two *812 years, students take academic courses in basic sciences; in the third year, they complete six consecutive clinical "clerkships" in core areas of medical practice; and in the fourth year, they take a series of more specialized clerkships. The clinical clerkships teach the students to integrate their academic knowledge with the skills necessary to practice medicine and test them on their progress in developing these skills.

Wong completed the first two years of medical school on a normal schedule and with a grade point average slightly above a "B"; he also passed the required national board examination immediately following the second year. He began his third year on schedule, enrolling in the Surgery clerkship in the summer of 1991 and, upon its conclusion, in the Medicine clerkship. When he was approximately four weeks into the Medicine clerkship, Wong learned that he had failed Surgery. In accordance with school policy, Wong appeared before the Student Evaluation Committee ("SEC"), a body that meets with students having academic problems and makes recommendations to another group, the Promotions Board, which ultimately decides what action, if any,

the school should take with respect to that student. The Promotions Board placed Wong on academic probation, decided that he should repeat the Surgery clerkship, and recommended that he continue in the Medicine clerkship at least until the midterm evaluation. Wong withdrew from the Medicine clerkship in November 1991 when his midterm evaluation showed significant problems with his performance to that point. Wong's instructor of record then assigned a senior resident to work with Wong one-on-one, focusing upon taking patient histories and making oral presentations. These sessions continued through the winter of 1992.

In March 1992, Dr. Ernest Lewis, associate dean of student affairs, granted Wong's request to take time off from school to be with his father, who had just been diagnosed with lung cancer. Wong spent at least some of this time doing extra reading in preparation for his upcoming clerkships, Psychiatry and Pediatrics. He returned to school in July 1992 and between July and December passed clerkships in Psychiatry (with a "B"), Pediatrics ("C+"), and Obstetrics/Gynecology ("C"). Wong generally received positive comments on his final evaluation forms for these courses. Instructors noted that he was "competent," "prompt," "enthusiastic," "a very hard worker," and "an extremely pleasant student who related exceptionally well with the staff"; they also stated that he had "a good fund of knowledge," "contributed meaningfully to the discussions at hand," "made astute observations of patients," and "did a good job of presenting on [gynecology] rounds." FN4 Evaluators also observed, however, that Wong "seem[ed] to have difficulty putting things together" and "limited abilities to effectively communicate his thoughts," and they recommended that he work on "organizational skills" and "setting priorities." FN5

FN4. Final Grades Sheets, Attach. to Decl. of Ernest Lewis, M.D., R17, Ex. C at 23-25.

FN5. *Id.*

Wong re-enrolled in the Medicine clerkship in January 1993. Three weeks later, his father died, an event that by all accounts had a devastating impact on Wong. He continued in the Medicine clerkship for a brief period of time, but after his midterm evaluation showed a borderline performance in the first half of the clerkship, Wong, with Dean Lewis's approval, withdrew from the course and left the Davis campus to be closer to his family, who lived in the San Francisco area. In order to prevent Wong from falling further behind, Dean Lewis permitted him to take several fourth-year level clerkships at hospitals in the San Francisco area. He earned A's and B's in these courses, with positive comments. Two evaluators thought that Wong needed to improve his fund of knowledge, but both attributed the ***813** deficiency to the fact that he was taking classes in the fourth-year curriculum without having completed his third year "core" clerkships. FN6 When Wong returned to the School of Medicine at Davis in the summer of 1993, he again enrolled in Medicine. He asserts that although he did not feel prepared for this course and attempted to drop it, Dean Lewis did not permit the withdrawal, and he ultimately failed the class, triggering another appearance before the SEC and Promotions Board.

FN6. *See* Evaluations of Clerk, Ambulatory Care Clerkship, Attach. to Lewis Decl., R17, Ex. C at 947, 949. One of the evaluators stated that his knowledge base was "probably appropriate for his [third-year] level." *Id.* at 949.

The Promotions Board adopted strict conditions for Wong to remain a student in the School of Medicine: it required him to take only reading electives for the next three quarters; to meet again with the SEC and Dean Lewis following that period to assess his progress; and, assuming he received approval to re-enter the clerkship program, to repeat the entire third year, including the courses he already had passed. During the meeting with the Promotions Board, Wong stated that he thought he might have a learning disability and learned from members of the Promotions Board about the University's Disability Resource Center ("DRC"). DRC staff members and doctors to whom they referred Wong administered a battery of tests and concluded that Wong has a disability that affects the way he processes verbal information and expresses himself verbally. FN7

FN7. One of the evaluations divided Wong's disability into two categories: "[r]eceptive language" and "[e]xpressive language." Mem. from Dr. Margaret Steward to Dean Lewis (April 14, 1994), Attach. to Lewis

> Decl., R17, Ex. C at 88. According to this description, Wong's problem with receptive language stems from his need to slow down information that others give him verbally by repeating their words to himself. Wong does not listen to the parts of the speaker's communication that occur while he is processing the previous message. *See id.* With respect to expressive language, Wong sometimes cannot find the words he needs to express his thoughts quickly; to compensate, he uses gestures or substitutes generic words for technical terms. *See id.* Both aspects of the disability can result in significant miscommunication and anxiety, and having to deal with new, technical, or "not-quite-mastered" information exacerbates the problem. *Id.* at 88-89.

When Dean Lewis learned the results of the tests, he referred Wong to Dr. Margaret Steward, a psychologist and School of Medicine faculty member, so that she could counsel him regarding coping skills and help him determine what accommodations would allow him to complete his courses successfully. Dr. Steward suggested several strategies for Wong to employ, including telling people that he has a "hearing problem" and may need them to slow down or repeat messages; using a tape recorder; and double-checking his understanding of information he has received verbally.[FN8] Dr. Steward reported to Dean Lewis in a memorandum that "[t]here is no doubt that [Wong] will need extra time to complete the clerkship years." [FN9] In the same memorandum, she also specifically recommended giving Wong extra time to read before his next two clerkships, Medicine and Surgery; in a later memorandum, she informed Dean Lewis that she had discussed with Wong that he needed to pass the Medicine clerkship to provide "empirical support" for extra reading time before his next clerkship and that "if he passes Medicine that he needs to anticipate extra time in order to complete the clerkship years." [FN10] Finally, Dr. Steward recommended that Dean ***814** Lewis assign Wong an "SLD [Student Learning Disability] advisor" with whom he could meet to review strategies for coping with his disability. Dean Lewis never appointed this advisor.[FN11] Wong also contends (and the University does not dispute) that Dr. Steward told him that the School of Medicine "would set up a learning disability resource team to ensure that Wong received adequate accommodations," but the school never did so.[FN12]

FN8. *See id.* at 90.

FN9. *Id.*

FN10. Mem. from Dr. Steward to Dean Lewis (May 14, 1994), Attach. to Lewis Decl., R17, Ex. C at 156. Wong asserts that Dr. Steward specifically told him that if he passed the first two clerkships (Medicine and Surgery) with the accommodation of extra reading time, the School of Medicine would consider granting him the same accommodation for future clerkships.

FN11. *See id.*

FN12. Pl.'s Separate Statement of Disputed Facts at 16-17, ¶¶ 16, 16B, Attach. to Mem. in Opp'n to Mot. for Summ. J., R32.

After completing the requisite three quarters of elective reading under the supervision of a faculty member, Wong planned to retake the Medicine clerkship in July 1994. After attending orientation, however, he felt unprepared for the course and asked for another eight weeks off for additional reading. Dean Lewis granted this request, although he noted that he did not know how the extra time would help Wong. In September 1994, Wong took and passed Medicine, earning a "B" and receiving overwhelmingly positive comments on his grade report, including observations of his "excellent fund of knowledge," "excellent retention of new material," and compassionate manner with patients as he performed effective physical exams and formulated diagnoses.[FN13] The instructor noted some difficulty in making verbal presentations, including uncertainty and taking extra time to answer, but concluded that Wong was a "solid third year medical student" who performed satisfactorily "in all areas of the clerkship." [FN14] Wong then received eight weeks off to read in preparation for his Surgery clerkship, which commenced in January 1995 and in which he earned a "B." The comments on his grade report were similar to those for the preceding clerkship: generally positive remarks mitigated by reference to his need for time and a calm setting to make good oral presentations. The instructor of record concluded:

FN13. Final Grade Sheet, Medicine Clerkship, Summer/Fall 1994, Attach. to Lewis Decl., R17, Ex. C at 8.

FN14. *Id.*

[T]he department was very pleased with [Wong]'s performance on the clerkship. We thought that he had turned in a solid performance and that he had improved markedly over the past year. We think that he has everything it takes to become a safe and effective physician. [FN15]

FN15. Final Grade Sheet, Surgery Clerkship, Winter 1995, Attach. to Lewis Decl., R17, Ex. C at 7.

Before completing the Surgery clerkship, Wong contacted Dean Lewis's office and requested eight weeks off to read for his next clerkship, Pediatrics. Dean Lewis denied this request through the registrar; [FN16] he has offered several different reasons for this decision, giving rise to an issue of fact on this point. In an October 1997 deposition, Dean Lewis stated that he received Wong's request through the registrar, who told him that Wong wanted time off for reading but also asked to intersperse fourth year electives with his remaining third year clerkships because he wanted to graduate on time without having to take the core clerkships in straight succession. According to Dean Lewis's testimony, he did not grant Wong's request because Wong needed to finish his third year before proceeding to fourth year courses and because giving Wong time off to read would keep him from graduating the following year.[FN17] Wong denies that he pressed for permission to take fourth year courses in order to keep from delaying his ***815** graduation date; he contends that he only mentioned this alternative after Dean Lewis denied his request for eight weeks off to read for Pediatrics and told Wong that he must take courses in succession for the remainder of the year.[FN18]

FN16. The parties agree that they communicated about the accommodation only through the registrar; Dean Lewis did not meet personally with Wong to discuss his request for additional time off for reading. *See* District Ct. Order Granting Mot. for Summ. J., R37 at 14, 15 n. 7.

FN17. *See* Dep. of Dr. Ernest Lewis, R24, at 5-7.

FN18. *See* Letter from Dean Lewis to Wong (March 22, 1995), Attach. to Lewis Decl., R17, Ex. C at 72 (sent to Wong during the Pediatrics clerkship and setting out the "schedule for the [three remaining] clerkships you must complete consecutively").

In the same deposition, Dean Lewis also explained his denial of Wong's request for reading time as follows: Wong already had received time off before the previous two clerkships and had passed the Pediatrics clerkship three years earlier. For these reasons, Dean Lewis opined that Wong did not need the extra time for this Pediatrics clerkship. In the course of this explanation, however, Dean Lewis again mentioned his belief that Wong wanted to graduate on time; furthermore, Dean Lewis acknowledged that Pediatrics, as well as Obstetrics/Gynecology and Psychiatry, which he expected Wong to take in succession following Pediatrics, had become much more rigorous and demanding over the past few years.[FN19] Wong concurred in Dean Lewis's evaluation of the relative difficulty of the 1995 Pediatrics course as compared to the 1992 Pediatrics course.

FN19. *See* Lewis Dep., R24 at 7-8, 26.

Finally, in his December 1997 declaration, Dean Lewis repeated as reasons for denying Wong's requested accommodation that he already had granted Wong a significant amount of time off for additional reading and directed studies and that Wong previously had passed Pediatrics (and the next scheduled clerkship, Obstetrics/Gynecology) with no accommodation. Lewis also advanced a third set of explanations: "In that he was presumed to have previously read the material for those courses, I decided that allowing additional time off to read before repeating those clerkships would have been unreasonable, unfair to other students and contrary to the purposes of the curriculum." [FN20]

FN20. Lewis Decl., R17 at 6, ¶ 11.

Wong received a "Y" grade in the Pediatrics clerkship. A "Y" signifies work of failing quality in one area of a clerkship; Wong's evaluations showed that he passed the written and oral examinations but that his ward performance was unsatisfactory. His final grade sheet reported that his "clinical judgment was poor" and that his evaluators "had concerns with his ability to synthesize information." FN21 The grade sheet also noted reporting inaccuracies that in at least one instance "would have resulted in inappropriate dosages," FN22 although Wong contends that his supervisor was responsible for this particular error. Some evaluators wondered whether Wong "could safely practice clinical medicine." FN23 At the time Wong learned of his unsatisfactory performance in Pediatrics, he already had begun his Obstetrics/Gynecology clerkship. A preliminary report from his instructor in that course stated that for the first two weeks, Wong's performance had been "borderline" and "lower than expected." FN24 This evaluation particularly noted that Wong did not communicate effectively and seemed unsure of himself when examining patients, causing them to react with anger or anxiety.

FN21. Final Grade Sheet, Pediatrics Clerkship, Winter/Spring 1995, Attach. to Lewis Decl., R17, Ex. C at 3.

FN22. *Id.*

FN23. *Id.*

FN24. Letter from William M. Birdsong, M.D., to the SEC (May 9, 1995), Attach. to Lewis Decl., R17, Ex. C at 55.

Wong's "Y" grade in Pediatrics triggered another appearance before the SEC and Promotions Board. In a letter to the Promotions Board, Wong attributed his poor performance in the pediatric ward to a flu-like virus that affected him during the first two weeks of the clerkship. He ***816** stated that during this time, he was extremely ill, once requiring IV fluids, and that he fell behind in his reading which affected his performance in the wards. Wong also mentioned being preoccupied with his mother's health; she recently had been diagnosed with cancer. Wong contends that Dean Lewis's refusal to grant him an eight-week reading period prior to this clerkship also contributed to his failing grade; he did not tell the Promotions Board about the refused accommodation because, according to Wong, Dean Lewis ordered him not to mention that issue, an allegation that the University has not disputed.

The SEC recommended dismissal from the School of Medicine, and the Promotions Board concurred. Although the Promotions Board does not keep records of its proceedings, Wong was present during some of the Board's debate and contends that Dean Lewis (a member of both the SEC and Promotions Board) dominated the discussion. The written recommendation of the Promotions Board stated that it had "considered at length the academic record of Mr. Wong, [including] his current academic deficiency, a 'Y' grade in [the] Pediatrics Clerkship.... After a discussion, it was ... approved to recommend Mr. Wong['s dismissal] for failure to meet the academic standards of the School of Medicine." FN25 The Dean of the School of Medicine accepted this recommendation and dismissed Wong on May 17, 1995. Wong did not appeal his dismissal through the procedure for appeal outlined in the School of Medicine Bylaws and Regulations.

FN25. Mem. from Promotions Board Chair to Dean of School of Medicine (May 16, 1995), Attach. to Lewis Decl., R17, Ex. C at 49. The University also has filed the declarations of two psychologists who, following Wong's dismissal, reviewed his entire academic record and expressed the opinion that, given his disability, they doubted whether he ever would be able to acquire the skills necessary to practice clinical medicine. *See* Decl. of Glenn A. Hammel, Ph.D., R19, at 1-2, ¶¶ 2-4; Decl. of James C. Wilson, Ph.D., R20, at 1-2, ¶¶ 2-4.

II. DISCUSSION

[1][2] To establish a prima facie case of discrimination based upon his disability in violation of the Acts, Wong must produce evidence that: (1) he is "disabled" as the Acts define that term; (2) he is qualified to remain a student at the School of Medicine, meaning that he can meet the essential eligibility requirements of the school with or without reasonable accommodation; FN26 (3) he "was dismissed solely because of [his] disability;" and (4) the school "receives federal financial assistance (for

the Rehabilitation Act claim) or is a public entity (for the ADA claim)." Zukle v. Regents of the Univ. of California, 166 F.3d 1041, 1045 (9th Cir.1999). For summary judgment purposes, the University concedes that Wong has met the first and last elements of this test. The dispute focuses upon the second element: the University argues that Wong was not qualified because he could not satisfy the academic standards of the School of Medicine, even with reasonable accommodation.

FN26. Although Title II of the ADA uses the term "reasonable modification" rather than "reasonable accommodation," these terms do not differ in the standards they create. *See*29 U.S.C. § 794(d) (directing that standards used to determine when violation of Title I of the ADA has occurred also apply to violation of section 794); 42 U.S.C. § 12111(8) (defining "[q]ualified individual with a disability," against whom employer may not discriminate under Title I of the ADA, in terms of "reasonable accommodation"); *see also* Zukle, 166 F.3d at 1045 n. 11 (observing that "Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act [29 U.S.C. § 794], and is to be interpreted consistently with that provision."(quoting *Theriault v. Flynn*, 162 F.3d 46, 48 n. 3 (1st Cir.1998))). We will continue the practice of using these terms interchangeably.

[3] Wong bears the "initial burden of producing evidence" both that a reasonable accommodation exists and that this accommodation "would enable [him] to meet the educational institution's essential eligibility requirements." ***817***Zukle*, 166 F.3d at 1047. Production of such evidence shifts the burden to the University to produce rebuttal evidence that either (1) the suggested accommodation is not reasonable (because it would substantially alter the academic program), or (2) that the student is not qualified (because even with the accommodation, the student could not meet the institution's academic standards). *See id.* Wong argues that, viewing the evidence in his favor, he has created an issue of fact as to whether allowing him eight weeks of additional reading time between the Surgery and Pediatrics clerkships was a reasonable modification of the School of Medicine's academic program. If extra reading time was reasonable, Wong contends, the evidence shows that he was qualified to continue in the School of Medicine because when granted that accommodation, he met the school's standards, performing satisfactorily in both the academic and interactive portions of his courses. According to the University, however, it is entitled to summary judgment because it has rebutted Wong's evidence on both of these points as a matter of law.

A. *Standards of Review*

[4] We review the district court's order granting summary judgment *de novo*. *See, e.g.*, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir.1996). We construe all evidence and reasonable inferences it creates in the light most favorable to the non-moving party. *See* Brookside Assocs. v. Rifkin, 49 F.3d 490, 492-93 (9th Cir.1995). "The mere existence of a scintilla of evidence in support of the [non-moving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." United States ex rel Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815 (9th Cir.1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986)). Only if, viewing all of the evidence in this manner, "no genuine issue as to any material fact" exists, is the moving party entitled to summary judgment. Fed.R.Civ.P. 56(c).

[5] In this case, we must consider another standard of review as well: the degree of deference (if any) with which we should treat an educational institution's decisions involving its academic standards and curriculum. We recently observed that the Supreme Court, in the context of examining whether a university violated a student's constitutional rights to due process when it dismissed him, has held that judges "should show great respect for [a] faculty's professional judgment" when reviewing "the substance of a genuinely academic decision." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985), *quoted in* Zukle, 166 F.3d at 1047. Extending this reasoning to the realm of the ADA and Rehabilitation Act, we concluded, as most other circuits have, "that an educational institution's academic decisions are entitled to deference." Zukle, 166 F.3d at 1047 (citing with approval cases from the First, Second, and Fifth Circuits). We typically defer to the

judgment of academics because courts generally are "ill-equipped," as compared with experienced educators, to determine whether a student meets a university's "reasonable standards for academic and professional achievement." *Id.* (internal quotations omitted).

[6] This deference is not absolute, however: courts still hold the final responsibility for enforcing the Acts, including determining whether an individual is qualified, with or without accommodation, for the program in question. We must ensure that educational institutions are not "disguis[ing] truly discriminatory requirements" as academic decisions; to this end, "[t]he educational institution has a 'real obligation ... to seek suitable means of reasonably accommodating a handicapped person *and to submit a factual record indicating that it conscientiously carried out this statutory obligation.*' " Zukle, 166 F.3d at 1048 (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir.1991) (en banc) (*Wynne I*)) (emphasis ***818** added). Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards. *See Wynne I*, 932 F.2d at 26 (explaining that institution needs to submit "*undisputed facts* " showing that "relevant officials" "considered alternative means, their feasibility, [and] cost and effect on the academic program") (emphasis added); *id.* at 28 (refusing to defer when institution presented no evidence regarding "who took part in the decision" and finding "simple conclusory averment" of head of institution insufficient to support deferential standard of review). We defer to the institution's academic decisions only after we determine that the school "has fulfilled this obligation." Zukle, 166 F.3d at 1048. Keeping these standards in mind, we examine the two issues in contention: whether the accommodation Wong requested was reasonable and whether, with accommodation, he was "qualified" to continue his studies at the School of Medicine.

B. *Reasonable Accommodation*

[7][8][9] A public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." Zukle, 166 F.3d at 1046 (quoting 28 C.F.R. § 35.130(b)(7)). The Acts do not require an academic institution "to make fundamental or substantial modifications to its programs or standards," however. *Id.; see also Southeastern Comm. Coll. v. Davis*, 442 U.S. 397, 413, 99 S.Ct. 2361, 2370-71, 60 L.Ed.2d 980 (1979) (Rehabilitation Act does not require school to substantially modify or lower its standards to accommodate disabled students). Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir.1996). As we have observed in the employment context, "mere[ ] speculat [ion] that a suggested accommodation is not feasible" falls short of the "reasonable accommodation" requirement; the Acts create "a duty to 'gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are *necessary* to enable [the individual to meet the standards in question].' " *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir.1993) (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir.1985)).

[10][11] In the typical disability discrimination case in which a plaintiff appeals a district court's entry of summary judgment in favor of the defendant, we undertake this reasonable accommodation analysis ourselves as a matter of course, examining the record and deciding whether the record reveals questions of fact as to whether the requested modification substantially alters the performance standards at issue or whether the accommodation would allow the individual to meet those requirements. In a case involving assessment of the standards of an academic institution, however, we abstain from an in-depth, *de novo* analysis of suggested accommodations that the school rejected if the institution demonstrates that it conducted such an inquiry itself and concluded that the accommodations were not feasible or would not be effective. *See supra* Part II.A. We do not defer to the academic institution's decision in the present case because the record that the University presented falls short of this requirement.

Dean Lewis's denial of Wong's requested accommodation is not entitled to deference because the University failed to present us with a record undisputedly showing ***819** that Dean Lewis investigated the proposed accommodation to determine whether the School of Medicine feasibly could implement it (or some alternative modification) without substantially altering the school's standards. First, Dean Lewis rejected Wong's request for an eight-week reading period before the Pediatrics clerkship without informing himself of Wong's need for accommodation of his learning disability. Despite Dr. Steward's earlier statement to Dean Lewis to the effect that Wong was certain to need additional time to finish the third-year clerkships, Dean Lewis failed to discuss Wong's proposal with any of the professionals who had worked with Wong to pinpoint his disability and help him develop skills to cope with it.[FN27] This omission is particularly noteworthy when considered in light of the following testimony that Dean Lewis gave at his deposition:

FN27. Dr. Steward had left the faculty of the School of Medicine in 1994. Wong received his initial diagnosis at the University's DRC, however, and several different professionals had evaluated him, both at the DRC and as a result of Dr. Steward's independent referrals.

Q: Am I correct, Dr. Lewis, that you are the person within the School of Medicine who has the ultimate authority to determine what accommodations should be made available to students with disabilities?

A: I'm not responsible for determining which accommodations will be offered to students[;] my office is responsible for seeing that the suggested accommodations are provided to the students, but we don't make the decisions as to what the accommodations are.

Q: Who does?

A: The Disability Resources Center.[FN28]

FN28. Dep. of Dr. Ernest Lewis, R24 at 3.

Given Dean Lewis's own description of the limitations upon his responsibility in assessing appropriate accommodations, the fact that he simply passed messages to Wong through the registrar stating his decision to deny Wong's request-without consulting Wong or any person at the University whose job it was to formulate appropriate accommodations-strikes us as a conspicuous failure to carry out the obligation "conscientiously" to explore possible accommodations.

Second, the evidence creates real doubts that Dean Lewis gave any consideration to the effect the proposed accommodation might have upon the School of Medicine's program requirements or academic standards at the time he denied Wong's request. In his October 1997 deposition, Dean Lewis stated that he denied Wong's requested accommodation because (1) Wong wanted to graduate on time, and (2) Wong already had taken Pediatrics and had received a significant amount of time off for reading, and Dean Lewis therefore did not believe Wong needed additional time off. Neither of these reasons is relevant to the School of Medicine's curriculum or standards. Only in a declaration dated two months after this deposition did Dean Lewis assert that he denied the requested accommodation because it was "contrary to the purposes of the curriculum." [FN29] A jury reasonably could find that Dean Lewis did not formulate this final rationale for denying the accommodation until long after Wong's dismissal from the School of Medicine. Such after-the-fact justification obviously does not satisfy the University's obligation to present "undisputed facts" showing that it conscientiously considered whether possible modification would fundamentally or substantially alter the school's standards when it decided that it could not reasonably accommodate the disabled student. *See Wynne I,* 932 F.2d at 26.[FN30] We therefore do not ***820** defer to the institution's decision; we examine the rejection of Wong's request for an eight-week reading period *de novo.*

FN29. Lewis Decl., R17 at 6, ¶ 11.

FN30. In *Zukle,* we cited *Wynne I* with approval for the proposition that the academic institution must present a factual record that it conscientiously fulfilled its obligation to seek suitable means of accommodating disabled students. *See Zukle,* 166 F.3d at 1048. We did not delve

into the particulars of what that record must show to entitle the school to deference, however, because that case did not call for any analysis of this issue: *Zukle* presented no dispute about whether the school properly had considered its ability feasibly to accommodate that disabled student.

[12][13] We briefly note that both parties have met their burdens of production as to whether the accommodation was reasonable. Among other things, Wong has shown that the University granted this accommodation in the past. The University, on the other hand, has produced the testimony of Dean Lewis that the eight-week break Wong requested was unreasonable because it required the School of Medicine to alter its curriculum. It contends that the schedule was designed for students to complete consecutively to allow them to practice skills consistently and frequently and to allow the faculty to evaluate the steady development of those skills.[FN31] Allowing extra time for reading before every clerkship does not comport with this goal, the University argues. Our analysis focuses upon whether this evidence shows as a matter of law that the proposed accommodation is unreasonable; we conclude for the reasons discussed below that the evidence creates an issue of fact as to the reasonableness of granting Wong an eight-week reading period prior to his Pediatrics clerkship.

FN31. *See* Lewis Decl., R17 at 5, ¶ 11.

First, Dr. Steward, the Coordinator of the Student Learning Disability Resource Teams and a member of the medical school faculty, informed Dean Lewis soon after Wong's diagnosis that Wong certainly would need additional time to complete the clerkship portion of the curriculum. Dr. Steward also stated that if Wong passed the Medicine clerkship after receiving additional reading time, that success would provide empirical support for Wong to receive the same accommodation for his next clerkship. A jury could have found Dr. Steward a persuasive authority on the issue whether the decelerated schedule fundamentally altered the curriculum. *See also* 34 C.F.R. § 104.44(a) (regulation interpreting Rehabilitation Act as it applies to postsecondary education stating that "[m]odifications may include changes in the length of time permitted for the completion of degree requirements" (emphasis added)).

[14] Second, the School of Medicine had granted Wong this same accommodation for his two previous clerkships. An institution's past decision to make a concession to a disabled individual does not obligate it to continue to grant that accommodation in the future, nor does it render the accommodation reasonable as a matter of law. *See, e.g., Myers v. Hose*, 50 F.3d 278, 284 (4th Cir.1995) (holding that fact that employer had offered accommodation to employees in the past did not require employer to grant same accommodation to plaintiff as a matter of federal law). The fact that the school previously made the exact modification for the Surgery and Medicine clerkships that Wong requested for the Pediatrics clerkship, however, is certainly persuasive evidence from which a jury could conclude that the accommodation was reasonable. *Cf. Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1013 (7th Cir.1997) (observing fact that employer previously had restricted employee's lifting requirements to 50 pounds in response to back injury indicated that this accommodation was reasonable).[FN32] The *821 School of Medicine also deviated from the consecutive clerkship standard when it allowed Wong to take a leave of absence during the third year to spend time with his ailing father. Both of these occurrences imply that consecutive completion of the third-year clerkships was not an essential element of the curriculum.

FN32. In *Zukle*, we specifically considered the school's previous decisions to grant students' requests for decelerated schedule as probative of the issue whether that plaintiff's request for eight weeks off between clerkships was reasonable. *See* 166 F.3d at 1050. In that case we determined that the defendant was entitled to summary judgment because the plaintiff had not produced evidence from which a jury could conclude that the accommodation was reasonable given her particular circumstances. Here, in contrast, Wong has produced such evidence. *See id.* at 1048 ("[W]hat is reasonable in a particular situation may not be reasonable in a different situation-even if the situational differences are relatively slight.").

Third, that Wong had earned "B's" and received generally positive comments in the Medicine and Surgery clerkships for which Dean Lewis granted him eight weeks of reading time indicates that it may have been reasonable for Wong to continue receiving this same accommodation. *Cf. Roberts v. Progressive Indep., Inc.*, 183 F.3d 1215, 1220 (10th Cir.1999) (in the employment context, holding that "[r]easonable accommodation[s are] those accommodations which presently, or in the near future, enable the employee to perform the essential functions of his job") (internal quotations and citations omitted). From this evidence, a jury could conclude that the decelerated schedule allowed Wong to meet the substantive academic standards of the two clerkships for which he received the eight-week reading period. Allowing disabled individuals to fulfill the "essential eligibility requirements for ... participation in programs" is, after all, the principle behind the statutory mandate that public entities provide disabled individuals with reasonable accommodations. 42 U.S.C. § 12131(2).

Our holding that Wong has created an issue of fact as to the reasonableness of an eight-week reading period between clerkships does not conflict with our opinion in *Zukle*, in which we decided that the plaintiff did not create an issue of fact as to the reasonableness of the same accommodation that Wong requested. *See*166 F.3d at 1050-51. In *Zukle*, we reached the conclusion that a disabled medical student's requested decelerated schedule for clerkships was not a reasonable accommodation only after determining that a deferential standard of review was appropriate. We noted that the Promotions Board had considered the plaintiff's previous failure to perform adequately even when granted a decelerated schedule. *See id.* at 1050-51. Given that plaintiff's inability to perform even *with* accommodation, we concluded that the school made a rationally considered decision that allowing her to remain in the program would negatively impact the school's academic standards. Here, however, Wong has presented evidence that when granted the decelerated schedule, his performance drastically improved, and that the University failed to consider fully the effect of this modification on its program and on his abilities. *See id.* at 1048 ("[R]easonableness is not a constant. To the contrary, what is reasonable in a particular situation may not be reasonable in a different situation-even if the situational differences are relatively slight.") (internal punctuation and citation omitted).

[15][16] We re-emphasize that at this stage of the litigation, we examine all of the record evidence in the light most favorable to Wong. We do not hold that allowing Wong to take eight weeks off between each of the third-year clerkships would have been a reasonable accommodation; in fact, we recognize that a jury may well find that, despite the evidence we have just discussed, this modification to the school's curriculum was not reasonable. Under the summary judgment standard, however, we do not consider whether a jury could find in favor of the defendant: we affirm the entry of summary judgment only if a jury could not find for the plaintiff. Here, a jury could decide that the modification he requested in the School of Medicine's program was reasonable. The district court erred in concluding otherwise.[FN33]

FN33. In its order granting the University's motion for summary judgment, the district court stated that it would disregard the parties' discussion of "time off" as an "accommodation," essentially concluding as a matter of law that additional time "dilute[d] appropriate academic standards" and thus fell outside of the Acts' requirements. District Ct. Order, R37 at 12 n. 5; *see also id.* at 13 & n. 6 (accepting as a matter of law the University's argument that granting additional time between clerkships for reading fundamentally altered the academic program and *sua sponte* applying this reasoning to the reading periods the school granted Wong for the Surgery and Medicine clerkships, stating: "Why this was considered an appropriate accommodation by the university, even at the outset, is puzzling to this court."). The district court misguidedly incorporated into its decision its own perception that the time Wong requested (and the University originally granted) significantly modified the curriculum.

We have determined in this case that we could not treat the University's denial of the requested accommodation with deference because it did not demonstrate that it conscientiously exercised professional judgment in considering the

feasibility of the modification in making that decision. Even so, where record evidence indicates that an institution determined that certain modifications to its program were acceptable, courts may not as a matter of law disregard that evidence in favor of their own ideas about what constitutes "appropriate academic standards."

In addition to relying upon its own assessment of the importance of different functions of an academic curriculum, the district court also based its conclusion in part upon the University's stated goal of requiring students to apply their knowledge "within the time demanded by the live clinical setting." District Ct. Order, R37 at 13 n. 6. The University does contend that this ability is an important part of its curriculum, but it did not defend the "consecutive clerkship" requirement on this basis: it claimed that it intended the clerkships to proceed in succession to allow students to practice their skills frequently and consistently and to allow the faculty to assess students' progress more effectively. *See* Lewis Decl., R17 at 5, ¶ 11. Although the former goal may indeed be an important part of the University's curriculum, the district court erred in holding that this function of the program rendered the accommodation unreasonable *per se* because the University did not contend that the "consecutive clerkship" requirement advanced the "live clinical setting" goal.

***822** C. *Qualified Individual*

The ADA provides 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...." 42 U.S.C. § 12132. The statute defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for the ... participation in programs or activities provides by a public entity." *Id.* § 12131(2). The Rehabilitation Act creates similar rights and duties.[FN34] In the context of postsecondary education, administrative regulations define "qualified" as "meet[ing] the academic and technical standards requisite to ... participation in the ... education program or activity." 34 C.F.R. § 104.3(k)(3). For purposes of resolving the summary judgment issue, Wong concedes that he is not qualified to continue in the School of Medicine without reasonable accommodation; the issue we must consider, therefore, is whether, with the accommodation of time off between clerkships for additional reading, Wong has created an issue of fact that he could satisfy the school's academic standards.

FN34. The Rehabilitation Act prohibits discrimination against an "*otherwise* qualified individual with a disability." 29 U.S.C. § 794(a) (emphasis added). Courts repeatedly have noted that despite this slight difference in terminology, the same analysis applies to claims under both Acts. *See, e.g., Forest City Daly Housing, Inc. v. Town of North Hempstead,* 175 F.3d 144, 150 n. 7 (2d Cir.1999) (comparing this particular language in ADA and Rehabilitation Act); *Nelson v. Miller,* 170 F.3d 641, 649 (6th Cir.1999) (noting that analysis under these two provisions is essentially the same); *see generally Zukle,* 166 F.3d at 1045 n. 11 (collecting cases noting relationship between the ADA and Rehabilitation Act).

[17][18] Again, our analysis begins with a determination of whether we defer to the University's decision to dismiss Wong for "failure to meet the academic standards of the School of Medicine." [FN35] We will not ***823** defer to a school's decision if the ostensibly professional, academic judgment "disguise[s] truly discriminatory requirements." *Zukle,* 166 F.3d at 1048. Moreover, the academic institution bears the burden of presenting us with a factual record that shows it conscientiously considered all pertinent and appropriate information in making its decision. Far from demonstrating a conscientious effort to consider all relevant factors in deciding that Wong could not meet the school's academic requirements even with reasonable accommodation, the record contains evidence that the University eschewed its obligation to consider possible modifications it could make (or could have

made) in the program to accommodate Wong and the past and potential effects of such accommodations (and lack thereof) on Wong's performance.

FN35. Mem. from Promotions Board Chair to Dean of School of Medicine (May 16, 1995), Attach. to Lewis Decl., R17, Ex. C at 49.

The University has not disputed Wong's assertion that Dean Lewis instructed him not to mention the requested accommodation-or Dean Lewis's denial of it-to the Promotions Board. In fact, the record contains evidence that at least two Promotions Board members believed that Dean Lewis *had* given Wong accommodations and erroneously believed that Wong had been unable to perform adequately even with those modifications.[FN36] These same two individuals also identified Wong's failure of the Pediatrics clerkship as the determining factor in their decision to dismiss him.[FN37] Finally, Dean Lazarus, who issued the letter formally dismissing Wong, testified that Dean Lewis told him that Wong had been accommodated and that based upon this representation and the Promotions Board's recommendation for dismissal, he issued the school's decision without considering the matter independently.[FN38] The University has presented no evidence that the Promotions Board considered the fact that in his previous two clerkships, Wong had performed well after receiving an eight-week reading period as an accommodation but that in the Pediatrics clerkship, Wong performed poorly after failing to receive the same accommodation. *Cf. Zukle,* 166 F.3d at 1050-51 (in deferring to University's decision not to grant accommodation to that plaintiff, noting that Promotions Board had considered fact that the student previously had "experienced severe academic difficulties" "even on a decelerated schedule").

FN36. For example, the following dialogue occurred during the deposition of the Chair of the Promotions Board:

Q: If he was given more support, he would have performed well in pediatrics as well?

A: Well, I will reflect the opinion of the Committee at this moment is that that support and opportunity had been given, and still there was unsatisfactory performance, and on that basis, and the fact that he was on probation at that time, that the Board voted to recommend dismissal.

Dep. of Dr. George Jordan, R25 at 17. In fact, Wong received extra time on some of his exams, including Pediatrics, but did not receive any additional time to read in preparation for Pediatrics. *See also* Dep. of Promotions Board member Dr. Donal Walsh, R26 at 14-15 (stating, in response to question regarding whether the Promotions Board discussed Wong's learning disability, "I believe it was discussed generally. I don't believe it was discussed in detail.").

FN37. *See* Jordan Dep., R25 at 4 (stating that the Promotions Board voted to dismiss Wong because "[h]e received [sic] insufficient grade in the pediatrics clerkship at the time that he was on probation."); Walsh Dep., R26 at 13.

FN38. *See* Dep. of School of Medicine Dean Gerald Lazarus, Attach. to Pl.'s Mem. of Points and Authorities in Opp'n to Mot. for Summ. J., R32, Ex. F at 63.

This failure to take Wong's disability and need for accommodation into account shows that the school's system for evaluating a learning disabled student's abilities and its own duty to make its program accessible to such individuals fell short of the standards we require to grant deference to an academic institution's decision-making process. We therefore analyze whether Wong has created an issue of fact with respect to his qualifications *de novo.*

[19] Wong has produced enough evidence that he could meet the University's ***824** eligibility requirements to shift the burden of production to the University: his final grade sheets from the Medicine and Surgery clerkships for which he received the accommodation show that he received satisfactory grades and generally positive comments from his evaluators. The University argues, however, that an examination of Wong's entire academic record demonstrates that he did not have the capacity to

become an effective physician. Evaluators from multiple courses reported flaws in his performance-such as Wong's inability to comprehend verbal information, accurately respond to questions posed to him on the wards, think on his feet, and relate to patients and staff-that the University argues could not be corrected simply by allowing Wong additional time to read before each clerkship. Thus, the University contends, Wong was not qualified because even with the accommodation he requested, he could not satisfy the School of Medicine's standards. We acknowledge that Wong's performance in some areas of the clerkship program were less than ideal, and a jury may eventually determine that Wong simply does not have and cannot acquire-even with reasonable modifications to the program-skills that are indispensable for the receipt of a license to practice medicine. For the reasons discussed below, however, we cannot say as a matter of law that he was unqualified to continue participating in the medical program.

Most importantly, a comparison of Wong's final grade sheets from his 1991 Surgery and 1993 Medicine clerkships (which he failed and for which he received no accommodation) and his 1994 Medicine and 1995 Surgery clerkships (which he passed with grades of "B" and for which he received eight weeks of reading time prior to starting) show a marked improvement, not only in Wong's performance on written and oral examinations, *but also in his performance in the clinical setting.* For example, the final grade sheet for the 1993 Medicine clerkship reported that Wong's clinical performance was "below that expected" because, for example, he could not collect data from patients and use it to formulate a diagnosis; his oral presentations were problematic; and he had difficulty with interpersonal interactions.[FN39] In contrast, his 1994 Medicine clerkship evaluation stated that his clinical performance was "satisfactory in all areas." [FN40] It noted some difficulty with verbal presentations, including taking a little extra time or repeating a question, but stated that he nonetheless answered questions satisfactorily. Significantly, this grade sheet reported excellent performance in two areas with which Wong earlier had struggled: interpersonal relationships (both with patients and with other professionals) and synthesizing a diagnosis while taking a patient's history.[FN41]

FN39. Final Grade Sheet, Medicine Clerkship, Summer 1993, Attach. to Lewis Decl., R17, Ex. C at 9.

FN40. Final Grade Sheet, Medicine Clerkship, Summer/Fall 1994, Attach. to Lewis Decl., R17, Ex. C at 8.

FN41. *See id.*

[20] Wong's poor performance in the 1995 Pediatrics clerkship for which he did not receive the accommodation he requested mimicked his earlier failures. The comments he received regarding his clinical performance were similar to the assessments of his work in the 1993 Medicine and 1991 Surgery clerkships: he could not synthesize information; his oral presentation skills were poor; and he lacked confidence.[FN42] From all of this evidence, a reasonable jury could discern a pattern: Wong failed when he did not have extra time to prepare before a clerkship, but with the modified schedule, he succeeded in all areas of the clerkship.

FN42. *See* Final Grade Sheet, Pediatrics Clerkship, Winter/Spring 1995, Attach. to Lewis Decl., R17, Ex. C at 3.

The University points out that Wong's scores on the written and oral examinations*825 in the 1995 Pediatrics clerkship were good; only his clinical and ward performance was less than satisfactory. Based upon these facts, the University contends that Wong still was not qualified because the accommodation he requested, additional reading time, would not have improved the "hands-on" skills with which he had so much difficulty. In addition to Wong's performance in the 1994 Medicine and 1995 Surgery clerkships, which tend to disprove the University's assertion, evidence from one of the School of Medicine's own faculty members discounts this argument. In a memorandum to Dean Lewis written soon after Wong received his learning disability diagnosis, Dr. Steward reported that two of the professionals who helped diagnose Wong concurred in Wong's own perception that his problems with processing verbal information increased "when he is anxious, worried, and/or nervous, and *when the vocabulary includes new, technical information.*" [FN43] Similarly, "negative and anxious emotions can interrupt or exacerbate [Wong's difficulty expressing himself

verbally], and new or not-quite-mastered terms and concepts are more likely to be difficult to retrieve than older material." [FN44] From this analysis of Wong's disability, a reasonable jury could conclude that having reading time between clerkships allowed him to perform satisfactorily by (1) enabling him to familiarize himself with new, technical information so that he could communicate more easily on these topics and (2) easing his anxiety about the new information, thus making him more comfortable in the clinical setting.

FN43. Mem. to Dean Lewis from Dr. Steward (April 14, 1994), Attach. to Lewis Decl., R17, Ex. C at 88 (emphasis added).

FN44. *Id.* at 88-89.

The University emphasizes that Wong passed the Pediatrics clerkship the first time he took it, in 1992, without any accommodation. Although this fact does bolster the school's argument that the lack of extra reading time should not have affected Wong's performance in Pediatrics in 1995, the fact that Pediatrics had become "a lot more rigorous in the last five [or] six years" [FN45] mitigates the support this evidence lends to the University's position. Finally, we give little credence to the University's argument that the total amount of time Wong already had spent in the third year of medical school-nearing four years at the time of his dismissal-indicates that he simply could not master the skills that the school's curriculum demanded. The majority of this time was attributable to the death of Wong's father; courses Wong failed prior to his diagnosis; and courses that Wong had passed but that the school required him to retake. If a jury were to find that the schedule modification Wong requested was reasonable, we could attribute at the most one year of additional time in the third year curriculum to the accommodation of his disability.[FN46] Neither the University's argument regarding Wong's prior passing grade in Pediatrics nor the emphasis it places upon the amount of time he had spent in the third year is sufficient to overcome, as a matter of law, the evidence Wong presented that when given extra time to read between clerkships, he could meet the academic standards of the School of Medicine.

FN45. Lewis Dep., R24 at 26.

FN46. If, starting on a clean slate, Wong received eight weeks off before every clerkship in the third-year curriculum, it would take him two years instead of one to complete these courses. Incidentally, we note that at least one member of the Promotions Board focused heavily on the time factor in voting to dismiss Wong. *See* Walsh Dep., R26 at 14, 15-17, 25, 29.

III. CONCLUSION

Faculty members and administrators of a professional school are unquestionably in the best position to set standards for the institution and to establish curricular requirements that fulfill the school's purpose of training students for the work that lies ***826** ahead of them. However, "extending deference to educational institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act.... The educational institution has a 'real obligation ... to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.' " *Zukle*, 166 F.3d at 1048 (quoting *Wynne I*, 932 F.2d at 25-26). Here, school administrators accepted the recommendation of a faculty member (and learning disability services coordinator) to grant Wong the schedule modification he requested for two courses, and Wong performed well with this accommodation. The School of Medicine did not present any evidence that during this time period, it believed that Wong's decelerated schedule impeded his attainment of the goals of the program or lowered the school's academic standards. Then, however, for reasons about which there is a dispute of fact, the school refused to continue granting Wong the accommodation and dismissed him when he could not perform satisfactorily without it.

The deference to which academic institutions are entitled when it comes to the ADA is a double-edged sword. It allows them a significant amount of leeway in making decisions about their curricular requirements and their ability to structure their programs to accommodate disabled students. On the other hand, it places on an institution the weighty responsibility of carefully considering each disabled student's particular limitations and analyzing whether and how it might accommodate that student in a way

that would allow the student to complete the school's program without lowering academic standards or otherwise unduly burdening the institution. Here, although the record shows that the University failed to undertake this task properly, the University still asks that we hold as a matter of law and at a very early stage of this litigation that it has satisfied its legal obligations under the ADA. Under the circumstances, we cannot grant this request. We will not sanction an academic institution's decision to refuse to accommodate a disabled student and subsequent dismissal of that student when the record contains facts from which a reasonable jury could conclude that the school made those decisions for arbitrary reasons unrelated to its academic standards.

Because genuine issues of fact remain as to both the reasonableness of the accommodation in question and Wong's qualifications, summary judgment was inappropriate. Resolving these factual disputes is the province of a jury. We REVERSE the order of the district court and REMAND this case for further proceedings consistent with this opinion.

C.A.9 (Cal.),1999.
Wong v. Regents of University of California
192 F.3d 807, 138 Ed. Law Rep. 698, 9 A.D. Cases 1227, 16 NDLR P 93, 99 Cal. Daily Op. Serv. 7683, 1999 Daily Journal D.A.R. 9695, 1999 Daily Journal D.A.R. 11,677

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Zukle v. Regents of University of California
C.A.9 (Cal.),1999.

United States Court of Appeals,Ninth Circuit.
Sherrie Lynn ZUKLE, Plaintiff-Appellant,
v.
The REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.
No. 97-16708.

Argued and Submitted Nov. 3, 1998.
Decided Feb. 23, 1999.

Learning disabled student who was dismissed from program at medical school brought action against university regents, alleging violation of the Americans with Disabilities Act (ADA) and Rehabilitation Act. The United States District Court for the Eastern District of California, David F. Levi, J., granted summary judgment for regents, and student appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) student bore initial burden of production, and burden would then shift to university, but student bore ultimate burden of persuasion; (2) university's academic decisions were entitled to judicial deference; and (3) student's requested accommodations were not reasonable, since they would require substantial modification of school's program.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚷915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases
Appellant's failure to raise certain claims in her opening brief on appeal waived any appeal from the district court's grant of summary judgment on those claims.

[2] Civil Rights 78 ⚷1402

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1402 k. Education. Most Cited Cases
(Formerly 78k240(1))
In student's action alleging that educational institution discriminated against her on basis of disability, in violation of Americans with Disabilities Act (ADA) and Rehabilitation Act, student bears initial burden of producing evidence that she is otherwise qualified, which includes burden of producing evidence of existence of a reasonable accommodation that would enable her to meet institution's essential eligibility requirements; burden then shifts to institution to produce evidence that requested accommodation would require a fundamental or substantial modification of its program or standards, or evidence that requested accommodations, regardless of whether they are reasonable, would not enable student to meet its academic standards, although student retains ultimate burden of persuading court that she is otherwise qualified. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7); 34 C.F.R. §§ 104.3(k)(3), 104.44(a).

[3] Civil Rights 78 ⚷1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Although ultimate determination of whether an individual is otherwise qualified to participate in educational institution's program must be made by the court, in action brought under Americans with Disabilities Act (ADA) and Rehabilitation Act, judicial deference will be extended to the evaluation

made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[4] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
Judicial deference should be accorded an educational institution's determination that a reasonable accommodation is not available to a disabled student, for purpose of student's claim of discrimination under Americans with Disabilities Act (ADA) and Rehabilitation Act; court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[5] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
University's dismissal of learning disabled student from medical school program did not amount to discrimination under Americans with Disabilities Act (ADA) or Rehabilitation Act; accommodations requested by student in addition to those offered by university, such as permitting student to begin one clerkship before finishing another, reducing amount of required clinical time, and placing student on decelerated schedule, were not reasonable because they would require substantial modification of school's program and would have lowered school's academic standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[6] **Civil Rights 78 ⚷1069**

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)
For purpose of student's claim, under Americans with Disabilities Act (ADA) and Rehabilitation Act, that she was otherwise qualified to participate in medical school program, with reasonable accommodation, reasonableness is not a constant; rather, what is reasonable in a particular situation may not be reasonable in a different situation, even if the situational differences are relatively slight, and court must thus evaluate student's requests for accommodation in light of the totality of her circumstances. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

***1042** Dan Siegel,Hunter Pyle, Siegel & Yee, Oakland, California, for the plaintiff-appellant.
Charity Kenyon, Diepenbrock, Wulff, Plant & Hannegan, Sacramento, California, for the defendant-appellee.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV-96-00127-DFL.

Before: ALARCON, O'SCANNLAIN and FERNANDEZ, Circuit Judges.

O'SCANNLAIN, Circuit Judge:
We must decide whether a medical school violated the Americans with Disabilities Act or the Rehabilitation Act when it dismissed a learning disabled student for failure to meet the school's academic standards.

I

Sherrie Lynn Zukle entered the University of California, Davis School of Medicine ("Medical School") in the fall of 1991 for a four year course of

study. The first two years comprise the "basic science" or "pre-clinical" curriculum, consisting of courses in the function, design and processes of the human body. The final two years comprise the "clinical curriculum." In the third year, students take six consecutive eight-week clinical clerkships. During the fourth year, students complete clerkships of varying lengths in more advanced areas. Most clerkships involve treating patients in hospitals or clinics, and oral and written exams.

From the beginning, Zukle experienced academic difficulty. During her first quarter, she received "Y" grades in Anatomy and Biochemistry.[FN1] Upon reexamination, her Biochemistry grade was converted to a "D." She did not convert her Anatomy grade at that time. In her second quarter, she received a "Y" grade in Human Physiology, which she converted to a "D" upon reexamination.

FN1. The Medical School assigns letter grades of A, B, C, D, F, I and Y to measure academic performance. A "Y" grade in a pre-clinical course is provisional; it means that a student has earned a failing grade but will be or has been permitted to retake the exam. However, a "Y" grade in a clinical clerkship indicates unsatisfactory performance in a major portion of that clerkship and may not be converted until the student repeats that portion of the clerkship.

In April 1992, the Medical School referred Zukle to the Student Evaluation Committee ("SEC").[FN2] Although subject to dismissal ***1043** pursuant to the Medical School's bylaws,[FN3] Zukle was allowed to remain in school. The SEC (1) placed Zukle on academic probation,[FN4] (2) required her to retake Anatomy and Biochemistry, (3) required her to be tested for a learning disability, and (4) placed her on a "split curriculum," meaning that she was given three years to complete the pre-clinical program, instead of the usual two years. Zukle continued to experience academic difficulty. For the spring quarter of 1992 (while on academic probation) she received a "Y" grade in Neurobiology. In the fall, she received a "Y" grade in Medical Microbiology and in the winter she received a "Y" in Principles of Pharmacology. In total, Zukle received eight "Y" grades during the pre-clinical portion of her studies. Five were converted to "C" after reexamination, two to "D" and one to "F."

FN2. The Medical School's Committee on Student Evaluation and Promotion, which consists of two Promotions Boards and the SEC, monitors the progress of students with academic difficulties. Promotions Board A reviews preclinical students (i.e. students in the first two years of study); Promotions Board B reviews clinical students (i.e. students in the last two years of study). Generally, the SEC meets with students and their advisors before making a recommendation to the appropriate Promotions Board. The Promotions Board then conducts an independent review of the student's performance and decides whether to accept or reject the SEC's recommendation.

FN3. The Medical School's bylaws provide that a student is subject to dismissal if she receives two or more failing grades within one academic quarter. Zukle received two "Y" grades in her first quarter.

FN4. The Medical School's bylaws provide that a student on academic probation is required to remedy her deficient grades, and is subject to dismissal for failure to do so or if she receives another deficient grade while on academic probation.

In November 1992, Zukle was tested for a learning disability. The results received in January 1993, revealed that Zukle suffered from a reading disability which "affects visual processing as it relates to reading comprehension and rate when under timed constraints." In short, it takes Zukle longer to read and to absorb information than the average person.[FN5]

Zukle asked Christine O'Dell, Coordinator of the University's Learning Disability Resource Center, to inform the Medical School of her test results in mid-July 1993. O'Dell informed Gail Currie of the Office of Student Affairs in a letter dated July 21, 1993. O'Dell recommended that the Medical School make various accommodations for Zukle's disability and recommended various techniques for Zukle to try to increase her reading comprehension. The Medical School offered all of these accommodations to Zukle.

FN5. Under timed conditions, Zukle's

reading comprehension is in the 2nd percentile, whereas when untimed her comprehension is in the 83rd percentile.

After completing the pre-clinical portion of Medical School, Zukle took the United States Medical Licensing Exam, Part I ("USMLE") in June 1994. Shortly thereafter, she began her first clinical clerkship, OB-GYN. During this clerkship, Zukle learned that she had failed the USLME.[FN6] The Medical School allowed Zukle to interrupt her OB-GYN clerkship to take a six-week review course to prepare to retake the USMLE, for which the Medical School paid.

FN6. Zukle's score placed her in the 5th percentile nationally.

Before leaving school to take the USMLE review course offered in southern California, Zukle asked Donal A. Walsh, the Associate Dean of Curricular Affairs, if she could rearrange her clerkship schedule. At this point, Zukle had completed the first half of her OB-GYN clerkship. She asked Dean Walsh if, instead of completing the second half of her OB-GYN clerkship upon return from retaking the USMLE, she could start the first half of a Family Practice Clerkship, and then repeat the OB-GYN clerkship in its entirety at a later date. Zukle testified that she made this request because she was concerned about how far behind she would be when she returned from the USMLE review course. She further asserted that she thought that if she started the Family Practice clerkship (which apparently requires less reading than the OB-GYN clerkship), she would be able to read for her upcoming Medicine clerkship at night. Zukle testified that Dean Walsh, and several other faculty members, including the Instructor of Record for Family Practice and the Instructor of Record for OB-GYN, initially approved her request. Later, however, Dean Walsh denied Zukle's request and informed her that she had to complete the OB-GYN clerkship before beginning another clerkship.

***1044** In September 1994, Zukle took and passed the USMLE on her second attempt.[FN7] She returned to the Medical School and finished her OB-GYN clerkship. Without requesting any accommodations, she began her Medicine clerkship. During this clerkship, she learned that she had earned a "Y" grade in her OB-GYN clerkship. Because of this grade, Zukle was automatically placed back on academic probation.[FN8]

FN7. Zukle's score placed her in the 9th percentile nationally.

FN8. The Promotions Board had voted to remove Zukle from academic probation in October 1994. At that time, it was unaware of her OB-GYN clerkship grade. The Medical School's bylaws provide that a student who receives a "Y" grade in her third or fourth years is automatically placed on academic probation at the time of receipt of the grade.

Two weeks before the Medicine written exam, Zukle contacted her advisor, Dr. Joseph Silva, and expressed concern that she had not completed the required reading. Dr. Silva offered to speak with Dr. Ruth Lawrence, the Medicine Instructor of Record, on Zukle's behalf. According to Zukle, she then spoke with Dr. Lawrence in person and requested time off from the clerkship to prepare for the exam. Dr. Lawrence denied Zukle's request. Zukle passed the written exam, but failed the Medicine clerkship because of unsatisfactory clinical performance. On Zukle's grade sheet, Dr. Lawrence rated Zukle as unsatisfactory in clinical problem solving skills; data acquisition, organization and recording; and skill/ability at oral presentations. Dr. Lawrence also reported negative comments from the people who worked with Zukle during the clerkship. Because Zukle had earned a failing grade while on academic probation, she was again subject to dismissal pursuant to the Medical School's bylaws.

On January 13, 1995, Zukle appeared before the SEC. The SEC recommended that Zukle (1) drop her current clerkship, Pediatrics; (2) start reviewing for the OB-GYN exam, and retake it; (3) repeat the Medicine clerkship in its entirety; (4) obtain the approval of the SEC before enrolling in any more clerkships; and (5) remain on academic probation for the rest of her medical school career.

On January 17, 1995, the Promotions Board met to consider Zukle's case. The Promotions Board voted to dismiss Zukle from the Medical School for "failure to meet the academic standards of the School of Medicine." According to Dr. Lewis, who was a

member of the Promotions Board and was present when it reached its decision, "the Promotions Board considered Plaintiff's academic performance throughout her tenure at the medical school and determined that it demonstrated an incapacity to develop or use the skills and knowledge required to competently practice medicine."

In June 1995, Zukle appealed her dismissal to an *ad hoc* Board on Student Dismissal composed of faculty and students ("the Board").[FN9] Zukle appeared before the Board on November 12, 1995, and requested that her dismissal be reconsidered and that she be given extra time to prepare prior to some of her clerkships to accommodate her disability. The Board also heard testimony from Dr. Silva, who spoke favorably on her behalf, Dr. Ernest Lewis, Associate Dean of Student Affairs and Dr. George Jordan, the Chair of the Promotions Board at the time of Zukle's dismissal. When asked about Zukle's request to remain in Medical School on a decelerated schedule, Dean Lewis testified:

FN9. The Medical School's bylaws provide that any student who has been dismissed from the Medical School may appeal her dismissal to the Dean, who in turn may appoint an *ad hoc* board consisting of five faculty members and two students to review the appeal. The Dean is responsible for the final disposition of the appeal.

There is a certain point when everyone has to be able to respond in the same time frame. A physician does not have extra time when in the ER, for example. Speed of appropriate reaction to crisis is essential.
The Board on Student Dismissal voted unanimously to uphold the Promotions Board's decision of dismissal.

***1045** On January 22, 1996, Zukle filed a complaint in federal district court for damages and injunctive relief against the Regents of the University of California ("Regents"). The complaint alleged discrimination based on disability, sex and race, and sexual harassment. On June 6, 1997, the Regents filed a motion for summary judgment. The district court entered its Memorandum of Opinion and Order on August 7, 1997, granting summary judgment to The Regents on all of Zukle's claims. The court found that Zukle's "race, sex, and sexual harassment claims are unsupported by the record and do not merit discussion." On Zukle's Americans with Disabilities Act ("ADA") and Rehabilitation Act claims, the district court found that "[b]ecause the evidence before the court shows that Zukle could not meet the minimum standards of the UCD School of Medicine with reasonable accommodation, she is not an otherwise qualified individual with a disability under the Rehabilitation Act or the ADA."

[1] Zukle timely appeals from the district court's grant of summary judgment on her ADA and Rehabilitation Act claims.[FN10]

FN10. Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the district court's grant of summary judgment on these claims. *See Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1100 (9th Cir.1998) ("Ordinarily, a party's failure to raise an issue in the opening brief constitutes a waiver of that issue.").

II

Zukle claims that she was dismissed from the Medical School in violation of Title II of the ADA and section 504 of the Rehabilitation Act. Title II of the ADA provides, in relevant part:

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.

42 U.S.C. § 12132. Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education. *See id.* at § 12131(1)(B).

Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, which provides:

No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, 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....

29 U.S.C. § 794.

To make out a prima facie case under either the ADA or Rehabilitation Act Zukle must show that (1) she is disabled under the Act; (2) she is "otherwise qualified" to remain a student at the Medical School, i.e., she can meet the essential eligibility requirements of the school, with or without reasonable accommodation; (3) she was dismissed solely because of her disability; and (4) the Medical School receives federal financial assistance (for the Rehabilitation Act claim), or is a public entity (for the ADA claim). *See Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir.1988); *cf. Willis v. Pacific Maritime Assoc.*, 162 F.3d 561, 565 (9th Cir.1998) (stating prima facie elements for ADA employment case).[FN11]

FN11. There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. *See*42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims]."); *Bragdon v. Abbott*, 524 U.S. 624, ----, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998) (stating that courts are required to "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). Thus, courts have applied the same analysis to claims brought under both statutes, *see Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265 n. 9 (4th Cir.1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both."), and courts routinely look to Rehabilitation Act case law to interpret the rights and obligations created by the ADA, *see, e.g., Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n. 3 (9th Cir.1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA."); *Theriault v. Flynn*, 162 F.3d 46, 48 n. 3 (1st. Cir.1998) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision."); *cf. Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.1997) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act ...." (citations omitted)).

*1046 The Regents do not dispute that Zukle is disabled and that the Medical School receives federal financial assistance and is a public entity. The Regents argue, however, that Zukle was not "otherwise qualified" to remain at the Medical School. Zukle responds that she *was* "otherwise qualified" with the aid of reasonable accommodations and that the Medical School failed reasonably to accommodate her.[FN12]

FN12. Zukle does not argue that she could meet the Medical School's essential eligibility requirements *without* the aid of reasonable accommodations. Indeed, Zukle could not make this argument. As discussed below, Zukle had failed to meet the Medical School's essential eligibility requirements at the time she was dismissed. Because she had received a failing grade while on academic probation, she was subject to dismissal pursuant to the Medical School's bylaws. Accordingly, Zukle must show that she can meet the academic standards of the Medical School *with* the aid of reasonable accommodations. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 n. 2 (9th Cir.1998).

A

The ADA defines a "qualified individual with a disability" as one who "meets the essential eligibility requirements ... for participation in [a given] program[ ] provided by a public entity" "*with or without reasonable modifications* to rules, policies, or practices...." 42 U.S.C. § 12131(2) (emphasis added); *accord Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (holding that under the Rehabilitation Act, an otherwise qualified individual is "one who is able to meet all of a program's requirements in spite of his handicap"). In the school context, the implementing regulations of the Rehabilitation Act

define an otherwise qualified individual as an individual who, although disabled, "meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." 34 C.F.R. § 104.3(k)(3).

However, under Rehabilitation Act regulations, educational institutions are required to provide a disabled student with reasonable accommodations to ensure that the institution's requirements do not discriminate on the basis of the student's disability. *See*34 C.F.R. § 104.44(a). Similarly, the ADA's implementing regulations require a public entity to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 35.130(b)(7). The Supreme Court has made clear that an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones. *See Alexander v. Choate*, 469 U.S. 287, 300, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

B

[2] In order to evaluate Zukle's claim, we must clarify the burdens of production and persuasion in cases of this type. The district court correctly noted that we have not previously addressed the allocation of the burdens of production and persuasion for the "otherwise qualified"-"reasonable accommodation" prong for a prima facie case in the school context. We have, however, recently articulated the allocation of these burdens in the employment context. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744 (9th Cir.1998). In *Barnett*, we made clear that the plaintiff bears the ultimate burden of persuasion with regard to whether he is qualified, i.e., in the school context, that he is able to meet the educational institution's essential eligibility requirements with or without the aid of reasonable accommodations. *See id.* at 749 (noting that, in the employment context, the plaintiff bears the burden of proving that he can perform the essential functions of the job with or without reasonable accommodation).

We further held that when the plaintiff alleges a failure to accommodate, part of the plaintiff's initial burden includes "showing the existence of a reasonable accommodation." *Id.* at 749. In the employment context,***1047** "[o]nce the plaintiff has established the existence of a reasonable accommodation that would enable him or her to perform the essential functions of an available job, the burden switches to the defendant to show that this accommodation would constitute an undue hardship." *Id.*

Adopting a similar burden shifting framework in the school context, we hold that the plaintiff-student bears the initial burden of producing evidence that she is otherwise qualified. This burden includes the burden of producing evidence of the existence of a reasonable accommodation that would enable her to meet the educational institution's essential eligibility requirements. The burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards. The school may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards. However, the plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified.

C

[3] Before turning to the merits of Zukle's claims, we must decide whether we should accord deference to academic decisions made by the school in the context of an ADA or Rehabilitation Act claim, an issue of first impression in this circuit.

In *Regents of the Univ. of Michigan v. Ewing*, the Supreme Court analyzed the issue of the deference a court should extend to an educational institution's decision in the due process context. *See* 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). In *Ewing*, the plaintiff-medical student challenged his dismissal from medical school as arbitrary and capricious in violation of his substantive due process rights. *See id.* at 217, 106 S.Ct. 507. The Court held that:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override

it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225, 106 S.Ct. 507 (footnote omitted).

While the Court made this statement in the context of a due process violation claim, a majority of circuits have extended judicial deference to an educational institution's academic decisions in ADA and Rehabilitation Act cases. *See Doe v. New York Univ.*, 666 F.2d 761 (2d. Cir.1981); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir.1993); *Wynne v. Tufts Univ. Sch. of Med. ("Wynne I")*, 932 F.2d 19 (1st. Cir.1991).[FN13] *But see Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372 (10th Cir.1981) (refusing to adopt deferential, rational basis test in evaluating educational institution's decisions in Rehabilitation Act case). These courts noted the limited ability of courts, "as contrasted to that of experienced educational administrators and professionals," to determine whether a student "would meet reasonable standards for academic and professional achievement established by a university," and have concluded that " '[c]ourts are particularly ill-equipped to evaluate academic performance.' " *Doe*, 666 F.2d at 775-76 (quoting *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978)).

FN13. Each circuit has, however, developed its own formulation of the deference standard. *Compare Doe*, 666 F.2d at 776 (holding that in determining whether a plaintiff is otherwise qualified to attend medical school, "*considerable judicial deference* must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no other purpose than to deny an education to handicapped persons." (emphasis added)), *with McGregor*, 3 F.3d at 859 ("[A]bsent evidence of discriminatory intent or disparate impact, we must accord *reasonable deference* to the [school's] academic decisions."(emphasis added)).

We agree with the First, Second and Fifth circuits that an educational institution's academic decisions are entitled to deference. Thus, while we recognize that the ultimate determination of whether an individual is otherwise qualified must be made by the ***1048** court, we will extend judicial deference "to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons." *Doe*, 666 F.2d at 776.

[4] Deference is also appropriately accorded an educational institution's determination that a reasonable accommodation is not available. Therefore, we agree with the First Circuit that "a court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available." *Wynne I*, 932 F.2d at 27-28; *see also McGregor*, 3 F.3d at 859 (the court must "accord deference to [the school's] decisions not to modify its programs [when] the proposed modifications entail academic decisions").

We recognize that extending deference to educational institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act. Thus, we must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a "real obligation ... to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation." *Wynne I*, 932 F.2d at 25-26. Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions.

III

[5] Having answered several preliminary questions, we now turn to the ultimate question-did Zukle establish a prima facie case of discrimination under the ADA or the Rehabilitation Act? As noted before, only the "otherwise qualified" prong of the prima facie case requirements is disputed by the parties. Zukle argues that she was otherwise qualified to remain at the Medical School, with the aid of the three accommodations she requested. The Medical School argues that Zukle's requested accommodations were not reasonable because they would have required a fundamental or substantial modification of its program. *See Alexander*, 469

U.S. at 300, 105 S.Ct. 712 (holding that institution subject to Rehabilitation Act may be required to make reasonable modifications to accommodate a disabled plaintiff, but need not make fundamental or substantial modifications).

Zukle bears the burden of pointing to the existence of a reasonable accommodation that would enable her to meet the Medical School's essential eligibility requirements. Once she meets this burden, the Medical School must show that Zukle's requested accommodation would fundamentally alter the nature of the school's program. We must determine, viewing the evidence in the light most favorable to Zukle, if there are any genuine issues of material fact with regard to the reasonableness of Zukle's requested accommodations. *See* *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998).

[6] We note at this stage that "[r]easonableness is not a constant. To the contrary, what is reasonable in a particular situation may not be reasonable in a different situation-even if the situational differences are relatively slight." *Wynne v. Tufts Univ. Sch. of Med. ("Wynne II")*, 976 F.2d 791, 795 (1st Cir.1992). Thus, we must evaluate Zukle's requests in light of the totality of her circumstances. *See* *Barnett*, 157 F.3d at 748 ("Whether a particular accommodation is reasonable depends on the circumstances of the individual case.").

The evidence is undisputed that the Medical School offered Zukle all of the accommodations that it normally offers learning disabled students. When the Medical School first learned of Zukle's disability she was offered double time on exams, notetaking services and textbooks on audio cassettes. Further, Zukle was allowed to retake courses, proceed on a decelerated schedule and remain at the Medical School despite being subject to dismissal under the Medical School's bylaws.

Even with these accommodations, Zukle consistently failed to achieve passing grades in her courses. Though Zukle was on a decelerated schedule, she continued to receive "Y" grades in her pre-clinical years and ***1049** failed the USMLE on her first attempt. Further, although she was able to remedy some of her failing grades in her pre-clinical years, she was only able to do so by retaking exams. Moreover, she received a "Y" grade in her first clinical clerkship, automatically placing her on academic probation, and an "F" in her second. Because Zukle received a failing grade while on academic probation, she was subject to dismissal pursuant to the Medical School's bylaws. Clearly, Zukle could not meet the Medical School's essential eligibility requirements without the additional accommodations she requested.

The issue, then, is whether the ADA and Rehabilitation Act required the Medical School to provide Zukle with those additional accommodations. As noted above, the Medical School was only required to provide Zukle with *reasonable* accommodations. Accordingly, we examine the reasonableness of Zukle's requested accommodations.

A

Zukle claims that the Medical School should have granted her request to modify her schedule by beginning the first half of the Family Practice Clerkship instead of finishing the second half of her OB-GYN clerkship when she returned from retaking the USMLE. She proposed that she would then begin the Medicine clerkship, and finish Family Practice and OB-GYN at a later time.

The Regents presented evidence that granting this request would require a substantial modification of its curriculum. While the Medical School has granted some students reading time prior to the commencement of a clerkship, Dean Walsh testified that once a clerkship begins "all students are expected to complete the reading and other requirements of the clerkship, including night call and ward care, and to prepare themselves for the written exam which is given only at the end of the 8-week clerkship." Zukle's request would have entailed interrupting her OB-GYN clerkship, and starting the Medicine clerkship before finishing the Family Practice clerkship. Thus, by the time Zukle began the Medicine clerkship she would have had two uncompleted clerkships.

Dean Walsh testified that the only time the Medical School allows a student to begin a clerkship, interrupt it, and then return to that clerkship at a later point is when a student has failed the USMLE and needs time off to study. However, the student is still required to return to the same clerkship. Given that no student

had been allowed to rearrange her clerkships in the manner Zukle requested and that Zukle's request would entail Zukle interrupting two courses to complete them at some later date, we have little difficulty concluding that this would be a substantial alteration of the Medical School's curriculum. *See* Davis, 442 U.S. at 413, 99 S.Ct. 2361 (holding that a school is not required to make substantial modifications to accommodate a handicapped student).

Zukle argues that the Medical School allowed numerous students to rearrange their clerkship schedules, and thus there is a material issue of fact as to whether her request was reasonable. However, while the students that Zukle mentions were allowed to remedy failing grades by retaking clerkships or exams, *none* was allowed to begin a clerkship, interrupt it, begin another clerkship, and retake the second half of the first clerkship at a later point. The facts are undisputed that no student had been allowed to rearrange their clerkship schedule as Zukle requested. Indeed, Zukle admitted in the district court that "no student has been permitted to finish an interrupted course in the fashion [she] requested because it would require substantial curricular alteration." [FN14] We defer to the Medical School's academic decision to require students to complete courses once they are begun and conclude, therefore, that this requested accommodation was not reasonable.

FN14. Zukle stated that this statement was "undisputed" in her Response to Separate Statement of Undisputed Facts.

B

Two weeks before the scheduled written exam in her Medicine clerkship, Zukle asked ***1050** Dr. Silva, her advisor, if she could have more time to prepare for the exam because she was behind in the readings. Zukle testified that she specifically requested to leave the hospital early every day so that she could spend more time preparing for the written exam in Medicine. Dr. Silva and Zukle spoke with the Instructor of Record in Zukle's Medicine clerkship, Dr. Lawrence. Dr. Lawrence told Zukle that she could not excuse her from the in-hospital part of the clerkship. Dr. Lawrence testified that she denied this request because she thought that it would be unfair to the other students.

The Medical School presented uncontradicted evidence that giving Zukle reduced clinical time would have fundamentally altered the nature of the Medical School curriculum. The Medical School presented the affidavit of Dean Lewis in which he explained the significance of the clinical portion of the Medical School curriculum:

The third-year clinical clerkships are designed to simulate the practice of medicine.... Depending on the specialty and the setting, students are generally required to be "on call" at the hospital through an evening and night one or more times each week. Other than these call nights, students remain at the hospital or clinic during day time hours on a schedule similar to that expected of clinicians.... Releasing a student from a significant number of scheduled hours during the course of a rotation would compromise the clerkship's curricular purpose, i.e. the simulation of medical practice.

We defer to the Medical School's academic decision that the in-hospital portion of a clerkship is a vital part of medical education and that allowing a student to be excused from this requirement would sacrifice the integrity of its program. Thus, we conclude that neither the ADA nor the Rehabilitation Act require the Medical School to make this accommodation.

In any event, the evidence shows that Zukle was not prejudiced by the Medical School's failure to grant this accommodation because she in fact passed the Medicine written exam. *See* *Ellis v. Morehouse School of Medicine*, 925 F.Supp. 1529, 1548 (N.D.Ga.1996) (noting that student was not prejudiced by failure to accommodate because he passed exam for which he was denied accommodation). Zukle's low score on the exam did not help her Medicine grade, but Zukle failed the clerkship because of her inadequate clinical performance. Indeed, as the district court stated, because Zukle was doing so poorly in the clinical portion of the clerkship, "[g]iving [her] time off from the clinical portion to study for the test[ ] could not have helped, but could only have further damaged, her already marginal clinical skills." Thus, Zukle did not establish that she would have been able to meet the Medical School's requirements with the requested accommodation.

C

Finally, after she was dismissed, Zukle requested that the *ad hoc* Board place her on a decelerated schedule during the clinical portion of her studies. Specifically, Zukle sought eight weeks off before each clerkship to read the assigned text for that clerkship in its entirety.[FN15]

FN15. The Regents allege that Zukle has abandoned this argument on appeal. While Zukle's presentation of this issue in her opening brief is not extensive, we do not feel that it is so lacking that she can be said to have abandoned it.

Zukle presented evidence that the Medical School regularly allowed students to proceed on a decelerated schedule. Indeed, Zukle herself was allowed an extra year to complete the pre-clinical curriculum. However, no student had been provided the specific accommodation that Zukle requested, i.e., taking eight weeks off between clerkships. Furthermore, simply because the Medical School had granted other students' requests to proceed on a decelerated schedule, does not mean that Zukle's request was reasonable. The reasonableness of Zukle's request must be evaluated in light of Zukle's particular circumstances.

We agree with the district court that the Board's denial of Zukle's request to proceed on a decelerated schedule was a "rationally justifiable conclusion." *See Wynne II,* 976 F.2d at 793 (quoting ***1051** *Wynne I,* 932 F.2d at 26). The Board noted that, even on a decelerated schedule during the pre-clinical phase, Zukle experienced severe academic difficulties: Zukle earned deficient grades in five courses and failed the USMLE exam on her first attempt even though she had taken several pre-clinical courses twice. The Board noted that there is "a fair amount of overlap on written exams of material from second-year courses and that the clinical work overlaps with the written." In sum, the evidence makes clear that the decelerated schedule would not have aided Zukle in meeting the Medical School's academic standards. Given Zukle's unenviable academic record, allowing her to remain in Medical School on a decelerated schedule would have lowered the Medical School's academic standards, which it was not required to do to accommodate Zukle. *See Davis,* 442 U.S. at 413, 99 S.Ct. 2361.[FN16]

FN16. Furthermore, Zukle requested this accommodation after the Medical School's decision to dismiss her. At no time prior to her dismissal did she request that the Medical School place her on a decelerated schedule. Her failure to request this accommodation earlier contributes to our finding of unreasonableness. *See Wynne II,* 976 F.2d at 796 n. 3 (finding relevant to reasonableness inquiry the fact that student did not ask for accommodation "until after [the school] sent him packing and adversary proceedings were underway").

IV

In conclusion, we are persuaded that Zukle failed to establish that she could meet the essential eligibility requirements of the Medical School with the aid of reasonable accommodations. Accordingly, she failed to establish a prima facie case of disability discrimination under the ADA or the Rehabilitation Act.

AFFIRMED.

C.A.9 (Cal.),1999.
Zukle v. Regents of University of California
166 F.3d 1041, 132 Ed. Law Rep. 81, 9 A.D. Cases 80, 14 NDLR P 188, 99 Cal. Daily Op. Serv. 1355, 1999 Daily Journal D.A.R. 1707

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CALIFORNIA CASE LAW

C Martin v. City of Los Angeles
Cal.App.2.Dist.
DOUGLAS MARTIN, Plaintiff and Appellant,
v.
CITY OF LOS ANGELES et al., Defendants and Respondents.
No. B002348.

Court of Appeal, Second District, Division 5, California.
Dec 11, 1984.

SUMMARY

In an action by a handicapped person against a city in which plaintiff alleged that the wheelchair access to a police station, constructed in 1964, did not meet the requirements of federal and state law, the trial court found that the access met the requirements for preexisting facilities, and entered judgment for the city. (Superior Court of Los Angeles County, No. C260224, Norman R. Dowds, Judge.)

The Court of Appeal affirmed, holding that current architectural standards did not apply to preexisting buildings, that the applicable federal and state laws and regulations required "program" access, not a barrier-free building, that handicapped wheelchair access to the police station was adequate, and that the record supported the trial court's finding that plaintiff had not sustained his burden of proof of any violation. (Opinion by Osborne, J., FN* with Feinerman, P. J., and Ashby, J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Civil Rights § 7--Discrimination by Government--Handicapped Persons-- Access to Public Buildings--Architectural Standards.
In an action against a city for relief under federal and state statutes (29 U.S.C. § 794; Gov. Code, § 11135) and regulations (28 C.F.R. § 42.501 et seq., 45 C.F.R. § 84.1 et seq.; Cal. Admin. Code, tit. 22, § 98000 et seq.), concerning access by handicapped persons to activities receiving federal and state financial aid, the trial court properly determined that the statutes and regulations applicable to new construction did not apply new architectural standards to require removal of all architectural barriers in existing facilities, and thus did not apply new standards to a police station constructed in 1964, with no structural alterations that would invoke the new standards.
[See **Cal.Jur.3d**, Civil Rights, § 2; **Am.Jur.2d**, Civil Rights, § 260.]
(2) Civil Rights § 7--Discrimination by Government--Handicapped Persons-- Access to Public Buildings--Wheelchair Access.
Under federal and state statutes and regulations concerning access by handicapped persons to activities receiving federal and state financial aid (29 U.S.C. § 794; Gov. Code, § 11135; 28 C.F.R. § 42.501 et seq.; 45 C.F.R. § 84.1 et seq.; Cal. Admin. Code, tit. 22, § 98000 et seq.), except for new construction the requirements are focused on the program, and the facility (or building) is only one factor to be considered in determining whether the program is accessible. A program, when viewed in its entirety, must be readily accessible to handicapped persons, but that does not require each existing facility to be so accessible. Accordingly, in an action concerning wheelchair access to a police station, the trial court properly found access was adequate for preexisting facilities, where the evidence indicated, in part, that a parking space was reserved for handicapped persons and that there was a rear entrance to the station from the parking lot, where access was provided for handicapped persons arriving by bus, and where there was no evidence that any handicapped person had ever sought and been denied access to the police station, and no evidence that any handicapped person had been denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program at the police station.

COUNSEL
Stanley Fleishman, Joseph Lawrence and Eve Triffo for Plaintiff and Appellant.
Ira Reiner, City Attorney, Gary R. Netzer, Senior Assistant City Attorney, Claudia McGee Henry,

Assistant City Attorney and Anthony Saul Alperin, Deputy City Attorney, for Defendants and Respondents.

OSBORNE, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

In this case, we review federal and state statutes and regulations concerning access by handicapped persons to activities receiving ***561** federal and state financial assistance. We consider their application to a public building constructed before the statutes were enacted.

Appellant, Douglas Martin, is a physically handicapped person who uses a battery-powered wheelchair for mobility. He was executive director of the Westside Community for Independent Living, an organization involved in providing services to people with disabilities and developing strategies that would improve the civil, social, and economic condition of people with disabilities. (See, e.g., *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348 [188 Cal.Rptr. 873, 657 P.2d 365].) He alleges that the wheelchair access to the Rampart police station does not meet the requirements of federal and state law. General public access to the Rampart police station is by means of steps from the sidewalk to the front of the building. Wheelchair access is through a door from the upper level parking lot at the rear of the building. We will set forth the general context of legislation involving the handicapped, the specific laws involved in this case, and then turn to the issues raised by the contentions of the parties. Additional facts will be discussed as they relate to the issues on appeal.

General Context

In recent years, the public has become much more sensitive to the problems of handicapped people. Ways have been sought to overcome problems inherent in the nature of the handicap, and to overcome the physical barriers to participation in the mainstream of society. The state and federal governments have adopted goals of eliminating discrimination against handicapped persons and facilitating their integration into the mainstream of social and economic life. These goals are reflected in legislation regarding such critical areas as employment, housing, education, transportation, and public access. In the area of public access, one goal is to reduce or eliminate the physical impediments to participation in community life, i.e., the "architectural barriers" against access by the handicapped to buildings and facilities used by the public at large. See *In re Marriage of Carney* (1979) 24 Cal.3d 725, 738-741 [157 Cal.Rptr. 383, 598 P.2d 36, 3 A.L.R.4th 1028], for a summary of the scope of these legislative efforts.

This case involves one aspect of those efforts-handicapped access to a preexisting public building, the Rampart police station.

Specific Laws Involved

The City of Los Angeles, and specifically the Los Angeles Police Department, conduct programs and activities receiving federal and state financial assistance. ***562**

The basic statutes prohibit discrimination, in any program receiving federal or state financial assistance, on the basis of physical handicap or disability.

Section 504 of the federal Rehabilitation Act of 1973 is codified as title 29 United States Code section 794. So far as relevant, that section provides: "No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." Various federal agencies have promulgated regulations to carry out the mandates of that section. Those of the Department of Justice appear in title 28 Code of Federal Regulations beginning at section 42.501. Those of the Department of Health and Human Services appear at title 45 Code of Federal Regulations beginning at section 84.1.

There are similar state provisions. Government Code section 11135 was enacted in 1977, and provides: "No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial

assistance from the state." The state regulations are set forth in title 22 California Administrative Code, beginning at section 98000.

The Department of Justice regulations were drafted to be consistent with the substance of Department of Health and Human Services (formerly HEW) regulations, but with some rewording to be as simple and clear as possible, as directed by executive orders. (45 Fed. Reg. 37620.)The state regulations are also similar in substance to the corresponding federal regulations.

For ease of reference, the United States Department of Justice and California Administrative Code regulations regarding access are set forth in the Appendix.

No reported cases have been called to our attention interpreting the regulations involved in this case.

Contentions of Parties

Appellant contends that: (1) The Rampart police station is required, and fails, to meet all current architectural standards to provide barrier-free wheelchair access to the building; (2) Even if current architectural standards ***563** do not apply to a preexisting building, respondents have failed to provide required access to Rampart police station by any standard; and (3) Appellant has suffered actionable injury to his dignity by respondents' actions.

Respondents contend that: (1) Current architectural standards do not apply to preexisting buildings; (2) The law requires "program" access, not a barrier-free building; (3) Handicapped access to the city's law enforcement program is reasonable, effective, and satisfies all legal requirements; and (4) Appellant has not suffered any injury, and therefore has no standing to seek any relief.

After a trial by the court, judgment was entered for respondents. We affirm.

Architectural Standards Apply Only to New Construction

(1)Appellant describes the relief requested as "simple enough: provide a barrier free reasonable entrance to the police station [such as] a ramp at the front door ...." Appellant contends that "barrier free physical design and program accessibility were not merely compatible concepts. They went hand in hand and neither could be realized without the other." He contends that, at the latest, the structural changes were required to be made within three years of the effective date of the regulations. (See 28 C.F.R. § 42.521(d); Cal. Admin. Code, tit. 22, § 98257.)

The regulations refer to the American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped, published by the American National Standards Institute, Inc. (ANSI). (28 C.F.R. § 42.522(b); Cal. Admin. Code, tit. 22, § 98262.) However, the regulations expressly provide that those standards apply only to new construction commenced, or alterations made, after the effective date of the regulations. (28 C.F.R. § 42.522(a); Cal. Admin. Code, tit. 22, §§ 98260-98261.)

The federal regulations became effective in 1977 (45 C.F.R. 84.1 et seq.) and 1980 (28 C.F.R. § 42.501 et seq.). The state regulations became effective in 1980 (Cal. Admin. Code, tit. 22, § 98000 et seq.).

The construction of the Rampart police station was commenced in 1964, and there has been no structural alteration that would invoke the standards.

Appendix A of title 45 Code of Federal Regulations, part 84 is an extensive analysis of the lead HEW regulations. Subpart C analyzes program ***564** accessibility for both new construction and existing facilities. The discussion regarding existing facilities states: "[A] recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible.... Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

"

. . . . . .

"We have received some comments from organizations of handicapped persons on the subject

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

Appellant relies on *Dopico v. Goldschmidt* (1982) 687 F.2d 644 as holding that title 29 United States Code, section 794 may require some affirmative action to remove access barriers. That case involved public transportation. The court stated, at page 652: "In the context of public transportation and the handicapped, denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing." The present case does not involve new construction. *Dopico* did not require that handicapped access be identical to general public access.

The trial court properly concluded that the federal and state laws, and their respective regulations, do not apply new architectural standards to require removal of all architectural barriers in existing facilities. [FN1]

FN1 This conclusion is consistent with cases involving similar statutes. Appellant's original complaint claimed relief under federal law, and under California Civil Code section 54 and Government Code section 4450. The access requirements of those two California statutes apply only to new construction, and do not require structural alteration of existing buildings. (*Marsh v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal.App.3d 881 [134 Cal.Rptr. 844].) (Appellant's first amended complaint eliminated reference to Civ. Code, § 54 and Gov. Code, § 4450, and substituted Gov. Code, § 11135 as a basis for his suit.)

Access Requirements Apply to Programs, Not Buildings

Turning from architectural standards for new construction, to access requirements for existing facilities, appellant focuses on the physical facility, ***565** the Rampart police station. Thus, he states that federal and state regulations plainly require the police department to "make its facility accessible to the handicapped." Further, he states that respondents "must take some kind of 'affirmative action' to make their facilities accessible to and usable by handicapped persons, so that the handicapped may participate in, and receive the benefits of the police department's many activities. The failure of the respondents to make their facilities accessible subjects handicapped persons to discrimination in violation of [29 U.S.C. 794]."

Appellant's focus is misdirected. (2)Facilities are merely means to an end-a program. Except of course for new construction, the requirements are focused on the program, and the facility (or building) is only one factor to be considered in determining whether the program is accessible.

The pertinent parts of the regulations are entitled "Program Accessibility." The regulations require that a program be operated so that the *program*, when viewed in its entirety, is readily accessible to and usable by handicapped persons. They do not require each existing facility to be accessible to handicapped persons. (28 C.F.R. § 42.521; Cal. Admin. Code, tit. 22, § 98254.)

The United States Attorney General has stated the rule simply and clearly: "For existing facilities, the key requirement is not a barrier free environment, but program accessibility ...." (45 Fed.Reg. 37621.)

The regulations include detailed provisions regarding program accessibility as it relates to existing facilities. It is that analysis to which we turn next.

Program Access Meets Applicable Requirements

Each set of regulations has similar provisions regarding program access as it relates to existing facilities. (28 C.F.R. § 42.521; Cal. Admin. Code, tit. 22, §§ 98254-98255.)

A program, when viewed in its entirety, must be readily accessible to handicapped persons. That does

not require each facility to be accessible to handicapped persons. The regulations suggest reassignment of services to accessible buildings, assignment of aids, home visits, delivery of services at alternate accessible sites, [FN2] and any other methods that result in program ***566** accessibility. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible. (45 C.F.R., part 84, appen. A-Analysis of Final Regulations, subpart C-Program Accessibility.)

FN2 There is a barrier-free police station much nearer to appellant's residence than Rampart police station. Nonetheless, respondents contend, and the trial court found, that there was adequate wheelchair access to law enforcement programs provided through Rampart police station.

We now turn to the facts of this case to determine if there is substantial evidence to support the trial court's finding.

The vast majority of citizen contacts for police services occur by telephone, or in person away from the police station. The department dispatches officers to meet citizens if a physical handicap or some other cause might interfere with the citizen's ability to get to the station.

However, substantial numbers of the general public do go in person to Rampart police station to participate in neighborhood watch meetings, report crimes, seek information, register guns, identify stolen property, and for similar activities. Though police sometimes go to a citizen's home or some other location for the convenience of a handicapped person, there is wheelchair access to the station itself.

A parking space is reserved for handicapped persons in the well-lighted upper parking lot. The rear of the station is much closer to the handicapped parking than the front is. There is a rear entrance to the station from the parking lot. The door is kept locked for security reasons. A buzzer clearly marked for use by handicapped persons rings inside and summons an officer to admit the citizen and conduct him to the public area of the station. There are signs at the front entrance to the building, at the foot of the driveway, and at the buzzer, giving directions to handicapped visitors. [FN3]

FN3 When appellant filed his original complaint, the buzzer and signs were planned, but not installed.

Handicapped persons who arrive by bus would gain access to the upper parking lot by going up the driveway. The driveway is 51 feet long, and has a slope of 8.1 percent, slightly less than the 8.33 percent maximum slope for wheelchair ramps permitted for new construction by ANSI standards.

Appellant argues that wheelchair access is still not adequate. The only accessible wheelchair entrance is the locked rear door, where someone has to ring a buzzer and wait to be admitted. Further, if the handicapped person arrives by public bus, he must go up the inclined driveway with the increased problems that implies. He contends that because an able-bodied citizen would not face those obstacles, the station is not accessible by any ***567** reasonable standard. However, as previously noted, the law does not require a barrier-free environment. The trial court found that the access met the requirements for preexisting facilities. There is ample evidence to support that finding.

Appellant cites *People* ex rel. *Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123 [197 Cal.Rptr. 484] as requiring integrated access through a primary entrance and rejecting a nonequivalent secondary handicapped entrance to a restaurant. The case is not in point. It involved a different statute applicable only to new construction.

There was no evidence that appellant or any other handicapped person had ever sought and been denied access to Rampart police station, and no evidence that he or any handicapped person had been denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program at Rampart police station.

The trial court found that appellant had not sustained his burden of proof of any violation by respondents. The record supports the findings and conclusions of the court. That is not to say that even better wheelchair access would not be desirable. However, at the present, further improvement is left to the discretion of respondents, for consideration along

with other needs for funds. Our function ends with the determination that sufficient evidence supports the trial court's finding that respondents have not violated the applicable statutes and regulations.

Standing

Appellant lives and works in West Los Angeles, near an accessible barrier-free police station which he would probably contact if he needed police services. Appellant never sought and was never denied any services at Rampart police station. Respondents contended that appellant therefore was not entitled to relief and lacked standing to sue. The trial court found that appellant had suffered no actual injury and was therefore not entitled to the relief he seeks. Appellant contends that, as a member of the class of handicapped persons for whose special benefit the laws were passed, he has standing to assert violations of the law. Since we hold that appellant is not entitled to relief because there is no showing of any violation of law by respondents, we need not reach that issue.

Conclusion

Since Rampart police station was constructed before standards were adopted for handicapped access to newly constructed buildings, those new ***568** construction standards do not apply to it. The handicapped accessibility standards applicable to preexisting buildings require accessibility to programs, but do not require complete elimination of all existing architectural barriers. There is legal wheelchair access to the programs and activities at Rampart police station. Accordingly, the judgment is affirmed.

Feinerman, P. J., and Ashby, J., concurred.
A petition for a rehearing was denied January 9, 1985, and appellant's petition for a hearing by the Supreme Court was denied February 27, 1985. Bird, C. J., was of the opinion that the petition should be granted.

28 Code of Federal Regulations Program Accessibility.

§ 42.520 Discrimination prohibited.

Recipients shall insure that no qualified handicapped person is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program receiving Federal financial assistance because the recipient's facilities are inaccessible to or unusable by handicapped persons.

§ 42.521 Existing facilities.

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

(b) *Compliance procedures.* A recipient may comply with the requirement of paragraph (a) of this section through acquisition or redesign of equipment, reassignment of services to accessible buildings, assignment of aids [*sic*] to beneficiaries, delivery of services at alternate accessible sites, alteration of existing facilities, or any other method that results in making its program accessible to its program accessible [*sic*] to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs to handicapped persons in the most integrated setting appropriate to obtain the full benefits of the program.

(c) *Small providers.* If a recipient with fewer than fifteen employees finds, after consultation with a handicapped person seeking its services, that there is no method of complying with § 42.521(a) other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other available providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within ninety days of the effective date of this subpart. However, where structural changes in facilities are necessary, such changes shall be made as expeditiously as possible and shall be completed no

later than three years from the effective date of this subpart. If structural changes to facilities are necessary, a recipient shall, within six months of the effective date of this subpart, develop a written plan setting forth the steps that will be taken to complete the changes together with a schedule for making the changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons and shall be made available for public inspection. The plan shall, at a minimum [*sic*]: ***569**

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

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

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

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

(e) *Notice.* The recipient shall adopt and implement procedures to insure that interested persons, including mentally retarded persons or persons with impaired vision or hearing, special learning problems, or other disabilities, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 42.522 New construction.

(a) *Design and construction.* Each new facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this subpart. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner. [Repetition in original.]

(b) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped" published by the American National Standards Institute, Inc. (ANSI A 117.1-1961 (R1971)), which is incorporated by reference in this subpart, shall constitute compliance with paragraph (a) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility is provided.

22 California Administrative Code

§ 98254. Program Accessibility.

(a) Except as set forth in subsection (b) below, it is a discriminatory practice where a qualified disabled person, because a recipient's facilities are in accessible to or unusable by such person, is denied the benefits of, or excluded from participation in, or otherwise subjected to discrimination under any program or activity to which this Division applies. It is a discriminatory practice for a recipient to fail to operate each program or activity to which this Division applies in such a manner that the program or activity, when viewed in its entirety, is readily accessible to disabled persons. This section does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by disabled persons.

(b) It is a discriminatory practice for recipients operating fixed route bus systems or paratransit systems to fail to adhere to the program accessibility requirements set forth in Title 49, Part 27 of the Code of Federal Regulations.

§ 98255. Methods of Ensuring Program Accessibility.

A recipient may comply with the provisions of Section 98254 through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignments [*sic*] of aides to

beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities, or other methods that result in making its program or activities accessible to disabled persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with Section 98254. In choosing among available methods for meeting the provisions of Section 98254, it is a discriminatory practice for a recipient to fail to give priority to those methods that offer programs and activities to disabled persons in the most integrated setting appropriate.

§ 98256. Methods For Small Recipients.

If a recipient with fewer than fifteen employees finds, after consultation with a disabled person seeking its services, that there is no method of complying with Section 98254 other than by making a significant alteration to its existing facilities, the recipient may, as an ***570** alternative, be permitted by the responsible State agency to refer the disabled person to other providers whose services are accessible.

§ 98257. Time Period for Compliance.

It is discriminatory practice for a recipient to fail to comply with the requirement of Section 98254 within sixty days of the effective date of implementing regulations, except that where structural changes in facilities are necessary, such changes may be made within three years of such effective date, but in any event, as expeditiously as possible.

§ 98258. Transition Plan.

In the event that structural changes to facilities are necessary to meet the provisions of Section 98254, a recipient should be required by the responsible State agency to develop, within six months of the effective date of implementing regulations, a transition plan setting forth the steps necessary to complete such changes. The plan should be developed with the assistance of interested persons, including disabled persons or organizations representing disabled persons. A copy of the transition plan should be made available for public inspection. The plan should, at a minimum:

(a) identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to disabled persons;

(b) describe in detail the methods that will be used to make the facilities accessible;

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

(d) indicate the person responsible for implementation of the plan.

§ 98259. Notice of the Availability of Accessible Facilities.

Each recipient which is unable to comply with the provisions of Section 98254 within the sixty day period set forth in Section 98257 should be required by the responsible State agency to adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by disabled persons.

§ 98260. New Construction

(a) Except as set forth in subsection (b) below, it is a discriminatory practice where a facility or part of a facility constructed by, on behalf of, or for the use of a recipient is designed or constructed in such manner that the facility or part of the facility is not readily accessible to and usable by disabled persons if the construction was commenced after the effective date of implementing regulations.

(b) It is a discriminatory practice for recipients operating fixed route bus systems or paratransit systems to fail to adhere to the accessibility requirements for new vehicles set forth in Title 49, Part 27 of the Code of Federal Regulations.

§ 98261. Alteration.

(a) Except as set forth in subsection (b) below, it is a discriminatory practice where each facility or part of

a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of implementing regulations in a manner that affects or could affect the usability of the facility or part of the facility is not to the maximum extent feasible, altered in such manner that the altered portion of the facility is readily accessible to and usable by disabled persons.

(b) It is a discriminatory practice for recipients operating fixed route bus systems or paratransit systems to fail to adhere to the accessibility requirements for alterations of vehicles set forth in Title 49, Part 27 of the Code of Federal Regulations.

§ 98262. Accessibility Standards.

Design, construction, or alteration of facilities in conformity with the current "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc., or the regulations promulgated by the Office of the State Architect pursuant to Chapter 7 (commencing with Section 4450) Division 5 of Title I of the Government Code, constitutes compliance with Sections 98260 and 98261. Departures from particular requirements of these two standards by the use of other methods by a recipient are permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. ***571**

Cal.App.2.Dist.
Martin v. City of Los Angeles
162 Cal.App.3d 559, 209 Cal.Rptr. 301

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Robinson v. Fair Employment and Housing Com'n
Cal. 1992.

J. E. ROBINSON, Plaintiff and Respondent,
v.
FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Appellant.
No. S019095.

Supreme Court of California
Mar 16, 1992.

SUMMARY

In an administrative mandamus proceeding, the trial court ordered issuance of a peremptory writ of mandate, directing the Fair Employment and Housing Commission to dismiss an accusation against a dentist alleging that the dentist had wrongfully refused to reinstate an employee following her pregnancy leave (Gov. Code, § 12945). The trial court found that the commission did not have jurisdiction over the dentist because he was not a person "regularly employing" five or more persons (Gov. Code, § 12926, subd. (c)). (Superior Court of Orange County, No. 587497, William F. Rylaarsdam, Judge.) The Court of Appeal, Fourth Dist., Div. Three, No. G009029, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that for purposes of Gov. Code, § 12926, subd. (c), the dentist was a person "regularly employing" five or more persons, even though three of his six employees worked only one to four days a week, and there were five employees working in the office at the same time only two days a week. The court further held that a commission regulation defining "regularly employing" as employing five or more individuals "for each working day" (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1)), did not fail to notify an employer reading it that employees working less than a full work week would be counted. The court also held that the dentist was not entitled to assert that the commission was estopped from asserting jurisdiction on the ground that the regulation was misleading, since he had not urged this basis for estoppel in the administrative or mandamus proceeding, and had failed to establish that he had known of and relied on the regulation. (Opinion by Baxter, J., with Lucas, C. J., Mosk, Panelli, Kennard and George, JJ., concurring. Separate dissenting opinion by Arabian, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Civil Rights § 8--Actions--Discrimination in Employment--Fair Employment and Housing Commission's Jurisdiction--Definition of Employer:Words, Phrases, and Maxims--Employer.
A dentist was an employer under Gov. Code, § 12926, subd. (c), which defines an employer as a person "regularly employing" five or more persons, even though three of the dentist's six employees worked only one to four days a week, and there were five employees working in the office at the same time only two days a week. Thus, the Fair Employment and Housing Commission had jurisdiction over a claim that the dentist had wrongfully refused to reinstate an employee following her pregnancy leave (Gov. Code, § 12945). Such a conclusion was consistent with the interpretation of the small-employer exemption of former Labor Code, § 1413, subd. (d), which was repealed and reenacted verbatim as Gov. Code, § 12926, subd. (c). It was also consistent with administrative interpretations of the statute.
[Meaning of term "employer" as defined in sec. 701(b) of title VII of Civil Rights Act of 1964, as amended (42 U.S.C. sec. 200e(b)), note, 69 **A.L.R. Fed** 191. See also **Cal.Jur.3d**, Civil Rights, § 10; 8 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 757.]
(2a, 2b, 2c) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
In an administrative mandamus proceeding in which a dentist claimed that the Fair Employment and Housing Commission did not have jurisdiction over him because he was not a person "regularly employing" five or more persons (Gov. Code, § 12926, subd. (c)), the term "regularly employing" being susceptible of more than one interpretation. Thus, it was proper for the court to look to the legislative history of the Fair Employment and Housing Act, and to administrative construction reasonably contemporaneous with the law's adoption in order to ascertain the Legislature's intent in using that phrase. Nevertheless, although a commission regulation had defined the phrase "regularly employing" five or more individuals (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1)), the Legislature's intent in using the phrase was the crucial issue, since a regulation that is inconsistent with the statute it seeks to implement is invalid. Moreover, the

issue could not be resolved solely by reference to the regulation, since the phrase "regularly employing" was used in defining "employers" for purposes of establishing fair employment law jurisdiction long before the regulation was adopted or the commission was created.

(3a, 3b) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless it is clearly erroneous. Nevertheless, the interpretation of an administrative agency's regulations and the statutes under which the agency operates are questions of law that the court must ultimately resolve.

(4) Statutes § 19--Construction--Purpose of Statute.
In construing a statute, the court will consider the purpose of the law and adopt a construction that will further that purpose.

(5) Statutes § 45--Construction--Presumptions--Legislature's Awareness of Administrative Construction.
The presumption that the Legislature is aware of an administrative construction of a statute should be applied only on a showing that the construction or practice of the agency has been made known to the Legislature, or is so long-standing that the Legislature can be presumed to know of it. Thus, in an administrative mandamus proceeding in which a dentist claimed that the Fair Employment and Housing Commission did not have jurisdiction over him because he was not a person "regularly employing" five or more persons (Gov. Code, § 12926, subd. (c)), the Legislature having authorized the commission to establish the system of publication in which precedential decisions are printed (Gov. Code, § 12935, subd. (h); Lab. Code, former, § 1418, subd. (i)), was presumed to be aware of two administrative decisions in which the commission, in asserting jurisdiction over employers who had five or more persons on the payroll for each working day, had construed Gov. Code, § 12926, subd. (c), as including part-time employees who worked less than full shifts or who did not work each day.

(6) Statutes § 26--Construction--Adopted and Reenacted Statutes.
In the absence of legislative history suggesting otherwise, there is a very strong presumption that the Legislature intended that the same construction be given to statutory language that has been readopted without change.

(7) Civil Rights § 3--Employment--Fair Employment and Housing Act-- Construction.
Because the Fair Employment and Housing Act is remedial legislation declaring that the opportunity to seek, obtain, and hold employment without discrimination is a civil right (Gov. Code, § 12921), and expresses a legislative policy that this right must be protected and safeguarded (Gov. Code, § 12920), the courts must construe the act broadly rather than restrictively, consistent with the mandate of Gov. Code, § 12993 (liberal construction of act). If there is an ambiguity that is not resolved by the legislative history of the act or by other extrinsic sources, a court is required to construe the act so as to facilitate the Fair Employment and Housing Commission's exercise of jurisdiction.

(8) Civil Rights § 8--Actions--Discrimination in Employment--Fair Employment and Housing Commission's Jurisdiction--Definition of Employer:Words, Phrases, and Maxims--Employer.
For purposes of the Fair Employment and Housing Commission's jurisdiction, under Gov. Code, § 12926, subd. (c), over employers "regularly employing" five or more individuals, a regulation defining an employer as a person "regularly employing" five or more individuals for each working day (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1)) does not fail to notify an employer reading the regulation that employees working less than a full work week will be counted under the definition. If the regulation were interpreted as excluding part-time employees from consideration, it would be inconsistent with Gov. Code, § 12926, subd. (c), which contains the statutory definition of employer, and would, therefore, be invalid. Even if the regulation were susceptible of two meanings, one of which rendered it invalid, a regulation, like a statute, should be construed whenever possible so as to uphold its validity. Moreover, employers are presumed to know the law and whether they come within the statutory definition of "employer."

(9a, 9b, 9c) Estoppel and Waiver § 13.4--Estoppel Against Public Entities--Entity Held Not Estopped--Fair Employment and Housing Commission's Exercise of Jurisdiction Over Employer.
In an administrative mandamus proceeding in which a dentist claimed that the Fair Employment and Housing Commission did not have jurisdiction over him because he was not a person "regularly employing" five or more persons (Gov. Code, § 12926, subd. (c)), the commission was not estopped from asserting jurisdiction over the

dentist. The dentist was not entitled to assert the estoppel doctrine on the ground of the misleading nature of a commission regulation, in defining the term "regularly employing" as employing five or more individuals "for each working day" (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1)), since he did not urge thus basis for estoppel in the administrative or mandamus proceeding and did not establish that he had known of and relied on the regulation.

(10) Estoppel and Waiver § 13--Estoppel Against Public Entities--When Applied.
The doctrine of estoppel is available against the government where justice and right require it. Although it has been applied when the government has misled a claimant, it will not be applied if to do so would nullify a strong rule of policy adopted for the benefit of the public.

(11) Estoppel and Waiver § 7--Equitable Estoppel--Elements.
The doctrine of estoppel has four elements: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his conduct be acted upon, or must so act that the party asserting estoppel has a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) the party asserting estoppel must rely upon the other party's conduct to his or her injury.

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BAXTER, J.
We are asked to construe Government Code section 12926, subdivision (c) (section 12926(c)), which defines "employer" for purposes of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and to determine whether under that section and the ***231** administrative regulation implementing it, plaintiff was properly subjected to the jurisdiction of the Fair Employment and Housing Commission (FEHC). [FN1]

FN1 All further references to code sections are to the Government Code, unless otherwise indicated.
Section 12926(c) states: " 'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.
" 'Employer' does not include a religious association or corporation not organized for private profit."

The particular focus of our inquiry is the meaning of the statutory term "regularly employing" as applied to a person who has more than five employees, but has as many as five of them working on only two days of each week. An FEHC regulation defines "regularly employing" as "employing five or more individuals for each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year." (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1).) (Regulation 7286.5.)

Plaintiff, assuming that Regulation 7286.5 establishes the jurisdiction of the FEHC, argues that under that definition he is not subject to FEHC jurisdiction. Discriminatory practices declared to be unlawful by section 12945 are so if the actor is an employer under section 12926(c), however. The statute, not the regulation, determines both the scope of section 12945 and the enforcement jurisdiction of the Department of Fair Employment and Housing and the FEHC.

The Court of Appeal, accepting the reasoning of the FEHC, concluded that the number of persons on the payroll, not the number working on any particular day, is determinative of the number of employees an employer regularly employs. We agree and reject plaintiff's further argument that Regulation 7286.5 did not give him notice that he was subject to FEHC jurisdiction. We therefore affirm the judgment of the Court of Appeal.

I.

This litigation arises out of the refusal of plaintiff, a dentist, to reinstate Josephine Saul as a dental assistant

after her six-week pregnancy leave terminated on February 21, 1984. At that time, plaintiff employed a receptionist and two dental assistants, each of whom worked five days per week. He also employed three dental hygienists who worked part time: one worked four days a week, one worked two days a week, and one worked only on *232 Saturday mornings. Thus, he employed six persons, but on only two days each week were there as many as five employees working. [FN2]

FN2 The staffing schedule was:

Monday:	4 persons
Tuesday:	4 persons
Wednesday:	1 person
Thursday:	5 persons
Friday:	5 persons
Saturday:	3 persons

Saul filed a complaint with the FEHC charging that plaintiff's refusal to reinstate her as a dental assistant following her pregnancy leave was an unlawful practice under section 12945. [FN3]Following the issuance of an accusation against plaintiff and a hearing before an administrative law judge, the FEHC concluded that it had jurisdiction and that plaintiff had violated section 12945 when he refused to reinstate Saul. [FN4]The FEHC ordered plaintiff to cease unlawful discriminatory practices; to pay back wages of $12,950 and retirement plan contributions of $1,295, both with interest; and to pay $20,000 as damages in compensation for Saul's emotional injury. [FN5]

FN3 Subdivision (b)(2) of section 12945 makes it an unlawful employment practice to deny a leave of absence on account of pregnancy for a reasonable period, not to exceed four months, "during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions."

FN4 This ruling was made after plaintiff first sought to raise his jurisdictional claim in the superior court. In *Robinson v. Department of Fair Employment & Housing* (1987) 192 Cal.App.3d 1414 [239 Cal.Rptr. 908], the Court of Appeal held that the claim must first be made in the administrative proceeding.

FN5 The FEHC concedes that the compensatory damages award is not enforceable. (See *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40 [276 Cal.Rptr. 114, 801 P.2d 357].)

Plaintiff had stipulated that he had five or more employees on his payroll for at least twenty consecutive calendar weeks in 1983 and 1984, but argued that the FEHC lacked jurisdiction over him because some of the employees worked part time and were not physically present in his office on each working day during those weeks.

Plaintiff sought review of the FEHC ruling by a petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5) filed in the superior court pursuant to section 11523, again challenging the jurisdiction of the FEHC on the ground that he was not an employer as defined by the FEHA. The superior court agreed and directed that a peremptory writ of mandate issue compelling the FEHC to dismiss the accusation. The FEHC appealed.

There being no prior case construing the term "regularly employing," the parties and the courts below relied on Regulation 7286.5 which was adopted *233 by the FEHC in 1983, administrative construction and decision, and the construction and application of title VII of the Civil

Rights Act of 1964 (42 U.S.C. § 2000e et seq.; hereafter Title VII).

The FEHC has asserted jurisdiction when an employer has five or more persons on the payroll for each working day, and includes part-time employees-i.e., those who work less than a full shift and those who do not work each day. (*Dept. Fair Empl. & Hous. v. Bee Hive Answering Service* (1984) No. 84-16, FEHC Precedential Decs. 1984-85, CEB 8, pp. 12-13; *Dept. Fair Empl. & Hous. v. Travel Express* (1983) No. 83-17, FEHC Precedential Decs. 1982-83, CEB 16, pp. 3-5.)

The Court of Appeal considered these decisions significant in the proper construction of section 12926(c), applying the rule that " '[c]onsistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight ....' " (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592].) That court also noted the apparent acceptance of the FEHC construction of section 12926 by the Legislature, which had amended the section in 1985 without making any change in subdivision (c).

The Court of Appeal also noted that while Title VII defines employer as a "person ... who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ...." (42 U.S.C. § 2000e(b)), federal courts have consistently held that regular part-time employees are properly included as employees within the meaning of that definition. (See *Thurber v. Jack Reilly's, Inc.* (1st Cir. 1983) 717 F.2d 633, 634, and cases cited.)

Finally, the court reasoned that a broad reading of section 12926 was required both by the rule that remedial legislation be given a liberal construction to promote its objective (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [104 Cal.Rptr. 110]) and by the express command of section 12993, subdivision (a) that: "The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof." Public policy required that the statute be construed to "safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination ...." (§ 12920.)

II

(1a) Plaintiff does not dispute that section 12926(c) is broad enough to encompass employers of part-time employees who work less than a full day ***234** or less than the full workweek, but argues that in defining "employer" the regulation makes no reference to persons "on the payroll," and clearly and unambiguously applies only to someone who has five or more employees working each working day. He contends that because the distinction between "full-time" and "part-time" employees refers only to those employees who work all or less than all of the working day (Reg. 7286.5, subd. (b)), employees who work a full day on some but less than all working days of the week are not "regularly" employed.

The dispositive question, however, is whether the FEHC assertion of jurisdiction over plaintiff is authorized by section 12926(c). If so, the regulation, as construed and applied by the FEHC, is consistent with the statute. Only if the regulation purported to extend FEHC jurisdiction to persons not within the statutory definition of employer, or if the FEHC misled plaintiff regarding his status, might plaintiff be entitled to relief.

A. *Construction of Section 12926(c).*

(2a) The statutory term "regularly employing" is susceptible of more than one interpretation. Therefore, the court will look to the legislative history of the FEHA (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 96 [255 Cal.Rptr. 670, 767 P.2d 1148]) and to administrative construction reasonably contemporaneous with the law's adoption in order to ascertain the intent of the Legislature in using the phrase. (*City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, 696 [125 Cal.Rptr. 779, 542 P.2d 1371]; *Wotton v. Bush* (1953) 41 Cal.2d 460, 466 [261 P.2d 256].) (3a) "Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless clearly erroneous." (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 61-62 [13 Cal.Rptr. 663, 362 P.2d 487].) (4) In construing a statute the court will also consider the purpose of the law and adopt a construction which will further that purpose. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485 [208 Cal.Rptr. 724, 691 P.2d 272].)

(2b) The intent of the Legislature when it used the limiting phrase "regularly employing" in the definition of employer is crucial since a regulation which is inconsistent with the statute it seeks to implement is

invalid. (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 679 [94 Cal.Rptr. 279, 483 P.2d 1231]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697]; *Steilberg v. Lackner* (1977) 69 Cal.App.3d 780, 789 [138 Cal.Rptr. 378].) (3b)**(See fn. 6.)**,(5) **(See fn. 7.)**, (2c) In this case, the proper ***235** construction of the statute cannot be resolved solely by reference to the administrative construction [FN6] reflected in Regulation 7286.5 because the phrase "regularly employing" was used in defining employer for purposes of establishing fair employment law jurisdiction long before the adoption of the regulation and the creation of the FEHC itself. [FN7]Its history predates enactment of the FEHA.

FN6 Even though the court will give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates, these are questions of law which the court must ultimately resolve. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93 [130 Cal.Rptr. 321, 550 P.2d 593]; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310 [118 Cal.Rptr. 473, 530 P.2d 161].)

FN7 The presumption that the Legislature is aware of an administrative construction of a statute should be applied only on a showing that the construction or practice of the agency had been made known to the Legislature (*Pacific Greyhound Lines v. Johnson* (1942) 54 Cal.App.2d 297, 303 [129 P.2d 32]), or is one of such long standing that the Legislature may be presumed to know of it. (*El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739 [215 P.2d 4].)
Because the Legislature authorized the FEHC to establish the system of publication in which precedential decisions are printed (§ 12935, subd. (h); Labor Code, former § 1418, subd. (i)) the Legislature now is presumed to be aware of the two administrative decisions on which the Court of Appeal relied, and thus has reason to be aware of the construction the agency placed on its own regulation.

(1b) In 1980, the FEHC succeeded to the powers of the Fair Employment Practices Commission. [FN8]At that time the Fair Employment Practices Act, then part 4.5 of the Labor Code, was repealed and reenacted as part of the FEHA. [FN9]That part of the definition of employer which is in dispute here was taken verbatim from subdivision (d) of former section 1413 of the Labor Code, where it had existed unamended since the adoption of the Fair Employment Practices Act in 1959. (Stats. 1959, ch. 121, § 1, p. 2000.) (6) In the absence of legislative history suggesting otherwise, there is a very strong presumption that the Legislature intends that the same construction be given statutory language which has been readopted without change. (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 502 [105 Cal.Rptr. 368, 503 P.2d 1376]; *Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735 [43 P.2d 291, 98 A.L.R. 1499]. See also, Lab. Code, § 2.) ***236**

FN8 Section 12910: "(a) The Department of Fair Employment and Housing and the Fair Employment and Housing Commission succeed to, and are vested with, all of the powers, duties, purposes, responsibilities, and jurisdiction of the Division of Fair Employment Practices and the State Fair Employment Practices Commission, respectively, in the Department of Industrial Relations, which are hereby abolished."

FN9 There was little substantive change in the reenacted provisions addressing employment discrimination. The declaration of public policy was expanded to include discrimination in housing, and to include marital status among the categories of discrimination which violate public policy. (§ 12920. Cf. Lab. Code, former § 1411.) Section 12940, which specifies practices that are unlawful, similarly added reference to discrimination on the basis of sex. It otherwise carried over verbatim, however, the provisions which had been former section 1420 of the Labor Code. (Also compare § 12941 [age] with Lab. Code, former § 1420.1; § 12943 with Lab. Code, former 1420.2)

(1c) We have therefore considered the history of the Fair Employment Practices Act and have attempted to ascertain the legislative purpose underlying the use of the phrase "regularly employing five or more persons" in former section 1413, subdivision (d), of the Labor Code. While the legislative history and evidence of administrative construction are not conclusive, they are helpful.

Fair employment legislation was first proposed in California in 1943. [FN10]The fair employment bill which is

the forerunner of the present law was introduced on January 9, 1945, as Assembly Bill No. 3 (Assem. Bill No. 3 (1945 Reg. Sess.)) and was reintroduced in each odd-numbered year thereafter until passage of the Fair Employment Practices Act in 1959. (See Tobriner, *California FEPC* (1965) 16 Hastings L.J. 333-334 [hereafter Tobriner].)

FN10 The 1943 bill (Assem. Bill No. 50 (1943 Reg. Sess.)), introduced by Assemblyman Hawkins would have added section 2806 to the Labor Code. As introduced on January 7, 1943, the proposed section read: "Any person, who, directly or indirectly excludes a citizen because of race, color, or creed from any public employment, or employment in any capacity in industries engaged on defense contracts, shall be guilty of a misdemeanor and punishable by a fine of not less than one hundred dollars ($100)."

In addition, an initiative, "Fair Employment Practices Act," was on the ballot in 1946 as Proposition 11, but was defeated by the voters. The definition of an employer as a person "regularly employing" five or more persons can be traced at least to Assembly Bill No. 3 and to that initiative measure. Both would have established the California Fair Employment Practices Act and a State Fair Employment Practices Commission, and both used the term "regularly employing."

Paragraph 4 of section 4 of Assembly Bill No. 3 read: "The term 'employer,' except as hereinafter provided includes any person regularly employing five or more persons or any person acting in the interest of such employer, directly or indirectly, with or without his knowledge; the State or any political or civil subdivision thereof and cities.

"The term 'employer' does not include a social club, fraternal, charitable, educational or religious association, or corporation not organized for private profit.

"This act shall not apply to or affect any farmer, agricultural organization, agricultural cooperative association, or agriculture in any form or manner." (Assem. Bill No. 3, *supra,* p. 2.)

Paragraph 4 of section 11 in the law proposed by the 1946 Fair Employment Practices Act initiative read: "The term 'employer' includes the State *237 or any political or civil subdivision thereof and cities, but does not include any person regularly employing fewer than five (5) persons, nor associations or corporations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, nor clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual." (Ballot Pamp., analysis of Prop. 11 as presented to the voters, Gen. Elec. (Nov. 5, 1946) pt. II, p. 12.)

Contemporary understanding of the term "regularly employing" is reflected in the argument in favor of the initiative which stated both that "[e]mployment situations in which fewer than five persons are involved are exempted by the proposition" and noted: "This is no new law. It is already operating successfully in many States, including New York, New Jersey, Indiana, Wisconsin and Massachusetts." (Ballot Pamp., analysis of Prop. 11 as presented to voters, Gen. Elec. (Nov. 5, 1946) pt. I, p. 11.)

New York had enacted the first state legislation outlawing discrimination in housing and establishing the New York State Commission Against Discrimination, the Ives-Quinn Law, on March 12, 1945. (1945 N.Y. Laws, ch. 118.)It has been suggested that the California Fair Employment Practices Act was patterned on that New York law. (Norgren & Hill, Toward Fair Employment (1964) pp. 93-94, fn. 8; 36 Notre Dame Law. (1961) 189, 193; Note, *The California FEPC: Stepchild of the State Agencies* (1965) 18 Stan.L.Rev. 187, 190, fn. 20; Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation* (1961) 74 Harv. L.Rev. 526, 527.)As we have noted, however, the California definition of "employer" is derived from Assembly Bill No. 3, which was introduced in the Legislature prior to the adoption of the New York fair employment law. Moreover, the New York law did not use the same language in defining employer. As enacted in 1945, the New York law provided: "The term 'employer' does not include ... any employer with fewer than six persons in his employ." (1945 N.Y Laws, ch. 118, § 27, p. 458.)The same wording is used today in the New York statute. (N.Y. Exec. Law, art. 14, § 292.)

Although the language differed, the Fair Employment Practices Commission construed the California law in the same manner as the New York State Commission Against Discrimination construed the New York law. After interviews with persons responsible for administering the Fair Employment Practices Act in 1965, one writer

described the manner in which the employer provision was being implemented:

"One question which arises under this exemption is whether it includes an individual who owns and conducts several businesses at each of which less ***238** than five persons are employed but at all of which a total of five or more are employed. As early as 1948 New York's State Commission Against Discrimination held that such an individual's employees were all to be counted together and that therefore the exemption did not apply. The position of the California Fair Employment Practices Commission is the same.

"The California act states that an employer falls within its provisions only when he is *regularly* employing five or more persons. This does not mean that the accused employer must have five or more employees every day throughout the year or that he must have five or more employees at the time of the discriminatory act. It does mean that he must have an 'average' or 'normal' complement of five or more persons in his employ on a 'regular' basis. Precisely how this rule is to be applied in practice is not yet determined. The commission hopes to evolve a clear formula by deciding actual cases." (Tobriner, *supra,* 16 Hastings L. J. at pp. 342-343, fns. omitted.)

This understanding of the law is reflected in the first precedential decision of the FEHC in which this question was raised. In *Dept. Fair Empl. & Hous. v. Travel Express, supra,* No. 83-17, FEHC Precedential Decisions 1982-83, CEB 16, the facts were similar to those before this court. The employer had five employees, two of whom worked alternate days and filled one position. There were no more than four employees working on any working day. The FEHC noted that there was at the time of that decision no appellate case or FEHC precedential decision on the issue, and found that the respondent was a person who regularly employed five or more persons within the meaning of the statute.

The FEHC analogized the employment pattern of the respondent with that of the employer in *Pascutoi v. Washburn-McReavy Mortuary* (D.Minn. 1975) 11 Fair Empl. Prac. Cas. (Bur. Nat. Affairs) 1325, a case decided under Title VII, which also held that part-time workers were to be included in determining the number of employees even though they did not work on each working day. Like the court in *Pascutoi,* the FEHC reasoned that its obligation to liberally interpret the FEHA to further its remedial purpose supported a finding that the respondent had employed a minimum of five people during the pertinent period and thus was an employer within the meaning of section 12926, and section 7286.5, subdivision (a) of title 2 of the then California Administrative Code.(*Dept. Fair Empl. & Hous. v. Travel Express, supra,* No. 83-17, FEHC Precedential Decs. 1982-83, CEB 16, pp. 4-5.)

This construction is consistent with the purpose of the legislation and of the small-employer exemption since by looking to the number of employees on the payroll the enforcement agency is able to channel its resources into enforcement where job opportunities will be maximized. ***239**

The purpose of the FEHA/Fair Employment Practices Commission exemption appears to be the same as that established in the similar, but not identical, statutes of the several other states which had enacted fair employment laws prior to California. New Jersey, [FN11] Indiana, [FN12] and Wisconsin [FN13] did so in 1945. They were followed by Massachusetts in 1946; [FN14] Connecticut in 1947; [FN15] New Mexico, Oregon, Rhode Island, and Washington in 1949; [FN16] Colorado in 1951; [FN17] and Michigan, Minnesota, and Pennsylvania in 1955. [FN18](Kovarsky, *A Review of State FEPC Laws* (1958) 9 Labor L.J. 478; Murray, *The Right to Equal Opportunity in Employment* (1945) 33 Cal.L.Rev. 388, 420.)Almost all included exemptions of small employers, but only one used the adverb "regularly" as a modifier in defining employer. [FN19]That state, Minnesota, did so in a paragraph of "exceptions" which included "[a] person who regularly employs fewer than eight individuals, ..." (1955 Minn. Laws, ch. 516; Minn. Stat. § 363.02.) [FN20]Because the Minnesota State Act Against Discrimination differs from the Fair Employment Practices Act in many respects, and the term "regularly employing" in the California statute can be traced to the 1945 bill, it does not appear that the Legislature had the Minnesota statute in mind when the Fair Employment Practices Act was adopted in 1959.

FN11 (1945 N.J. Laws, ch. 169.)

FN12 (1945 Ind. Acts, ch. 325.)

FN13 (1945 Wis. Laws, ch. 490; Wis. Stats. ch. 111, subch. II, §§ 111.31-111.37 (1945).)

FN14 (1946 Mass. Acts, ch. 368.)

FN15 (1947 Conn. Pub. Acts 171, tit. 31, ch. 563.)

FN16 (1949 N.M. Laws, ch. 161; 1949 Or. Laws, ch. 221; 1949 R.I. Pub. Laws, ch. 2181; 1949 Wash. Laws, ch. 183.)

FN17 (1951 Colo. Sess. Laws, ch. 217.)

FN18 (1955 Mich. Pub. Acts No. 251 (H.24); Mich. Comp. Laws, §§ 423.301- 423.311; 1955 Minn. Laws, ch. 516 (H.778); Minn. Stat. §§ 363.01-363.11; 1955 Pa. Laws Act No. 222; Pa. Stat. Ann. tit. 43, §§ 951-963 (Purdon).)

FN19 State fair employment laws enacted as of 1964 are compiled in State Fair Employment Laws and Their Administration (Bur. Nat. Affairs 1964).
Of the states whose fair employment laws were enacted prior to that enacted in California, only Wisconsin had no small-employer exemption. The laws of New Mexico and Rhode Island applied to employers of four or more persons. The Connecticut law applied to employers of five or more persons. Those of Colorado, Indiana, New Jersey, New York, and Oregon applied to employers of six or more persons. Those of Michigan, Minnesota, and Washington applied to employers of eight or more persons, and that of Pennsylvania to employers of twelve or more persons.

FN20 The Minnesota law was subsequently changed to define employer as "[a] person who has one or more employees." (Minn. Stat. Ann. § 363.01, subd. 17 (West).) Case law and administrative decisions construing the Minnesota law are not helpful in ascertaining the legislative intent underlying the Fair Employment Practices Act or the FEHA, therefore.

Notwithstanding the various phraseology of the small-employer exemptions and the inclusion of the term "regularly" in the laws of Minnesota and California, no case law or contemporary comment on fair employment laws ***240** attaches any significance to those differences. The commentators uniformly explain the reasons for the exemptions as relieving the administrative body of the burden of enforcement where few job opportunities are available, and as keeping the agency out of situations in which discrimination is too subtle or too personal to make effective solutions possible.

One commentator explains: "Employers of less than four to eight employees are excepted from statutory coverage because regulation of the practices of numerous small employers was thought infeasible. The number of jobs which could be made available in these units is relatively small compared to the results that can be obtained by eliminating discriminatory practices of large firms. And discrimination between persons working together in a small establishment might often be so elusive that the law could not effectively protect the employee. (Note, *The Operation of State Fair Employment Practices Commissions* (1955) 68 Harv.L.Rev. 685, 687-688, fns. omitted.)

Others, addressing the California law specifically, reach a similar conclusion: "The exceptions for employers of fewer than five persons and for family and domestic servants serve a dual function: they keep the Commission out of trivia in terms of job opportunities and out of situations too personal for the law to effect a satisfactory solution." (Note, *The California FEPC: Stepchild of the State Agencies, supra,* 18 Stan.L.Rev. at p. 202.)

"A sense of justice and propriety led the framers to believe that individuals should be allowed to retain some small measure of the so-called freedom to discriminate; besides, they feared the political repercussions of eliminating totally an area of free choice whose infringement had been so bitterly opposed. In the second place, the framers believed that discrimination on a small scale would prove exceedingly difficult to detect and police. Third, it was believed that an employment situation in which there were less than five employees might involve a close personal relationship between employer and employees and that fair employment laws should not apply where such a relationship existed. Finally, the framers were interested primarily in attacking protracted, large-scale discrimination by important employers and strong unions. Their aim was not so much to redress each discrete instance of individual discrimination as to eliminate the egregious and continued discriminatory practices of economically powerful organizations. Thus they could afford to exempt the small employer." (Tobriner, *supra,* 16 Hastings L.J. at p. 342, fns. omitted.)

It is noteworthy that in discussing these small employer exemptions the commentators uniformly assumed that "regularly employing" referred to the ***241** number of persons in the employ of an employer, i.e., the number of persons on the payroll. The existence of an employee-employer relationship determined whether the employee would be counted to determine applicability of the law.

To the extent that contemporary understanding of the scope of the Fair Employment Practices Act can be ascertained, that understanding also supports the FEHC's argument that the total number of employees is determinative, and that the qualifying phrase "regularly employing" does not permit exclusion of part-time employees, whether they work only part of the working week or only part of the working day.

In the April 16, 1959, Report of the Legislative Counsel, analyzing Assembly Bill No. 91, the scope of the measure is described as extending to "those *employing* five or more persons including the State and political and civil subdivisions thereof and cities, but not including non-profit social clubs, fraternal, charitable, educational, or religious associations or corporations; but specifies that an individual employed by his parents, spouse, or child, or in domestic service in the home of any person, is not a subject employee, and that employers and employees are not covered in respect to farm work performed by agricultural workers residing on the land on which they are employed." (Italics added.) The failure to note or attach special significance to the qualifying term "regularly" suggests an understanding that the word would be given its usual meaning-i.e., occurring at fixed intervals (see Webster's New Collegiate Dict. (9th ed. 1984) p. 992) and did not merit explanation. Given that understanding, the number of employees who work regularly as opposed to intermittently, or who are carried on the payroll at the time of the discriminatory act, would be dispositive.

In its pamphlet FEPC, Fair Employment Law in California, Your Rights, Your Responsibilities, the Fair Employment Practices Commission also appears to have construed the exemption as one based on the total number of employees, stating: "*Exempt* are employers of fewer than five, of domestic workers, of farm workers living where employed, and certain nonprofit institutions." FN21

FN21 This undated, unpaginated publication was printed shortly after the Fair Employment Practices Commission was created, as reflected by the date stamp indicating receipt of the pamphlet by the California State Library in June 1961.

Plaintiff speculates that the Legislature intended to spare small businesses the burden of keeping records documenting the circumstances of each termination and layoff and from the expense of employing legal counsel to assist them in a complex and volatile area of law. Amicus curiae California ***242** Dental Association argues that dentists must employ hygienists, many of whom choose not to work full time. In addition, dentists are not educated in employment law. Therefore, amicus curiae suggests, dentists and other professionals should not be burdened with expenses related to compliance, expenses which will necessarily be passed on to the consumer.

Nothing in the history of the FEHA or the Fair Employment Practices Act supports these arguments, persuades us that the law should be construed restrictively, or suggests that it was the legislative intent to exempt professionals or other small businesses who employ part-time personnel on a regular basis. Were we to accept the construction of section 12926(c) suggested by the dissent, we would have to first assume that the Legislature intended to draw a distinction between the two categories of part-time employees, although an employee who works a full eight-hour day one day a week for several years is no less "regularly" employed than one who works one or two hours a day five days a week. Then, contrary to accepted rules of statutory construction (see *People ex rel. Riles v. Windsor University* (1977) 71 Cal.App.3d 326, 332 [139 Cal.Rptr. 378]; *City of Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 466 [96 Cal.Rptr. 636]), we would have to assume that the Legislature intended that an employer of five or more workers could avoid FEHC jurisdiction by having only four on duty for one day of the regular workweek. We decline to make that assumption.

Indeed, if one purpose of the exemption of employers of less than five persons was to permit the agency to concentrate its enforcement efforts in areas involving greater numbers of employment opportunities, enforcement in this field is consistent with the legislative purpose. Plaintiff, individually, might be considered a small employer. As the California Dental Association concedes, however, there are 24,000 dentists in California, many of whom have employment arrangements similar to those of plaintiff. The number of

employment opportunities is, therefore, quite large.

It is also noteworthy that California, unlike some other states, did not elect to exempt small businesses from the pregnancy leave provisions of the FEHA when it was enacted. By contrast, The Wisconsin Family Leave Act (1989 Wis. Law 228), which grants leave in connection with the birth of a child, applies only to employers of 50 or more persons on a permanent basis. (Wis. Stat. § 103.10, subd. (1)(c).) That state's Fair Employment Act (Wis. Stat. ch. 111, subch. II, §§ 111.31-111.395) applies to any person who employees at least one individual. (*Id.*, § 111.32, subd. (6)(a).) New Jersey, in a phased application of its Family Leave Act applied it in the first year to any person who "employs 100 or more employees for each working day during each of 20 or more calendar workweeks in the then current or ***243** immediately preceding calendar year," reducing the number in the second year to 75, and finally in the third year to 50. (1989 N.J. Laws, ch. 261, eff. May 4, 1990.) The New Jersey Law Against Discrimination (10 N.J. Rev. Stat., ch. 5, § 10:5-5) has no exemption for small businesses.

(7) Because the FEHA is remedial legislation, which declares "[t]he opportunity to seek, obtain and hold employment without discrimination" to be a civil right (§ 12921), and expresses a legislative policy that it is necessary to protect and safeguard that right (§ 12920), the court must construe the FEHA broadly, not, as plaintiff suggests, restrictively. Section 12993, subdivision (a) directs: "The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof." If there is ambiguity that is not resolved by the legislative history of the FEHA or other extrinsic sources, we are required to construe the FEHA so as to facilitate the exercise of jurisdiction by the FEHC. (*Brown v. Superior Court, supra*, 37 Cal.3d at p. 486.)

(1d) We therefore conclude that plaintiff is an employer within the meaning of section 12926(c) and is subject to the pregnancy leave requirement of section 12945. Therefore, the FEHC has enforcement jurisdiction over him. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391 [211 Cal.Rptr. 758, 696 P.2d 150].)

B. *Regulation 7286.5.*

(8) Plaintiff does not claim that section 12926(c), which defines employer as a person "regularly employing five or more persons" is vague or that if considered alone the statutory definition is inadequate to give employers of five or more persons notice that they fall within the statutory definition. He claims, however, that an employer who reads Regulation 7286.5 does not have notice that employees who work less than the full workweek will be counted because the regulation specifies that only persons employed for "each working day" are counted.

The claim is not that Regulation 7286.5 is impermissibly vague, [FN22] but that it can be read as excluding plaintiff's part-time employees from consideration in determining if he is an employer subject to FEHC jurisdiction. If read as plaintiff suggests, however, Regulation 7286.5 would be inconsistent with section 12926(c) and would, therefore, be invalid. "Whenever by the express or implied terms of any statute a state agency has authority to adopt ***244** regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (§ 11342.2. See also, *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205 [132 Cal.Rptr. 377, 553 P.2d 537].)

FN22 Such a claim would necessarily fail. (See *Thole v. Structural Pest Control Bd.* (1974) 42 Cal.App.3d 732, 737 [117 Cal.Rptr. 206].)

Plaintiff's claim that the regulation fails to give notice thus assumes that, given two possible meanings, the regulation may be construed so as to render it invalid. Like a statute, however, whenever possible a regulation should be construed to uphold validity. (*Associated Homebuilders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 598 [135 Cal.Rptr. 41, 557 P.2d 473]; *Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292 [140 P.2d 657]; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 344 [129 Cal.Rptr. 824].)

Moreover, plaintiff and other employers are presumed to know the law and whether they come within the *statutory* definition of "employer." (*People v. Snyder* (1982) 32 Cal.3d 590, 592-593 [186 Cal.Rptr. 485, 652 P.2d 42].) Thus, the claim that the *regulation* does not give notice fails.

(9a) If plaintiff's theory is that the FEHC should be estopped from imposing sanctions on him because Regulation 7286.5 is misleading, that claim also fails. (10) The doctrine of estoppel is available against the

government " 'where justice and right require it.' " (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399 [261 Cal.Rptr. 310, 777 P.2d 83].) It has been applied when the government has misled a claimant (see *Lerner v. Board of Education* (1963) 59 Cal.2d 382 [29 Cal.Rptr. 657, 380 P.2d 97]; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666 [197 P.2d 710]; *Farrell v. County of Placer* (1944) 23 Cal.2d 624 [145 P.2d 570, 153 A.L.R. 323]), but will not be applied if to do so would nullify a " 'strong rule of policy adopted for the benefit of the public.' (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 839-830 [186 P.2d 124].)" (*Lentz v. McMahon, supra,* 49 Cal.3d 393, 399.)

(9b) We need not decide here whether, applying the balancing approach suggested in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497 [91 Cal.Rptr. 23, 476 P.2d 423], the harm caused plaintiff by the imposition of sanctions by the FEHC outweighs the governmental interest in enforcing section 12945 in his case. Plaintiff has not met one of the threshhold requirements for application of the doctrine.

(11) "Generally speaking, four elements must be present ...: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his ***245** conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Lentz v. McMahon, supra,* 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 489, and *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245]. Inner quotation marks omitted.)

(9c) Assuming, therefore, that the doctrine of estoppel may be urged on grounds that an administrative regulation is so vague as to mislead a party into believing that he or she was not subject to the statute the regulation implements, plaintiff may not do so. He did not urge this basis for estoppel in the administrative or mandamus proceedings (see *Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 980 [194 Cal.Rptr. 672]), and has not established the factual predicate-knowledge of and reliance on Regulation 7286.5.

III

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Mosk, J., Panelli, J., Kennard, J., and George, J., concurred.

ARABIAN, J.,
Dissenting.

I respectfully dissent from the majority's construction of Government Code section 12926, subdivision (c) (section 12926(c)). Time and again, this court has been constrained to articulate the legislative and constitutional limitations necessarily circumscribing the jurisdictional authority of the Fair Employment and Housing Commission (FEHC or Commission). (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245 [284 Cal.Rptr. 718, 814 P.2d 704] [FEHC may not award compensatory damages for emotional distress caused by housing discrimination]; *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40 [276 Cal.Rptr. 114, 801 P.2d 357] [FEHC not authorized to award compensatory damages for sexual harassment claim]; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr. 67, 743 P.2d 1323] [no FEHC authority to award punitive damages].) I fail to comprehend any rational basis on which the majority now acquiesce in yet another effort to expand administrative territory beyond the boundaries set by the Legislature. On the contrary, notwithstanding the intriguing variety of secondary sources used to divine legislative intent, they have construed section 12926(c) essentially out of whole cloth and materially departed from the reasonable, commonsense implication of the statute's express terms, to wit, that only those employers having ***246** five or more employees, whether full-time or part-time, working every business day come within the Commission's authority. In doing so, the majority fill the hollow cavity of ambiguous language with the silver amalgam of judicially created jurisdiction. The ache they leave will be substantial.

Legislative intent is the touchstone of judicial interpretation; and "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (*Dyna- Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at pp. 1386-1387.) Nevertheless, the majority analysis begins not with the actual terms of the statute but with the unexplicated conclusion that " 'regularly employing' is

susceptible of more than one interpretation." (Maj. opn., *ante*, p. 234.) Without examining the words themselves and delineating the possible ambiguities and reasonable alternative constructions, the majority embark on their quest for legislative intent without a chart or compass. As a critical consequence, they stray from the course of "according significance, if possible, to every word" and render the qualifier "regularly" virtually meaningless in this context.

The extralegislative sources relied on by the majority offer little assistance in this search for legislative design. Many of these are of dubious relevance; [FN1] and, in any event, no clear consensus emerges: while some make reference to the number of employees on the payroll as dispositive of jurisdiction, others are silent or ambiguous on the point. [FN2]Nor does the record suggest the Legislature considered any of these materials when enacting either *247section 12926(c) or its predecessor. [FN3](Cf. *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 742- 743 [248 Cal.Rptr. 115 [755 P.2d 299] [staff opinion distributed only to select committee members not evidence of legislative intent].)

FN1 For example, "[u]npassed bills, as evidence of legislative intent, have little value. [Citations.]" (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra*, 43 Cal.3d at p. 1396.) A defeated initiative measure can have even less. As the majority acknowledge, fair employment legislation from other jurisdictions does not track California's statutory language. (See *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 888 [153 Cal.Rptr. 842, 592 P.2d 329],overruled on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 313 [250 Cal.Rptr. 116, 758 P.2d 58]; cf. *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665] [Legislature presumed to intend like interpretation be given identical statutory language].) And while language in an employer pamphlet prepared by the FEHC possibly in 1961 may have guided the Commission's own interpretation of section 12926(c), such a document does not typically inform legislative enactments. (See generally 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 96, pp. 149-150.)

FN2 For example, at least one commentator acknowledged, "Precisely how this rule [interpreting 'regularly'] is to be applied in practice is not yet determined." (Tobriner, *California FEPC* (1965) 16 Hastings L.J. 333, 343; see maj. opn., *ante*, p. 238.) Subsequent administrative construction is equally ambiguous: the pertinent regulation states an "employer" is one employing five or more individuals "for each working day" (Cal. Code Regs., tit. 2, § 7286.5, subd. (a)(1)); however, the FEHC interprets the term to mean having five or more individuals "on the payroll." (*Dept. Fair Empl. & Hous. v. Travel Express* (1983) No. 83-17, FEHC Precedential Decs. 1982-83, CEB 16, p. 4.)

FN3 For example, most of the commentaries postdate adoption of Labor Code section 1413, the predecessor statute, to which the majority attach considerable significance as the original source of the term "regularly employing."

The Commission's decisions applying the statute and related regulation (Cal. Code Regs., tit. 2, § 7285.1, subd. (a)) might provide some insight: " 'Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless clearly erroneous.' [Citations.]" (*City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, 696 [125 Cal.Rptr. 779, 542 P.2d 1371].) [FN4] Even assuming two decisions from 1983 and 1984 satisfy the standard for consistency and longevity, however, I am unpersuaded by the Commission's superficial and facile analysis, which makes no attempt to grapple with the terms of the statute.

FN4 The majority cite *City of Los Angeles v. Public Utilities Com., supra*, 15 Cal.3d 680, 696, and *Wotton v. Bush* (1953) 41 Cal.2d 460, 466 [261 P.2d 256], for the proposition that "the court will look ... to administrative construction reasonably contemporaneous with the law's adoption in order to ascertain the intent of the Legislature in using the phrase." (Maj. opn., *ante*, p. 234.) However, Commission decisions in 1983 and 1984 can hardly be considered "contemporaneous" with enactments in 1959 and 1980, particularly when their analysis does not reflect on any original legislative understanding.

(See 2B Sutherland, Statutory Construction (5th ed. 1992 rev.) § 49.08, p. 67.)

The first case, *Dept. Fair Empl. & Hous. v. Travel Express, supra,* No. 83-17, FEHC Precedential Decisions 1982-83, CEB 16, pages 3-5, relies solely on one federal district court decision interpreting "employer" as defined in title VII (42 U.S.C. § 2000e(b)). (*Pascutoi v. Washburn-McReavy Mortuary* (D.Minn. 1975) 11 Fair Empl. Prac. Cas. (Bur. Nat. Affairs) 1325, 1326.) The federal statute provides that a person comes within the purview of the Equal Employment Act "who has fifteen or more employees for each working day ...." (*Ibid.*) Effectuating the remedial purpose of the act and according great deference to administrative implementation thereof, the federal court determined that Congress intended to bring both full-time and part-time workers within this definition and that therefore the number of persons on the payroll, not the number working any particular day, controlled. (*Id.,* at p. 1327.)On this limited basis and citing its own mandate to "give[] a broad sweep to the definition of 'employer,' " the Commission similarly concluded that the number of persons on an employer's payroll was ***248** dispositive of its jurisdiction. (*Dept. Fair Empl. & Hous. v. Travel Express, supra,* No. 83-17, FEHC Precedential Decs. 1982-1983, CEB 16, p. 4].)

In my view, this determination is "clearly erroneous" and not entitled to any weight or deference. [FN5]The Commission attempted no critical analysis of the actual words at issue. Regardless of a perceived "legislative directive to liberally interpret the act" (*Dept. Fair Empl. & Hous. v. Travel Express, supra,* No. 83-17, FEHC Precedential Decs. 1982- 1983, CEB 16, p. 4), the language of the statute itself must initially inform its construction. The Commission failed to recognize this overarching mandate and in drawing so heavily on *Pascutoi, supra,* ignored a critical distinction in the wording of the federal and state code provisions. I see a substantial difference between defining an employer under the federal act as one who "has" a given number of employees and under the state scheme as one who is "regularly employing" such persons. In this context, "has" is essentially equivalent to "employing"; [FN6] and adopting the federal analysis renders "regularly" superfluous.

FN5 The second case, *Dept. Fair Empl. & Hous. v. Bee Hive Answering Service* (1984) No. 84-16, FEHC Precedential Decs. 1984-85, CEB 8, page 13, merely follows *Travel Express* and thus shares its analytical weakness, as discussed below.

FN6 For present purposes, "employing" generally means "provid[ing] work and pay for" and "engag[ing] the services or labor of for pay; hir[ing]." (See Webster's New World Dict. (3d college ed. 1988) p. 445.)

The Commission attempts no explanation for relying solely upon one federal decision construing dissimilar statutory language. An affinity of remedial purpose cannot justify a flagrant disregard for the integrity of state law and administrative jurisdiction. Moreover, under the Commission's own regulations, "federal laws and their interpretations regarding discrimination in employment and housing are not determinative of the construction of these [FEHC] rules and regulations and the California statutes which they interpret and implement ...." (Cal. Code Regs., tit. 2, § 7285.1, subd. (b).)

The majority construction as well reads the qualifier "regularly" out of section 12926(c). One commonly understood meaning of "regularly" is "consistently" or "habitually" (see Webster's New World Dict. (3d college ed. 1988) p. 1131) or, as the majority suggest, not "intermittently." (Maj. opn., *ante,* p. 241.) Merely having an individual on the payroll bears no particular relation to the frequency or regularity of that person's job function. For example, a small business, such as a "Mom and Pop" grocery, may employ only two workers full time but need to supplement that work force for an additional period each day. For whatever reason, the proprietor may choose to hire three individuals, each of whom works one or two days each week, to fill the part-time position. Five persons would appear on the payroll, but not all of them would "regularly" report to work. Nevertheless, ***249** under the majority's interpretation, the employer would come within the Commission's jurisdiction. Of course, by hiring only one or two individuals to work part time, the same employer could avoid jurisdiction even though the nature of the business and the number of job opportunities remained the same in both situations. Moreover, even an employer who restricted his or her payroll to only four full-time and part- time employees daily would become an "employer" for purposes of FEHC jurisdiction if he or she hired a bookkeeper to work two hours once a month.

Fixing the jurisdiction according to the number of employees on the payroll provides the Commission with a bright line determinative; but at the same time, it creates

vagaries for the employer that can only inure to the ultimate detriment of employees, particularly those who work part time, denied jobs by employers seeking to avoid FEHC jurisdiction. The majority's analysis neglects to consider any of these consequences or the potentially wide-ranging impact on both employers and employees. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.) Implementation of the Commission's mandate to rectify and eliminate discriminatory practices in the workplace should enhance not defeat the primary goal of maximizing employment opportunities. (Cf. Gov. Code, § 12920.)

To avoid the anomalous results threatened by the majority interpretation while still effectuating the underlying remedial intent of the Legislature, I would construe section 12926(c) to invoke jurisdiction based upon the number of persons working each day. In other words, if five employees report for work every day, then the employer is subject to the Fair Employment and Housing Act irrespective of the number of hours worked. This approach provides an equally dispositive definition of "employer" but focuses more realistically on the size of the enterprise potentially subject to the Commission's jurisdiction, a matter clearly of legislative concern in providing an exemption. [FN7](See also Tobriner, *California FEPC, supra,* 16 Hastings L.J. at p. 342 ["the framers [of the Fair Employment and Housing Act] were interested primarily in attacking protracted, large- scale discrimination by important employers and strong unions"].) It also gives small employers a ***250** measure of control in structuring their work force. If an employer chooses to hire five part-time workers for each day's work rather than three full-time ones, he or she has impliedly agreed to submit to the FEHC's jurisdiction by virtue of that business decision. In my view, this result more accurately explicates section 12926(c) and more reasonably effectuates the purpose of the statutory scheme consistent with the underlying legislative goal of effecting compliance and remediating employment discrimination.

FN7 The majority imply plaintiff's business should come within the Commission's jurisdiction despite its relatively small-scale nature because California has 24,000 dentists and the "number of employment opportunities is, therefore, quite large." (Maj. opn., *ante,* p. 242.) I fail to discern the logic of this observation. These professionals do not function as a single business entity and may or may not engage in similar employment practices. Hence, their collective job availability seems of little relevance in determining whether subjecting them to the Fair Employment and Housing Act would have any practical impact. More significantly, in response to the majority's interpretation of section 12926(c), some practitioners may, as plaintiff might well, eliminate part- time positions to avoid jurisdiction, with obvious negative consequences for employees.

In the instant case, the Commission clearly should not have exercised jurisdiction because plaintiff scheduled five or more persons to work on only two business days. Accordingly, I would reverse the contrary determination of the Court of Appeal. ***251**

Cal. 1992.
Robinson v. Fair Employment & Housing Com.
2 Cal.4th 226, 825 P.2d 767, 5 Cal.Rptr.2d 782, 58 Fair Empl.Prac.Cas. (BNA) 887

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FEDERAL STATUTES

TITLE 20--EDUCATION

CHAPTER 31--GENERAL PROVISIONS CONCERNING EDUCATION

SUBCHAPTER III--GENERAL REQUIREMENTS AND CONDITIONS CONCERNING OPERATION AND ADMINISTRATION OF EDUCATION PROGRAMS: GENERAL AUTHORITY OF SECRETARY

Part 4--Records; Privacy; Limitation on Withholding Federal Funds

Sec. 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975,

if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations--

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term ``educational agency or institution'' means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term ``education records'' means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term ``education records'' does not include--

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's

capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term ``directory information'' relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term ``student'' includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to

challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted--

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if--

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.\1\

\1\ So in original. The period probably should be a semicolon.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only

be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding--

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary

or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from--

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the

student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if--

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) of this section or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general.--An application under paragraph (1) shall certify that there are specific and articulable facts giving reason

to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.

(Pub. L. 90-247, title IV, Sec. 444, formerly Sec. 438, as added Pub. L. 93-380, title V, Sec. 513(a), Aug. 21, 1974, 88 Stat. 571; amended Pub. L. 93-568, Sec. 2(a), Dec. 31, 1974, 88 Stat. 1858; Pub. L. 96-46, Sec. 4(c), Aug. 6, 1979, 93 Stat. 342; Pub. L. 101-542, title II, Sec. 203, Nov. 8, 1990, 104 Stat. 2385; Pub. L. 102-325, title XV, Sec. 1555(a), July 23, 1992, 106 Stat. 840; renumbered Sec. 444 and amended Pub. L. 103-382, title II, Secs. 212(b)(1), 249, 261(h), Oct. 20, 1994, 108 Stat. 3913, 3924, 3928; Pub. L. 105-244, title IX, Secs. 951, 952, Oct. 7, 1998, 112 Stat. 1835, 1836; Pub. L. 106-386, div. B, title VI, Sec. 1601(d), Oct. 28, 2000, 114 Stat. 1538; Pub. L. 107-56, title V, Sec. 507, Oct. 26, 2001, 115 Stat. 367; Pub. L. 107-110, title X, Sec. 1062(3), Jan. 8, 2002, 115 Stat. 2088.)

References in Text

This Act, referred to in subsec. (i)(1), is Pub. L. 90-247, Jan. 2, 1968, 80 Stat. 783, as amended, known as the Elementary and Secondary Education Amendments of 1967. Title IV of the Act, known as the General Education Provisions Act, is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title of 1968 Amendment note set out under section 6301 of this title and Tables.

The Higher Education Act of 1965, referred to in subsec. (i)(1), is Pub. L. 89-329, Nov. 8, 1965, 79 Stat. 1219, as amended, which is classified principally to chapter 28 (Sec. 1001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

Prior Provisions

A prior section 444 of Pub. L. 90-247 was classified to section 1233c of this title prior to repeal by Pub. L. 103-382.

Amendments

2002--Subsec. (a)(1)(B). Pub. L. 107-110, Sec. 1062(3)(A), realigned margins.

Subsec. (b)(1). Pub. L. 107-110, Sec. 1062(3)(C), substituted ``subparagraph (E)'' for ``clause (E)'' in concluding provisions.

Subsec. (b)(1)(J). Pub. L. 107-110, Sec. 1062(3)(B), realigned margins.

Subsec. (b)(7). Pub. L. 107-110, Sec. 1062(3)(D), realigned margins.

2001--Subsec. (j). Pub. L. 107-56 added subsec. (j).

2000--Subsec. (b)(7). Pub. L. 106-386 added par. (7).

1998--Subsec. (b)(1)(C). Pub. L. 105-244, Sec. 951(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: ``authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, or (iii) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;''.

Subsec. (b)(6). Pub. L. 105-244, Sec. 951(2), designated existing provisions as subpar. (A), substituted ``or a nonforcible sex offense, the final results'' for ``the results'', substituted ``such crime or offense'' for ``such crime'' in two places, and added subpars. (B) and (C).

Subsec. (i). Pub. L. 105-244, Sec. 952, added subsec. (i).

1994--Subsec. (a)(1)(B). Pub. L. 103-382, Sec. 249(1)(A)(ii), added subpar. (B). Former subpar. (B) redesignated (C).

Subsec. (a)(1)(C). Pub. L. 103-382, Sec. 249(1)(A)(i), (iii), redesignated subpar. (B) as (C) and substituted ``subparagraph (D)'' for ``subparagraph (C)'' in cl. (iii). Former subpar. (C) redesignated (D).

Subsec. (a)(1)(D). Pub. L. 103-382, Sec. 249(1)(A)(i), (iv), redesignated subpar. (C) as (D) and substituted ``subparagraph (C)'' for ``subparagraph (B)''.

Subsec. (a)(2). Pub. L. 103-382, Sec. 249(1)(B), substituted ``privacy rights'' for ``privacy or other rights''.

Subsec. (a)(4)(B)(ii). Pub. L. 103-382, Sec. 261(h)(1), substituted semicolon for period at end.

Subsec. (b)(1)(A). Pub. L. 103-382, Sec. 249(2)(A)(i), inserted before semicolon ``, including the educational interests of the child for whom consent would otherwise be required''.

Subsec. (b)(1)(C). Pub. L. 103-382, Sec. 261(h)(2)(A), substituted ``or (iii)'' for ``(iii) an administrative head of an education agency (as defined in section 1221e-3(c) of this title), or (iv)''.

Subsec. (b)(1)(E). Pub. L. 103-382, Sec. 249(2)(A)(ii), amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: ``State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;''.

Subsec. (b)(1)(H). Pub. L. 103-382, Sec. 261(h)(2)(B), substituted ``the Internal Revenue Code of 1986'' for ``the Internal Revenue Code of 1954'', which for purposes of codification was translated as ``title 26'' thus requiring no change in text.

Subsec. (b)(1)(J). Pub. L. 103-382, Sec. 249(2)(A)(iii)-(v), added subpar. (J).

Subsec. (b)(2). Pub. L. 103-382, Sec. 249(2)(B)(i), which directed amendment of matter preceding subpar. (A) by substituting ``, unless--'' for the period, was executed by substituting a comma for the period before ``unless--'' to reflect the probable intent of Congress.

Subsec. (b)(2)(B). Pub. L. 103-382, Sec. 249(2)(B)(ii), inserted ``except as provided in paragraph (1)(J),'' before ``such information''.

Subsec. (b)(3). Pub. L. 103-382, Sec. 261(h)(2)(C), substituted ``or (C)'' for ``(C) an administrative head of an education agency or (D)'' and ``education programs'' for ``education program''.

Subsec. (b)(4). Pub. L. 103-382, Sec. 249(2)(C), inserted at end ``If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.''

Subsec. (c). Pub. L. 103-382, Sec. 249(3), substituted ``Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which'' for ``The Secretary shall adopt appropriate regulations to''.

Subsec. (d). Pub. L. 103-382, Sec. 261(h)(3), inserted a comma after ``education''.

Subsec. (e). Pub. L. 103-382, Sec. 249(4), inserted ``effectively'' before ``informs''.

Subsec. (f). Pub. L. 103-382, Sec. 261(h)(4), struck out ``, or an administrative head of an education agency,'' after ``The Secretary'' and substituted ``enforce this section'' for ``enforce provisions of this section'', ``in accordance with'' for ``according to the provisions of'', and ``comply with this section'' for ``comply with the provisions of this section''.

Subsec. (g). Pub. L. 103-382, Sec. 261(h)(5), struck out ``of Health, Education, and Welfare'' after ``the Department'' and ``the provisions of'' after ``adjudicating violations of''.

Subsec. (h). Pub. L. 103-382, Sec. 249(5), added subsec. (h).

1992--Subsec. (a)(4)(B)(ii). Pub. L. 102-325 amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: ``if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;''.

1990--Subsec. (b)(6). Pub. L. 101-542 added par. (6).

1979--Subsec. (b)(5). Pub. L. 96-46 added par. (5).

1974--Subsec. (a)(1). Pub. L. 93-568, Sec. 2(a)(1)(A)-(C), (2)(A)-(C), (3), designated existing par. (1) as subpar. (A), substituted reference to educational agencies and institutions for reference to state or local educational agencies, institutions of higher education, community colleges, schools, agencies offering preschool programs, and other educational institutions, substituted the generic term education records for the enumeration of such records, and extended the right to inspect and review such records to parents of children who have been in attendance, and added subpars. (B) and (C).

Subsec. (a)(2). Pub. L. 93-568, Sec. 2(a)(4), substituted provisions making the availability of funds to educational agencies and institutions conditional on the granting of an opportunity for a hearing to parents of students who are or have been in attendance at such

institution or agency to challenge the contents of the student's education records for provisions granting the parents an opportunity for such hearing, and inserted provisions authorizing insertion into the records a written explanation of the parents respecting the content of such records.

Subsec. (a)(3) to (6). Pub. L. 93-568, Sec. 2(a)(1)(G), (2)(F), (5), added pars. (3) to (6).

Subsec. (b)(1). Pub. L. 93-568, Sec. 2(a)(1)(D), (2)(D), (6), (8)(A)-(C), (10)(A), in provisions preceding subpar. (A), substituted ``educational agency or institution which has a policy of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)'' for ``state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of permitting the release of personally identifiable records or files (or personal information contained therein)'', in subpar. (A), substituted ``educational agency, who have been determined by such agency or institution to have'' for ``educational agency who have'', in subpar. (B), substituted ``the student seeks or intends to'' for ``the student intends to'', in subpar. (C), substituted reference to ``section 408(c)'' for reference to ``section 409 of this Act'' which for purposes of codification has been translated as ``section 1221e-3(c) of this title'', and added subpars. (E) to (I).

Subsec. (b)(2). Pub. L. 93-568, Sec. 2(a)(1)(E), (2)(E), substituted ``educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection'' for ``state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) of this section''.

Subsec. (b)(3). Pub. L. 93-568, Sec. 2(a)(8)(D), substituted ``information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements'' for ``data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected''.

Subsec. (b)(4). Pub. L. 93-568, Sec. 2(a)(9), substituted provisions that each educational agency or institution maintain a record, kept with the education records of each student, indicating individuals, agencies, or organizations who obtained access to the student's record and the legitimate interest in obtaining such information, that such record of access shall be available only to parents, school officials, and their

assistants having responsibility for the custody of such records, and as a means of auditing the operation of the system, for provisions that with respect to subsecs. (c)(1), (c)(2), and (c)(3) of this section, all persons, agencies, or organizations desiring access to the records of a student shall be required to sign forms to be kept with the records of the student, but only for inspection by the parents or the student, indicating specifically the legitimate educational or other interest of the person seeking such information, and that the form shall be available to parents and school officials having responsibility for record maintenance as a means of auditing the operation of the system.

Subsec. (e). Pub. L. 93-568, Sec. 2(a)(1)(F), substituted ``to any educational agency or institution unless such agency or institution'' for ``unless the recipient of such funds''.

Subsec. (g). Pub. L. 93-568, Sec. 2(a)(7), (10)(B), struck out reference to sections 1232c and 1232f of this title and inserted provisions that except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107-110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107-110, set out as an Effective Date note under section 6301 of this title.

Effective Date of 1998 Amendment

Amendment by Pub. L. 105-244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105-244, see section 3 of Pub. L. 105-244, set out as a note under section 1001 of this title.

Effective Date of 1992 Amendment

Section 1555(b) of Pub. L. 102-325 provided that: ``The amendment made by this section [amending this section] shall take effect on the date of enactment of this Act [July 23, 1992].''

Effective Date of 1979 Amendment

Amendment by Pub. L. 96-46 effective Oct. 1, 1978, see section 8 of Pub. L. 96-46, set out as a note under section 930 of this title.

Effective Date of 1974 Amendment

Section 2(b) of Pub. L. 93-568 provided that: ``The amendments made by subsection (a) [amending this section] shall be effective, and retroactive to, November 19, 1974.''

Effective Date

Section 513(b)(1) of Pub. L. 93-380 provided that: ``The provisions of this section [enacting this section and provisions set out as a note under section 1221 of this title] shall become effective ninety days after the date of enactment [Aug. 21, 1974] of section 438 [now 444] of the General Education Provisions Act [this section].''

TITLE 29--LABOR

CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES

GENERAL PROVISIONS

Sec. 714. State administration

The application of any State rule or policy relating to the administration or operation of programs funded by this chapter (including any rule or policy based on State interpretation of any Federal law, regulation, or guideline) shall be identified as a State imposed requirement.

(Pub. L. 93-112, Sec. 17, formerly Sec. 15, as added Pub. L. 105-220, title IV, Sec. 403, Aug. 7, 1998, 112 Stat. 1114; renumbered Sec. 17, Pub. L. 105-277, div. A, Sec. 101(f) [title VIII, Sec. 402(a)(1)], Oct. 21, 1998, 112 Stat. 2681-337, 2681-412.)

Prior Provisions

Provisions similar to this section were contained in section 716 of this title prior to repeal by Pub. L. 105-220.

A prior section 714, Pub. L. 93-112, Sec. 15, as added Pub. L. 95-602, title I, Sec. 122(a)(10), Nov. 6, 1978, 92 Stat. 2986; amended Pub. L. 96-374, title XIII, Sec. 1322, Oct. 3, 1980, 94 Stat. 1499; Pub. L. 98-221, title I, Sec. 104(a)(1), Feb. 22, 1984, 98 Stat. 18; Pub. L. 99-506, title I, Sec. 103(d)(2)(C), Oct. 21, 1986, 100 Stat. 1810; Pub. L. 102-569, title I, Sec. 102(p)(6), Oct. 29, 1992, 106 Stat. 4356, related to information clearinghouse, prior to repeal by Pub. L. 105-220, title IV, Sec. 403, Aug. 7, 1998, 112 Stat. 1093. See section 712 of this title.

A prior section 17 of Pub. L. 93-112 was renumbered section 19 and is classified to section 716 of this title.

Another prior section 17 of Pub. L. 93-112 was classified to section 716 of this title prior to repeal by Pub. L. 105-220.

TITLE 29--LABOR

CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES

SUBCHAPTER I--VOCATIONAL REHABILITATION SERVICES

Part A--General Provisions

Sec. 720. Declaration of policy; authorization of appropriations

(a) Findings; purpose; policy

(1) Findings

Congress finds that--

(A) work--

(i) is a valued activity, both for individuals and society; and

(ii) fulfills the need of an individual to be productive, promotes independence, enhances self-esteem, and allows for participation in the mainstream of life in the United States;

(B) as a group, individuals with disabilities experience staggering levels of unemployment and poverty;

(C) individuals with disabilities, including individuals with the most significant disabilities, have demonstrated their ability to achieve gainful employment in integrated settings if appropriate services and supports are provided;

(D) reasons for significant numbers of individuals with disabilities not working, or working at levels not commensurate with their abilities and capabilities, include--

(i) discrimination;

(ii) lack of accessible and available transportation;

(iii) fear of losing health coverage under the medicare and medicaid programs carried out under titles XVIII and XIX of the Social Security Act (42 U.S.C. 1395 et seq. and 1396 et seq.) or fear of losing private health insurance; and

(iv) lack of education, training, and supports to meet job qualification standards necessary to secure, retain, regain, or advance in employment;

(E) enforcement of subchapter V of this chapter and of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) holds the promise of ending discrimination for individuals

with disabilities;

(F) the provision of workforce investment activities and vocational rehabilitation services can enable individuals with disabilities, including individuals with the most significant disabilities, to pursue meaningful careers by securing gainful employment commensurate with their abilities and capabilities; and

(G) linkages between the vocational rehabilitation programs established under this subchapter and other components of the statewide workforce investment systems are critical to ensure effective and meaningful participation by individuals with disabilities in workforce investment activities.

(2) Purpose

The purpose of this subchapter is to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, each of which is--

(A) an integral part of a statewide workforce investment system; and

(B) designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for and engage in gainful employment.

(3) Policy

It is the policy of the United States that such a program shall be carried out in a manner consistent with the following principles:

(A) Individuals with disabilities, including individuals with the most significant disabilities, are generally presumed to be capable of engaging in gainful employment and the provision of individualized vocational rehabilitation services can improve their ability to become gainfully employed.

(B) Individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings.

(C) Individuals who are applicants for such programs or eligible to participate in such programs must be active and full partners in the vocational rehabilitation process, making meaningful and informed choices--

(i) during assessments for determining eligibility and vocational rehabilitation needs; and

(ii) in the selection of employment outcomes for the individuals, services needed to achieve the outcomes, entities providing such services, and the methods used to secure such services.

(D) Families and other natural supports can play important

roles in the success of a vocational rehabilitation program, if the individual with a disability involved requests, desires, or needs such supports.

(E) Vocational rehabilitation counselors that are trained and prepared in accordance with State policies and procedures as described in section 721(a)(7)(B) of this title (referred to individually in this subchapter as a ``qualified vocational rehabilitation counselor''), other qualified rehabilitation personnel, and other qualified personnel facilitate the accomplishment of the employment outcomes and objectives of an individual.

(F) Individuals with disabilities and the individuals' representatives are full partners in a vocational rehabilitation program and must be involved on a regular basis and in a meaningful manner with respect to policy development and implementation.

(G) Accountability measures must facilitate the accomplishment of the goals and objectives of the program, including providing vocational rehabilitation services to, among others, individuals with the most significant disabilities.

(b) Authorization of appropriations

(1) In general

For the purpose of making grants to States under part B of this subchapter to assist States in meeting the costs of vocational rehabilitation services provided in accordance with State plans under section 721 of this title, there are authorized to be appropriated such sums as may be necessary for fiscal years 1999 through 2003, except that the amount to be appropriated for a fiscal year shall not be less than the amount of the appropriation under this paragraph for the immediately preceding fiscal year, increased by the percentage change in the Consumer Price Index determined under subsection (c) of this section for the immediately preceding fiscal year.

(2) Reference

The reference in paragraph (1) to grants to States under part B of this subchapter shall not be considered to refer to grants under section 732 of this title.

(c) Consumer Price Index

(1) Percentage change

No later than November 15 of each fiscal year (beginning with fiscal year 1979), the Secretary of Labor shall publish in the Federal Register the percentage change in the Consumer Price Index published for October of the preceding fiscal year and October of the fiscal year in which such publication is made.

(2) Application

(A) Increase

If in any fiscal year the percentage change published under paragraph (1) indicates an increase in the Consumer Price Index, then the amount to be appropriated under subsection (b)(1) of this section for the subsequent fiscal year shall be at least the amount appropriated under subsection (b)(1) of this section for the fiscal year in which the publication is made under paragraph (1) increased by such percentage change.

(B) No increase or decrease

If in any fiscal year the percentage change published under paragraph (1) does not indicate an increase in the Consumer Price Index, then the amount to be appropriated under subsection (b)(1) of this section for the subsequent fiscal year shall be at least the amount appropriated under subsection (b)(1) of this section for the fiscal year in which the publication is made under paragraph (1).

(3) Definition

For purposes of this section, the term ``Consumer Price Index'' means the Consumer Price Index for All Urban Consumers, published monthly by the Bureau of Labor Statistics.

(d) Extension

(1) In general

(A) Authorization or duration of program

Unless the Congress in the regular session which ends prior to the beginning of the terminal fiscal year--

(i) of the authorization of appropriations for the program authorized by the State grant program under part B of this subchapter; or

(ii) of the duration of the program authorized by the State grant program under part B of this subchapter;

has passed legislation which would have the effect of extending the authorization or duration (as the case may be) of such program, such authorization or duration is automatically extended for 1 additional year for the program authorized by this subchapter.

(B) Calculation

The amount authorized to be appropriated for the additional

fiscal year described in subparagraph (A) shall be an amount equal to the amount appropriated for such program for fiscal year 2003, increased by the percentage change in the Consumer Price Index determined under subsection (c) of this section for the immediately preceding fiscal year, if the percentage change indicates an increase.

(2) Construction

(A) Passage of legislation

For the purposes of paragraph (1)(A), Congress shall not be deemed to have passed legislation unless such legislation becomes law.

(B) Acts or determinations of Commissioner

In any case where the Commissioner is required under an applicable statute to carry out certain acts or make certain determinations which are necessary for the continuation of the program authorized by this subchapter, if such acts or determinations are required during the terminal year of such program, such acts and determinations shall be required during any fiscal year in which the extension described in that part of paragraph (1) that follows clause (ii) of paragraph (1)(A) is in effect.

(Pub. L. 93-112, title I, Sec. 100, as added Pub. L. 105-220, title IV, Sec. 404, Aug. 7, 1998, 112 Stat. 1116.)

References in Text

The Social Security Act, referred to in subsec. (a)(1)(D)(iii), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles XVIII and XIX of the Act are classified generally to subchapters XVIII (Sec. 1395 et seq.) and XIX (Sec. 1396 et seq.), respectively, of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

The Americans with Disabilities Act of 1990, referred to in subsec. (a)(1)(E), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327, as amended, which is classified principally to chapter 126 (Sec. 12101 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

Prior Provisions

A prior section 720, Pub. L. 93-112, title I, Sec. 100, Sept. 26, 1973, 87 Stat. 363; Pub. L. 93-516, title I, Sec. 102(a), Dec. 7, 1974, 88 Stat. 1618; Pub. L. 93-651, title I, Sec. 102(a), Nov. 21, 1974, 89 Stat. 2-3; Pub. L. 94-230, Secs. 2(a), 11(b)(2), (3), Mar. 15, 1976, 90

Stat. 211, 213; Pub. L. 95-602, title I, Sec. 101(a), (b), Nov. 6, 1978, 92 Stat. 2955; Pub. L. 98-221, title I, Sec. 111(a)-(d), Feb. 22, 1984, 98 Stat. 19; Pub. L. 99-506, title I, Sec. 103(d)(2)(C), title II, Sec. 201, Oct. 21, 1986, 100 Stat. 1810, 1813; Pub. L. 100-630, title II, Sec. 202(a), Nov. 7, 1988, 102 Stat. 3304; Pub. L. 102-52, Sec. 2(a), (b)(1), June 6, 1991, 105 Stat. 260; Pub. L. 102-569, title I, Sec. 121(a), (b), Oct. 29, 1992, 106 Stat. 4365, 4367, related to congressional findings, purpose, policy, authorization of appropriations, change in Consumer Price Index, and extension of program, prior to the general amendment of this subchapter by Pub. L. 105-220.

TITLE 29--LABOR

CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES

SUBCHAPTER I--VOCATIONAL REHABILITATION SERVICES

Part A--General Provisions

Sec. 721. State plans

(a) Plan requirements

(1) In general

(A) Submission

To be eligible to participate in programs under this subchapter, a State shall submit to the Commissioner a State plan for vocational rehabilitation services that meets the requirements of this section, on the same date that the State submits a State plan under section 112 of the Workforce Investment Act of 1998 [29 U.S.C. 2822].

(B) Nonduplication

The State shall not be required to submit, in the State plan for vocational rehabilitation services, policies, procedures, or descriptions required under this subchapter that have been previously submitted to the Commissioner and that demonstrate that such State meets the requirements of this subchapter, including any policies, procedures, or descriptions submitted under this subchapter as in effect on the day before August 7, 1998.

(C) Duration

The State plan shall remain in effect subject to the submission of such modifications as the State determines to be necessary or as the Commissioner may require based on a change in State policy, a change in Federal law (including regulations), an interpretation of this chapter by a Federal court or the highest court of the State, or a finding by the Commissioner of State noncompliance with the requirements of this chapter, until the State submits and receives approval of a new State plan.

(2) Designated State agency; designated State unit

(A) Designated State agency

The State plan shall designate a State agency as the sole State agency to administer the plan, or to supervise the administration of the plan by a local agency, except that--

(i) where, under State law, the State agency for individuals who are blind or another agency that provides assistance or services to adults who are blind is authorized to provide vocational rehabilitation services to individuals who are blind, that agency may be designated as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for individuals who are blind (or to supervise the administration of such part by a local agency) and a separate State agency may be designated as the sole State agency to administer or supervise the administration of the rest of the State plan;

(ii) the Commissioner, on the request of a State, may authorize the designated State agency to share funding and administrative responsibility with another agency of the State or with a local agency in order to permit the agencies to carry out a joint program to provide services to individuals with disabilities, and may waive compliance, with respect to vocational rehabilitation services furnished under the joint program, with the requirement of paragraph (4) that the plan be in effect in all political subdivisions of the State; and

(iii) in the case of American Samoa, the appropriate State agency shall be the Governor of American Samoa.

(B) Designated State unit

The State agency designated under subparagraph (A) shall be--

(i) a State agency primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities; or

(ii) if not such an agency, the State agency (or each State agency if 2 are so designated) shall include a vocational rehabilitation bureau, division, or other organizational unit that--

(I) is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities, and is responsible for the vocational rehabilitation program of the designated State agency;

(II) has a full-time director;

(III) has a staff employed on the rehabilitation work of the organizational unit all or substantially all of whom are employed full time on such work; and

(IV) is located at an organizational level and has an organizational status within the designated State

agency comparable to that of other major organizational units of the designated State agency.

(C) Responsibility for services for the blind

If the State has designated only 1 State agency pursuant to subparagraph (A), the State may assign responsibility for the part of the plan under which vocational rehabilitation services are provided for individuals who are blind to an organizational unit of the designated State agency and assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of subparagraph (B) applying separately to each of the designated State units.

(3) Non-Federal share

The State plan shall provide for financial participation by the State, or if the State so elects, by the State and local agencies, to provide the amount of the non-Federal share of the cost of carrying out part B of this subchapter.

(4) Statewideness

The State plan shall provide that the plan shall be in effect in all political subdivisions of the State, except that--

(A) in the case of any activity that, in the judgment of the Commissioner, is likely to assist in promoting the vocational rehabilitation of substantially larger numbers of individuals with disabilities or groups of individuals with disabilities, the Commissioner may waive compliance with the requirement that the plan be in effect in all political subdivisions of the State to the extent and for such period as may be provided in accordance with regulations prescribed by the Commissioner, but only if the non-Federal share of the cost of the vocational rehabilitation services involved is met from funds made available by a local agency (including funds contributed to such agency by a private agency, organization, or individual); and

(B) in a case in which earmarked funds are used toward the non-Federal share and such funds are earmarked for particular geographic areas within the State, the earmarked funds may be used in such areas if the State notifies the Commissioner that the State cannot provide the full non-Federal share without such funds.

(5) Order of selection for vocational rehabilitation services

In the event that vocational rehabilitation services cannot be provided to all eligible individuals with disabilities in the State who apply for the services, the State plan shall--

(A) show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(B) provide the justification for the order of selection;

(C) include an assurance that, in accordance with criteria

established by the State for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and

(D) provide that eligible individuals, who do not meet the order of selection criteria, shall have access to services provided through the information and referral system implemented under paragraph (20).

(6) Methods for administration

(A) In general

The State plan shall provide for such methods of administration as are found by the Commissioner to be necessary for the proper and efficient administration of the plan.

(B) Employment of individuals with disabilities

The State plan shall provide that the designated State agency, and entities carrying out community rehabilitation programs in the State, who are in receipt of assistance under this subchapter shall take affirmative action to employ and advance in employment qualified individuals with disabilities covered under, and on the same terms and conditions as set forth in, section 793 of this title.

(C) Facilities

The State plan shall provide that facilities used in connection with the delivery of services assisted under the State plan shall comply with the Act entitled ``An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped'', approved on August 12, 1968 (commonly known as the ``Architectural Barriers Act of 1968'') [42 U.S.C. 4151 et seq.], with section 794 of this title, and with the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.].

(7) Comprehensive system of personnel development

The State plan shall--

(A) include a description (consistent with the purposes of this chapter) of a comprehensive system of personnel development, which shall include--

(i) a description of the procedures and activities the designated State agency will undertake to ensure an adequate supply of qualified State rehabilitation professionals and paraprofessionals for the designated State unit, including the development and maintenance of a system for determining, on an annual basis--

(I) the number and type of personnel that are employed by the designated State unit in the provision of vocational rehabilitation services, including ratios of qualified vocational rehabilitation counselors to

clients; and

(II) the number and type of personnel needed by the State, and a projection of the numbers of such personnel that will be needed in 5 years, based on projections of the number of individuals to be served, the number of such personnel who are expected to retire or leave the vocational rehabilitation field, and other relevant factors;

(ii) where appropriate, a description of the manner in which activities will be undertaken under this section to coordinate the system of personnel development with personnel development activities under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(iii) a description of the development and maintenance of a system of determining, on an annual basis, information on the programs of institutions of higher education within the State that are preparing rehabilitation professionals, including--

(I) the numbers of students enrolled in such programs; and

(II) the number of such students who graduated with certification or licensure, or with credentials to qualify for certification or licensure, as a rehabilitation professional during the past year;

(iv) a description of the development, updating, and implementation of a plan that--

(I) will address the current and projected vocational rehabilitation services personnel training needs for the designated State unit; and

(II) provides for the coordination and facilitation of efforts between the designated State unit, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel who are individuals with disabilities; and

(v) a description of the procedures and activities the designated State agency will undertake to ensure that all personnel employed by the designated State unit are appropriately and adequately trained and prepared, including--

(I) a system for the continuing education of rehabilitation professionals and paraprofessionals within the designated State unit, particularly with respect to rehabilitation technology; and

(II) procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit significant knowledge from research and other sources, including procedures for providing training regarding the amendments to this chapter made by the Rehabilitation Act Amendments of

1998;

(B) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel, including rehabilitation professionals and paraprofessionals, needed within the designated State unit to carry out this part are appropriately and adequately prepared and trained, including--

(i) the establishment and maintenance of standards that are consistent with any national or State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which such personnel are providing vocational rehabilitation services; and

(ii) to the extent that such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel within the designated State unit that meet appropriate professional requirements in the State; and

(C) contain provisions relating to the establishment and maintenance of minimum standards to ensure the availability of personnel within the designated State unit, to the maximum extent feasible, trained to communicate in the native language or mode of communication of an applicant or eligible individual.

(8) Comparable services and benefits

(A) Determination of availability

(i) In general

The State plan shall include an assurance that, prior to providing any vocational rehabilitation service to an eligible individual, except those services specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title, the designated State unit will determine whether comparable services and benefits are available under any other program (other than a program carried out under this subchapter) unless such a determination would interrupt or delay--

(I) the progress of the individual toward achieving the employment outcome identified in the individualized plan for employment of the individual in accordance with section 722(b) of this title;

(II) an immediate job placement; or

(III) the provision of such service to any individual at extreme medical risk.

(ii) Awards and scholarships

For purposes of clause (i), comparable benefits do not include awards and scholarships based on merit.

(B) Interagency agreement

The State plan shall include an assurance that the Governor of the State, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between any appropriate public entity, including the State entity responsible for administering the State medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, and the designated State unit, in order to ensure the provision of vocational rehabilitation services described in subparagraph (A) (other than those services specified in paragraph (5)(D), and in paragraphs (1) through (4) and (14) of section 723(a) of this title), that are included in the individualized plan for employment of an eligible individual, including the provision of such vocational rehabilitation services during the pendency of any dispute described in clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a description of a method for defining, the financial responsibility of such public entity for providing such services, and a provision stating the financial responsibility of such public entity for providing such services.

(ii) Conditions, terms, and procedures of reimbursement

Information specifying the conditions, terms, and procedures under which a designated State unit shall be reimbursed by other public entities for providing such services, based on the provisions of such agreement or mechanism.

(iii) Interagency disputes

Information specifying procedures for resolving interagency disputes under the agreement or other mechanism (including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism).

(iv) Coordination of services procedures

Information specifying policies and procedures for public entities to determine and identify the interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services (except those services specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title).

(C) Responsibilities of other public entities

(i) Responsibilities under other law

Notwithstanding subparagraph (B), if any public entity other than a designated State unit is obligated under Federal or State law, or assigned responsibility under State policy or under this paragraph, to provide or pay for any services that are also considered to be vocational rehabilitation services (other than those specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title), such public entity shall fulfill that obligation or responsibility, either directly or by contract or other arrangement.

(ii) Reimbursement

If a public entity other than the designated State unit fails to provide or pay for the services described in clause (i) for an eligible individual, the designated State unit shall provide or pay for such services to the individual. Such designated State unit may claim reimbursement for the services from the public entity that failed to provide or pay for such services. Such public entity shall reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in this paragraph according to the procedures established in such agreement or mechanism pursuant to subparagraph (B)(ii).

(D) Methods

The Governor of a State may meet the requirements of subparagraph (B) through--

(i) a State statute or regulation;

(ii) a signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity relating to the provision of services; or

(iii) another appropriate method, as determined by the designated State unit.

(9) Individualized plan for employment

(A) Development and implementation

The State plan shall include an assurance that an individualized plan for employment meeting the requirements of section 722(b) of this title will be developed and implemented in a timely manner for an individual subsequent to the determination of the eligibility of the individual for services under this subchapter, except that in a State operating under an order of selection described in paragraph (5), the plan will be developed and implemented only for individuals meeting the order of selection criteria of the State.

(B) Provision of services

The State plan shall include an assurance that such services will be provided in accordance with the provisions of the individualized plan for employment.

(10) Reporting requirements

(A) In general

The State plan shall include an assurance that the designated State agency will submit reports in the form and level of detail and at the time required by the Commissioner regarding applicants for, and eligible individuals receiving, services under this subchapter.

(B) Annual reporting

In specifying the information to be submitted in the reports, the Commissioner shall require annual reporting on the eligible individuals receiving the services, on those specific data elements described in section 136(d)(2) of the Workforce Investment Act of 1998 [29 U.S.C. 2871(d)(2)] that are determined by the Secretary to be relevant in assessing the performance of designated State units in carrying out the vocational rehabilitation program established under this subchapter.

(C) Additional data

In specifying the information required to be submitted in the reports, the Commissioner shall require additional data with regard to applicants and eligible individuals related to--

(i) the number of applicants and the number of individuals determined to be eligible or ineligible for the program carried out under this subchapter, including--

(I) the number of individuals determined to be ineligible because they did not require vocational rehabilitation services, as provided in section 722(a) of this title; and

(II) the number of individuals determined, on the basis of clear and convincing evidence, to be too severely disabled to benefit in terms of an employment outcome from vocational rehabilitation services;

(ii) the number of individuals who received vocational rehabilitation services through the program, including--

(I) the number who received services under paragraph (5)(D), but not assistance under an individualized plan for employment;

(II) of those recipients who are individuals with significant disabilities, the number who received assistance under an individualized plan for employment consistent with section 722(b) of this title; and

(III) of those recipients who are not individuals

with significant disabilities, the number who received assistance under an individualized plan for employment consistent with section 722(b) of this title;

(iii) of those applicants and eligible recipients who are individuals with significant disabilities--

(I) the number who ended their participation in the program carried out under this subchapter and the number who achieved employment outcomes after receiving vocational rehabilitation services; and

(II) the number who ended their participation in the program and who were employed 6 months and 12 months after securing or regaining employment, or, in the case of individuals whose employment outcome was to retain or advance in employment, who were employed 6 months and 12 months after achieving their employment outcome, including--

(aa) the number who earned the minimum wage rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or another wage level set by the Commissioner, during such employment; and

(bb) the number who received employment benefits from an employer during such employment; and

(iv) of those applicants and eligible recipients who are not individuals with significant disabilities--

(I) the number who ended their participation in the program carried out under this subchapter and the number who achieved employment outcomes after receiving vocational rehabilitation services; and

(II) the number who ended their participation in the program and who were employed 6 months and 12 months after securing or regaining employment, or, in the case of individuals whose employment outcome was to retain or advance in employment, who were employed 6 months and 12 months after achieving their employment outcome, including--

(aa) the number who earned the minimum wage rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or another wage level set by the Commissioner, during such employment; and

(bb) the number who received employment benefits from an employer during such employment.

(D) Costs and results

The Commissioner shall also require that the designated State agency include in the reports information on--

(i) the costs under this subchapter of conducting administration, providing assessment services, counseling and guidance, and other direct services provided by designated State agency staff, providing services purchased

under individualized plans for employment, supporting small business enterprises, establishing, developing, and improving community rehabilitation programs, providing other services to groups, and facilitating use of other programs under this chapter and title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] by eligible individuals; and

(ii) the results of annual evaluation by the State of program effectiveness under paragraph (15)(E).

(E) Additional information

The Commissioner shall require that each designated State unit include in the reports additional information related to the applicants and eligible individuals, obtained either through a complete count or sampling, including--

(i) information on--

(I) age, gender, race, ethnicity, education, category of impairment, severity of disability, and whether the individuals are students with disabilities;

(II) dates of application, determination of eligibility or ineligibility, initiation of the individualized plan for employment, and termination of participation in the program;

(III) earnings at the time of application for the program and termination of participation in the program;

(IV) work status and occupation;

(V) types of services, including assistive technology services and assistive technology devices, provided under the program;

(VI) types of public or private programs or agencies that furnished services under the program; and

(VII) the reasons for individuals terminating participation in the program without achieving an employment outcome; and

(ii) information necessary to determine the success of the State in meeting--

(I) the State performance measures established under section 136(b) of the Workforce Investment Act of 1998 [29 U.S.C. 2871(b)], to the extent the measures are applicable to individuals with disabilities; and

(II) the standards and indicators established pursuant to section 726 of this title.

(F) Completeness and confidentiality

The State plan shall include an assurance that the information submitted in the reports will include a complete count, except as provided in subparagraph (E), of the applicants and eligible individuals, in a manner permitting the greatest possible cross-classification of data and that the identity of each individual for which information is supplied under this paragraph will be kept confidential.

(11) Cooperation, collaboration, and coordination

(A) Cooperative agreements with other components of statewide workforce investment systems

The State plan shall provide that the designated State unit or designated State agency shall enter into a cooperative agreement with other entities that are components of the statewide workforce investment system of the State, regarding the system, which agreement may provide for--

(i) provision of intercomponent staff training and technical assistance with regard to--

(I) the availability and benefits of, and information on eligibility standards for, vocational rehabilitation services; and

(II) the promotion of equal, effective, and meaningful participation by individuals with disabilities in workforce investment activities in the State through the promotion of program accessibility, the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology, for individuals with disabilities;

(ii) use of information and financial management systems that link all components of the statewide workforce investment system, that link the components to other electronic networks, including nonvisual electronic networks, and that relate to such subjects as employment statistics, and information on job vacancies, career planning, and workforce investment activities;

(iii) use of customer service features such as common intake and referral procedures, customer databases, resource information, and human services hotlines;

(iv) establishment of cooperative efforts with employers to--

(I) facilitate job placement; and

(II) carry out any other activities that the designated State unit and the employers determine to be appropriate;

(v) identification of staff roles, responsibilities, and available resources, and specification of the financial responsibility of each component of the statewide workforce investment system with regard to paying for necessary services (consistent with State law and Federal requirements); and

(vi) specification of procedures for resolving disputes among such components.

(B) Replication of cooperative agreements

The State plan shall provide for the replication of such

cooperative agreements at the local level between individual offices of the designated State unit and local entities carrying out activities through the statewide workforce investment system.

(C) Interagency cooperation with other agencies

The State plan shall include descriptions of interagency cooperation with, and utilization of the services and facilities of, Federal, State, and local agencies and programs, including programs carried out by the Under Secretary for Rural Development of the Department of Agriculture and State use contracting programs, to the extent that such agencies and programs are not carrying out activities through the statewide workforce investment system.

(D) Coordination with education officials

The State plan shall contain plans, policies, and procedures for coordination between the designated State agency and education officials responsible for the public education of students with disabilities, that are designed to facilitate the transition of the students with disabilities from the receipt of educational services in school to the receipt of vocational rehabilitation services under this subchapter, including information on a formal interagency agreement with the State educational agency that, at a minimum, provides for--

(i) consultation and technical assistance to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including vocational rehabilitation services;

(ii) transition planning by personnel of the designated State agency and educational agency personnel for students with disabilities that facilitates the development and completion of their individualized education programs under section 614(d) of the Individuals with Disabilities Education Act [20 U.S.C. 1414(d)];

(iii) the roles and responsibilities, including financial responsibilities, of each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services; and

(iv) procedures for outreach to and identification of students with disabilities who need the transition services.

(E) Coordination with Statewide Independent Living Councils and independent living centers

The State plan shall include an assurance that the designated State unit, the Statewide Independent Living Council established under section 796d of this title, and the independent living centers described in subpart 3 \1\ of part A of subchapter VII of this chapter within the State have developed working relationships and coordinate their activities.

\1\ See References in Text note below.

(F) Cooperative agreement with recipients of grants for services to American Indians

In applicable cases, the State plan shall include an assurance that the State has entered into a formal cooperative agreement with each grant recipient in the State that receives funds under part C of this subchapter. The agreement shall describe strategies for collaboration and coordination in providing vocational rehabilitation services to American Indians who are individuals with disabilities, including--

(i) strategies for interagency referral and information sharing that will assist in eligibility determinations and the development of individualized plans for employment;

(ii) procedures for ensuring that American Indians who are individuals with disabilities and are living near a reservation or tribal service area are provided vocational rehabilitation services; and

(iii) provisions for sharing resources in cooperative studies and assessments, joint training activities, and other collaborative activities designed to improve the provision of services to American Indians who are individuals with disabilities.

(12) Residency

The State plan shall include an assurance that the State will not impose a residence requirement that excludes from services provided under the plan any individual who is present in the State.

(13) Services to American Indians

The State plan shall include an assurance that, except as otherwise provided in part C of this subchapter, the designated State agency will provide vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides such services to other significant populations of individuals with disabilities residing in the State.

(14) Annual review of individuals in extended employment or other employment under special certificate provisions of the Fair Labor Standards Act of 1938

The State plan shall provide for--

(A) an annual review and reevaluation of the status of each individual with a disability served under this subchapter who has achieved an employment outcome either in an extended employment setting in a community rehabilitation program or any other employment under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) for 2 years after the achievement of the outcome (and thereafter if requested by the individual or, if

appropriate, the individual's representative), to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment;

(B) input into the review and reevaluation, and a signed acknowledgment that such review and reevaluation have been conducted, by the individual with a disability, or, if appropriate, the individual's representative; and

(C) maximum efforts, including the identification and provision of vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individuals described in subparagraph (A) in engaging in competitive employment.

(15) Annual State goals and reports of progress

(A) Assessments and estimates

The State plan shall--

(i) include the results of a comprehensive, statewide assessment, jointly conducted by the designated State unit and the State Rehabilitation Council (if the State has such a Council) every 3 years, describing the rehabilitation needs of individuals with disabilities residing within the State, particularly the vocational rehabilitation services needs of--

(I) individuals with the most significant disabilities, including their need for supported employment services;

(II) individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program carried out under this subchapter; and

(III) individuals with disabilities served through other components of the statewide workforce investment system (other than the vocational rehabilitation program), as identified by such individuals and personnel assisting such individuals through the components;

(ii) include an assessment of the need to establish, develop, or improve community rehabilitation programs within the State; and

(iii) provide that the State shall submit to the Commissioner a report containing information regarding updates to the assessments, for any year in which the State updates the assessments.

(B) Annual estimates

The State plan shall include, and shall provide that the State shall annually submit a report to the Commissioner that includes, State estimates of--

(i) the number of individuals in the State who are eligible for services under this subchapter;

(ii) the number of such individuals who will receive services provided with funds provided under part B of this subchapter and under part B of subchapter VI of this chapter, including, if the designated State agency uses an order of selection in accordance with paragraph (5), estimates of the number of individuals to be served under each priority category within the order; and

(iii) the costs of the services described in clause (i), including, if the designated State agency uses an order of selection in accordance with paragraph (5), the service costs for each priority category within the order.

(C) Goals and priorities

(i) In general

The State plan shall identify the goals and priorities of the State in carrying out the program. The goals and priorities shall be jointly developed, agreed to, and reviewed annually by the designated State unit and the State Rehabilitation Council, if the State has such a Council. Any revisions to the goals and priorities shall be jointly agreed to by the designated State unit and the State Rehabilitation Council, if the State has such a Council. The State plan shall provide that the State shall submit to the Commissioner a report containing information regarding revisions in the goals and priorities, for any year in which the State revises the goals and priorities.

(ii) Basis

The State goals and priorities shall be based on an analysis of--

(I) the comprehensive assessment described in subparagraph (A), including any updates to the assessment;

(II) the performance of the State on the standards and indicators established under section 726 of this title; and

(III) other available information on the operation and the effectiveness of the vocational rehabilitation program carried out in the State, including any reports received from the State Rehabilitation Council, under section 725(c) of this title and the findings and recommendations from monitoring activities conducted under section 727 of this title.

(iii) Service and outcome goals for categories in order of selection

If the designated State agency uses an order of selection in accordance with paragraph (5), the State shall also identify in the State plan service and outcome goals and the time within which these goals may be achieved for

individuals in each priority category within the order.

(D) Strategies

The State plan shall contain a description of the strategies the State will use to address the needs identified in the assessment conducted under subparagraph (A) and achieve the goals and priorities identified in subparagraph (C), including--

(i) the methods to be used to expand and improve services to individuals with disabilities, including how a broad range of assistive technology services and assistive technology devices will be provided to such individuals at each stage of the rehabilitation process and how such services and devices will be provided to such individuals on a statewide basis;

(ii) outreach procedures to identify and serve individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program;

(iii) where necessary, the plan of the State for establishing, developing, or improving community rehabilitation programs;

(iv) strategies to improve the performance of the State with respect to the evaluation standards and performance indicators established pursuant to section 726 of this title; and

(v) strategies for assisting entities carrying out other components of the statewide workforce investment system (other than the vocational rehabilitation program) in assisting individuals with disabilities.

(E) Evaluation and reports of progress

The State plan shall--

(i) include the results of an evaluation of the effectiveness of the vocational rehabilitation program, and a joint report by the designated State unit and the State Rehabilitation Council, if the State has such a Council, to the Commissioner on the progress made in improving the effectiveness from the previous year, which evaluation and report shall include--

(I) an evaluation of the extent to which the goals identified in subparagraph (C) were achieved;

(II) a description of strategies that contributed to achieving the goals;

(III) to the extent to which the goals were not achieved, a description of the factors that impeded that achievement; and

(IV) an assessment of the performance of the State on the standards and indicators established pursuant to section 726 of this title; and

(ii) provide that the designated State unit and the State Rehabilitation Council, if the State has such a

Council, shall jointly submit to the Commissioner an annual report that contains the information described in clause (i).

(16) Public comment

The State plan shall--

(A) provide that the designated State agency, prior to the adoption of any policies or procedures governing the provision of vocational rehabilitation services under the State plan (including making any amendment to such policies and procedures), shall conduct public meetings throughout the State, after providing adequate notice of the meetings, to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures, and actively consult with the Director of the client assistance program carried out under section 732 of this title, and, as appropriate, Indian tribes, tribal organizations, and Native Hawaiian organizations on the policies or procedures; and

(B) provide that the designated State agency (or each designated State agency if two agencies are designated) and any sole agency administering the plan in a political subdivision of the State, shall take into account, in connection with matters of general policy arising in the administration of the plan, the views of--

(i) individuals and groups of individuals who are recipients of vocational rehabilitation services, or in appropriate cases, the individuals' representatives;

(ii) personnel working in programs that provide vocational rehabilitation services to individuals with disabilities;

(iii) providers of vocational rehabilitation services to individuals with disabilities;

(iv) the director of the client assistance program; and

(v) the State Rehabilitation Council, if the State has such a Council.

(17) Use of funds for construction of facilities

The State plan shall provide that if, under special circumstances, the State plan includes provisions for the construction of facilities for community rehabilitation programs--

(A) the Federal share of the cost of construction for the facilities for a fiscal year will not exceed an amount equal to 10 percent of the State's allotment under section 730 of this title for such year;

(B) the provisions of section 776 of this title (as in effect on the day before August 7, 1998) shall be applicable to such construction and such provisions shall be deemed to apply to such construction; and

(C) there shall be compliance with regulations the Commissioner shall prescribe designed to assure that no State will reduce its efforts in providing other vocational rehabilitation services (other than for the establishment of

facilities for community rehabilitation programs) because the plan includes such provisions for construction.

(18) Innovation and expansion activities

The State plan shall--

(A) include an assurance that the State will reserve and use a portion of the funds allotted to the State under section 730 of this title--

(i) for the development and implementation of innovative approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities under this subchapter, particularly individuals with the most significant disabilities, consistent with the findings of the statewide assessment and goals and priorities of the State as described in paragraph (15); and

(ii) to support the funding of--

(I) the State Rehabilitation Council, if the State has such a Council, consistent with the plan prepared under section 725(d)(1) of this title; and

(II) the Statewide Independent Living Council, consistent with the plan prepared under section 796d(e)(1) of this title;

(B) include a description of how the reserved funds will be utilized; and

(C) provide that the State shall submit to the Commissioner an annual report containing a description of how the reserved funds were utilized during the preceding year.

(19) Choice

The State plan shall include an assurance that applicants and eligible individuals or, as appropriate, the applicants' representatives or individuals' representatives, will be provided information and support services to assist the applicants and individuals in exercising informed choice throughout the rehabilitation process, consistent with the provisions of section 722(d) of this title.

(20) Information and referral services

(A) In general

The State plan shall include an assurance that the designated State agency will implement an information and referral system adequate to ensure that individuals with disabilities will be provided accurate vocational rehabilitation information and guidance, using appropriate modes of communication, to assist such individuals in preparing for, securing, retaining, or regaining employment, and will be appropriately referred to Federal and State programs (other than the vocational rehabilitation program carried out under this subchapter), including other components of the statewide

workforce investment system in the State.

(B) Referrals

An appropriate referral made through the system shall--
(i) be to the Federal or State programs, including programs carried out by other components of the statewide workforce investment system in the State, best suited to address the specific employment needs of an individual with a disability; and
(ii) include, for each of these programs, provision to the individual of--
(I) a notice of the referral by the designated State agency to the agency carrying out the program;
(II) information identifying a specific point of contact within the agency carrying out the program; and
(III) information and advice regarding the most suitable services to assist the individual to prepare for, secure, retain, or regain employment.

(21) State independent consumer-controlled commission; State Rehabilitation Council

(A) Commission or Council

The State plan shall provide that either--
(i) the designated State agency is an independent commission that--
(I) is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State;
(II) is consumer-controlled by persons who--
(aa) are individuals with physical or mental impairments that substantially limit major life activities; and
(bb) represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind;

(III) includes family members, advocates, or other representatives, of individuals with mental impairments; and
(IV) undertakes the functions set forth in section 725(c)(4) of this title; or

(ii) the State has established a State Rehabilitation Council that meets the criteria set forth in section 725 of this title and the designated State unit--
(I) in accordance with paragraph (15), jointly develops, agrees to, and reviews annually State goals and priorities, and jointly submits annual reports of progress with the Council;
(II) regularly consults with the Council regarding

the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services;

(III) includes in the State plan and in any revision to the State plan, a summary of input provided by the Council, including recommendations from the annual report of the Council described in section 725(c)(5) of this title, the review and analysis of consumer satisfaction described in section 725(c)(4) of this title, and other reports prepared by the Council, and the response of the designated State unit to such input and recommendations, including explanations for rejecting any input or recommendation; and

(IV) transmits to the Council--

(aa) all plans, reports, and other information required under this subchapter to be submitted to the Secretary;

(bb) all policies, and information on all practices and procedures, of general applicability provided to or used by rehabilitation personnel in carrying out this subchapter; and

(cc) copies of due process hearing decisions issued under this subchapter, which shall be transmitted in such a manner as to ensure that the identity of the participants in the hearings is kept confidential.

(B) More than one designated State agency

In the case of a State that, under subsection (a)(2) of this section, designates a State agency to administer the part of the State plan under which vocational rehabilitation services are provided for individuals who are blind (or to supervise the administration of such part by a local agency) and designates a separate State agency to administer the rest of the State plan, the State shall either establish a State Rehabilitation Council for each of the two agencies that does not meet the requirements in subparagraph (A)(i), or establish one State Rehabilitation Council for both agencies if neither agency meets the requirements of subparagraph (A)(i).

(22) Supported employment State plan supplement

The State plan shall include an assurance that the State has an acceptable plan for carrying out part B of subchapter VI of this chapter, including the use of funds under that part to supplement funds made available under part B of this subchapter to pay for the cost of services leading to supported employment.

(23) Annual updates

The plan shall include an assurance that the State will submit to the Commissioner reports containing annual updates of the

information required under paragraph (7) (relating to a comprehensive system of personnel development) and any other updates of the information required under this section that are requested by the Commissioner, and annual reports as provided in paragraphs (15) (relating to assessments, estimates, goals and priorities, and reports of progress) and (18) (relating to innovation and expansion), at such time and in such manner as the Secretary may determine to be appropriate.

(24) Certain contracts and cooperative agreements

(A) Contracts with for-profit organizations

The State plan shall provide that the designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under part A of subchapter VI of this chapter, upon a determination by such agency that such for-profit organizations are better qualified to provide such rehabilitation services than nonprofit agencies and organizations.

(B) Cooperative agreements with private nonprofit organizations

The State plan shall describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

(b) Approval; disapproval of the State plan

(1) Approval

The Commissioner shall approve any plan that the Commissioner finds fulfills the conditions specified in this section, and shall disapprove any plan that does not fulfill such conditions.

(2) Disapproval

Prior to disapproval of the State plan, the Commissioner shall notify the State of the intention to disapprove the plan and shall afford the State reasonable notice and opportunity for a hearing.

(Pub. L. 93-112, title I, Sec. 101, as added Pub. L. 105-220, title IV, Sec. 404, Aug. 7, 1998, 112 Stat. 1119; amended Pub. L. 105-277, div. A, Sec. 101(f) [title VIII, Sec. 402(c)(4)], Oct. 21, 1998, 112 Stat. 2681-337, 2681-415; Pub. L. 108-446, title III, Sec. 305(h)(1), Dec. 3, 2004, 118 Stat. 2805.)

References in Text

The Architectural Barriers Act of 1968, referred to in subsec. (a)(6)(C), is Pub. L. 90-480, Aug. 12, 1968, 82 Stat. 718, as amended, which is classified generally to chapter 51 (Sec. 4151 et seq.) of Title

42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4151 of Title 42 and Tables.

The Americans with Disabilities Act of 1990, referred to in subsec. (a)(6)(C), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327, as amended, which is classified principally to chapter 126 (Sec. 12101 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

The Individuals with Disabilities Education Act, referred to in subsec. (a)(7)(A)(ii), is title VI of Pub. L. 91-230, Apr. 13, 1970, 84 Stat. 175, as amended, which is classified generally to chapter 33 (Sec. 1400 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see section 1400 of Title 20 and Tables.

The Rehabilitation Act Amendments of 1998, referred to in subsec. (a)(7)(A)(v)(II), is title IV of Pub. L. 105-220, Aug. 7, 1998, 112 Stat. 1092. For complete classification of this Act to the Code, see Short Title of 1998 Amendment note set out under section 701 of this title and Tables.

The Workforce Investment Act of 1998, referred to in subsec. (a)(10)(D)(i), is Pub. L. 105-220, Aug. 7, 1998, 112 Stat. 936, as amended. Title I of the Act is classified principally to chapter 30 (Sec. 2801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 9201 of Title 20, Education, and Tables.

Subpart 3 of part A of subchapter VII of this chapter, referred to in subsec. (a)(11)(E), was in the original a reference to ``part C of title VII'', meaning part C of title VII of the Rehabilitation Act of 1973, and was translated as if it referred to part C of chapter I of title VII of the Act to reflect the probable intent of Congress.

Prior Provisions

A prior section 721, Pub. L. 93-112, title I, Sec. 101, Sept. 26, 1973, 87 Stat. 363; Pub. L. 93-516, title I, Sec. 111(b)-(d), Dec. 7, 1974, 88 Stat. 1619, 1620; Pub. L. 93-651, title I, Sec. 111(b)-(d), Nov. 21, 1974, 89 Stat. 2-5; Pub. L. 95-602, title I, Secs. 102, 122(b)(1), Nov. 6, 1978, 92 Stat. 2957, 2987; Pub. L. 98-221, title I, Sec. 104(a)(2), Feb. 22, 1984, 98 Stat. 18; Pub. L. 98-524, Sec. 4(f), Oct. 19, 1984, 98 Stat. 2489; Pub. L. 99-506, title I, Sec. 103(d)(2), title II, Sec. 202, title X, Sec. 1001(b)(1)-(4), Oct. 21, 1986, 100 Stat. 1810, 1814, 1841, 1842; Pub. L. 100-630, title II, Sec. 202(b), Nov. 7, 1988, 102 Stat. 3304; Pub. L. 102-54, Sec. 13(k)(1)(A), June 13, 1991, 105 Stat. 276; Pub. L. 102-119, Sec. 26(e), Oct. 7, 1991, 105 Stat. 607; Pub. L. 102-569, title I, Secs. 102(o), (p)(7), 122, Oct. 29, 1992, 106 Stat. 4355, 4356, 4367; Pub. L. 103-73, title I, Secs. 102(2), 107(a), Aug. 11, 1993, 107 Stat. 718, 719; Pub. L. 104-106, div. D, title XLIII, Sec. 4321(i)(7), Feb. 10, 1996, 110 Stat. 676, related to State plans, prior to the general amendment of this subchapter by Pub. L. 105-220.

Amendments

2004--Subsec. (a)(11)(D)(ii). Pub. L. 108-446 struck out ``(as added by section 101 of Public Law 105-17)'' before semicolon at end.

1998--Subsec. (a)(18)(C). Pub. L. 105-277, Sec. 101(f) [title VIII, Sec. 402(c)(4)(A)], substituted ``were utilized during the preceding year'' for ``will be utilized''.

Subsec. (a)(21)(A)(i)(II)(bb). Pub. L. 105-277, Sec. 101(f) [title VIII, Sec. 402(c)(4)(B)], substituted ``commission'' for ``Commission''.

TITLE 29--LABOR

CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES

SUBCHAPTER V--RIGHTS AND ADVOCACY

Sec. 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, 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.

(b) ``Program or activity'' defined

For the purposes of this section, the term ``program or activity'' means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(Pub. L. 93-112, title V, Sec. 504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, Secs. 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, Sec. 103(d)(2)(B), title X, Sec. 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, Sec. 4, Mar. 22, 1988, 102 Stat. 29; Pub. L. 100-630, title II, Sec. 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, Sec. 102(p)(32), title V, Sec. 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub. L. 103-382, title III, Sec. 394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub. L. 105-220, title IV, Sec. 408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub. L. 107-110, title X, Sec. 1076(u)(2), Jan. 8, 2002, 115 Stat. 2093.)

References in Text

The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in subsec. (a), mean the amendments made by Pub. L. 95-602. See 1978 Amendments note below.

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327, as amended. Title

I of the Act is classified generally to subchapter I (Sec. 12111 et seq.) of chapter 126 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

Amendments

2002--Subsec. (b)(2)(B). Pub. L. 107-110 substituted ``section 7801 of title 20'' for ``section 8801 of title 20''.

1998--Subsec. (a). Pub. L. 105-220 substituted ``section 705(20)'' for ``section 706(8)''.

1994--Subsec. (b)(2)(B). Pub. L. 103-382 substituted ``section 8801 of title 20'' for ``section 2891(12) of title 20''.

1992--Subsec. (a). Pub. L. 102-569, Sec. 102(p)(32), substituted ``a disability'' for ``handicaps'' and ``disability'' for ``handicap'' in first sentence.

Subsec. (d). Pub. L. 102-569, Sec. 506, added subsec. (d).

1988--Subsec. (a). Pub. L. 100-630, Sec. 206(d)(1), substituted ``her or his handicap'' for ``his handicap''.

Pub. L. 100-259, Sec. 4(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub. L. 100-259, Sec. 4(2), added subsec. (b).

Subsec. (b)(2)(B). Pub. L. 100-630, Sec. 206(d)(2), substituted ``section 2891(12) of title 20'' for ``section 2854(a)(10) of title 20''.

Subsec. (c). Pub. L. 100-259, Sec. 4(2), added subsec. (c).

1986--Pub. L. 99-506 substituted ``individual with handicaps'' for ``handicapped individual'' and ``section 706(8) of this title'' for ``section 706(7) of this title''.

1978--Pub. L. 95-602 substituted ``section 706(7) of this title'' for ``section 706(6) of this title'' and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107-110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107-110, set out as an Effective Date note under section 6301 of Title 20, Education.

Exclusion From Coverage

Amendment by Pub. L. 100-259 not to be construed to extend application of this chapter to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100-259, set out as a Construction note under section 1687 of Title 20, Education.

Abortion Neutrality

Amendment by Pub. L. 100-259 not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100-259, set out as a note under section 1688 of Title 20, Education.

Construction of Prohibition Against Discrimination Under Federal Grants

Rights or protections of this section not affected by any provision of Pub. L. 98-457, see section 127 of Pub. L. 98-457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

Coordination of Implementation and Enforcement of Provisions

For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1-201 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

Executive Order No. 11914

Ex. Ord. No. 11914, Apr. 28, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, 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) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) 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) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the 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.

(b) Purpose

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;

(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.

(Pub. L. 101-336, Sec. 2, July 26, 1990, 104 Stat. 328.)

References in Text

This chapter, referred to in subsec. (b), was in the original ``this Act'', meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

Short Title

Section 1(a) of Pub. L. 101-336 provided that: ``This Act [enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title] may be cited as the `Americans with Disabilities Act of 1990'.''

Study by General Accounting Office of Existing Disability-Related Employment Incentives

Pub. L. 106-170, title III, Sec. 303(a), Dec. 17, 1999, 113 Stat.

1903, provided that, as soon as practicable after Dec. 17, 1999, the Comptroller General was to undertake a study to assess existing tax credits and other disability-related employment incentives under the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and other Federal laws, specifically addressing the extent to which such credits and other incentives would encourage employers to hire and retain individuals with disabilities; and that, not later than 3 years after Dec. 17, 1999, the Comptroller General was to transmit to the appropriate congressional committees a written report presenting the results of the study and any appropriate recommendations for legislative or administrative changes.

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TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term ``auxiliary aids and services'' includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term ``disability'' means, with respect to an individual--

(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.

(3) State

The term ``State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub. L. 101-336, Sec. 3, July 26, 1990, 104 Stat. 329.)

Termination of Trust Territory of the Pacific Islands

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II--PUBLIC SERVICES

Part A--Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity

The term ``public entity'' means--

(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 24102(4) \1\ of title 49).

\1\ See References in Text note below.

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(2) Qualified individual with a disability

The term ``qualified individual with a disability'' means 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.

(Pub. L. 101-336, title II, Sec. 201, July 26, 1990, 104 Stat. 337.)

References in Text

Section 24102 of title 49, referred to in par. (1)(C), was subsequently amended, and section 24102(4) no longer defines ``commuter authority''. However, such term is defined elsewhere in that section.

Codification

In par. (1)(C), ``section 24102(4) of title 49'' substituted for

``section 103(8) of the Rail Passenger Service Act'' on authority of Pub. L. 103-272, Sec. 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

Effective Date

Section 205 of Pub. L. 101-336 provided that:

``(a) General Rule.--Except as provided in subsection (b), this subtitle [subtitle A (Secs. 201-205) of title II of Pub. L. 101-336, enacting this part] shall become effective 18 months after the date of enactment of this Act [July 26, 1990].

``(b) Exception.--Section 204 [section 12134 of this title] shall become effective on the date of enactment of this Act.''

Ex. Ord. No. 13217. Community-Based Alternatives for Individuals With Disabilities

Ex. Ord. No. 13217, June 18, 2001, 66 F.R. 33155, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to place qualified individuals with disabilities in community settings whenever appropriate, it is hereby ordered as follows:

Section 1. Policy. This order is issued consistent with the following findings and principles:

(a) The United States is committed to community-based alternatives for individuals with disabilities and recognizes that such services advance the best interests of Americans.

(b) The United States seeks to ensure that America's community-based programs effectively foster independence and participation in the community for Americans with disabilities.

(c) Unjustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 [12131] et seq. States must avoid disability-based discrimination unless doing so would fundamentally alter the nature of the service, program, or activity provided by the State.

(d) In Olmstead v. L.C., 527 U.S. 581 (1999) (the ``Olmstead decision''), the Supreme Court construed Title II of the ADA [42 U.S.C. 12131 et seq.] to require States to place qualified individuals with mental disabilities in community settings, rather than in institutions, whenever treatment professionals determine that such placement is appropriate, the affected persons do not oppose such placement, and the State can reasonably accommodate the placement, taking into account the resources available to the State and the needs of others with disabilities.

(e) The Federal Government must assist States and localities to implement swiftly the Olmstead decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.

Sec. 2. Swift Implementation of the Olmstead Decision: Agency

Responsibilities. (a) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall work cooperatively to ensure that the Olmstead decision is implemented in a timely manner. Specifically, the designated agencies should work with States to help them assess their compliance with the Olmstead decision and the ADA [42 U.S.C. 12101 et seq.] in providing services to qualified individuals with disabilities in community-based settings, as long as such services are appropriate to the needs of those individuals. These agencies should provide technical guidance and work cooperatively with States to achieve the goals of Title II of the ADA [42 U.S.C. 12131 et seq.], particularly where States have chosen to develop comprehensive, effectively working plans to provide services to qualified individuals with disabilities in the most integrated settings. These agencies should also ensure that existing Federal resources are used in the most effective manner to support the goals of the ADA. The Secretary of Health and Human Services shall take the lead in coordinating these efforts.

(b) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall evaluate the policies, programs, statutes, and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. The review shall focus on identifying affected populations, improving the flow of information about supports in the community, and removing barriers that impede opportunities for community placement. The review should ensure the involvement of consumers, advocacy organizations, providers, and relevant agency representatives. Each agency head should report to the President, through the Secretary of Health and Human Services, with the results of their evaluation within 120 days.

(c) The Attorney General and the Secretary of Health and Human Services shall fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization. Whenever possible, the Department of Justice and the Department of Health and Human Services should work cooperatively with States to resolve these complaints, and should use alternative dispute resolution to bring these complaints to a quick and constructive resolution.

(d) The agency actions directed by this order shall be done consistent with this Administration's budget.

Sec. 3. Judicial Review. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

George W. Bush.

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TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II--PUBLIC SERVICES

Part A--Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12132. Discrimination

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.

(Pub. L. 101-336, title II, Sec. 202, July 26, 1990, 104 Stat. 337.)

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II--PUBLIC SERVICES

Part A--Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub. L. 101-336, title II, Sec. 203, July 26, 1990, 104 Stat. 337.)

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TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II--PUBLIC SERVICES

Part A--Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for ``program accessibility, existing facilities'', and ``communications'', regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to ``program accessibility, existing facilities'', and ``communications'', such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub. L. 101-336, title II, Sec. 204, July 26, 1990, 104 Stat. 337.)

References in Text

This chapter, referred to in subsec. (b), was in the original ``this Act'', meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

Effective Date

Section effective July 26, 1990, see section 205(b) of Pub. L. 101-336, set out as a note under section 12131 of this title.

FEDERAL REGULATIONS

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e-CFR Data is current as of August 29, 2008

Title 28: Judicial Administration

Browse Previous | Browse Next

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

Section Contents

Subpart A—General

Subpart B—General Requirements

Subpart C—Employment

Subpart D—Program Accessibility

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Title II, Pub. L. 101–336 (42 U.S.C. 12134).

Source: Order No. 1512–91, 56 FR 35716, July 26, 1991, unless otherwise noted.

Subpart A—General

top

§ 35.101 Purpose.

top

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

§ 35.102 Application.

top

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

§ 35.103 Relationship to other laws.

top

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

(b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

§ 35.104 Definitions.

top

For purposes of this part, the term—

Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes—

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee

compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, 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.

(1)(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment means*—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term *disability* does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of

Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term *illegal use of drugs* does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means 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.

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 35.105 Self-evaluation.

top

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the efects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation

implementing section 504 ofthe Rehabilitation Act of1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

(Approved by the Office of Management and Budget under control number 1190–0006)

[56 FR 35716, July26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§ 35.106 Notice.

top

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

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

top

(a) *Designation of responsible employee.*A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including anyinvestigation of any complaint communicated to it alleging its noncompliance with this part or alleging anyactions that would be prohibited bythis part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited bythis part.

§§ 35.108-35.129 [Reserved]

top

Subpart B—General Requirements

top

§ 35.130 General prohibitions against discrimination.

top

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis ofdisability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid,

benefit, or service that is not equal to that aforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

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

(v) Aid or perpetuate discrimination against a qualifed individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

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

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or diferent, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certifed entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certifed by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the

service, program, or activity being offered.

(c) Nothing in this part prohibits a public entityfrom providing benefits, services, or advantages to individuals with disabilities, or to a particular class ofindividuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs ofqualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

§ 35.131 Illegal use of drugs.

top

(a) *General.* (1) Except as provided in paragraph (b) ofthis section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis ofillegal use of drugs against an individual who is not engaging in current illegal use ofdrugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.*(1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis ofthat individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing.* (1) This part does not prohibit a public entityfrom adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use ofdrugs is not now engaging in current illegal use ofdrugs.

(2) Nothing in paragraph (c) ofthis section shall be construedto encourage, prohibit, restrict, or authorize the conduct oftesting for the illegal use of drugs.

§ 35.132 Smoking.

top

This part does not preclude the prohibition of or the imposition of restrictions on, smoking in transportation covered by this part.

§ 35.133 Maintenance of accessible features.

top

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§ 35.134 Retaliation or coercion.

top

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

§ 35.135 Personal devices and services.

top

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study, or services of a personal nature including assistance in eating, toileting, or dressing.

§§ 35.136-35.139 [Reserved]

top

Subpart C—Employment

top

§ 35.140 Employment discrimination prohibited.

top

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of

the Equal Employment Opportunity Commission in 29 CFR part 1630 apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

§§ 35.141-35.148 [Reserved]

top

Subpart D—Program Accessibility

top

§ 35.149 Discrimination prohibited.

top

Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.

§ 35.150 Existing facilities.

top

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods*—(1) *General.* A public entity may comply with the requirements of this section 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 accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing

facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of §35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

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

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

(Approved by the Office of Management and Budget under control number 1190–0004)

[56 FR 35716, July 26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§ 35.151 New construction and alterations.

top

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable byindividuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration offacilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendixA to 41 CFR part 101–19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic properties.* (1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of §35.150.

(e) *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at anyintersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694–93, 58 FR 17521, Apr. 5, 1993]

§§ 35.152-35.159 [Reserved]

top

Subpart E—Communications

top

§ 35.160 General.

top

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests ofthe individual with disabilities.

§ 35.161 Telecommunication devices for the deaf (TDD's).

top

Where a public entity communicates by telephone with applicants and beneficiaries, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

§ 35.162 Telephone emergency services.

top

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

§ 35.163 Information and signage.

top

(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 35.164 Duties.

top

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

§§ 35.165-35.169 [Reserved]

top

Subpart F—Compliance Procedures

top

§ 35.170 Complaints.

top

(a) *Who may file.* An individual who believes that he or she or a specifc class of individuals has been subjected to discrimination on the basis ofdisability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file.* An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

§ 35.171 Acceptance of complaints.

top

(a) *Receipt of complaints.* (1)(i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

(ii) If the agency does not have section 504 jurisdiction, it shall promptly determine whether it is the designated agency under subpart G of this part responsible for complaints filed against that public entity.

(2)(i) If an agency other than the Department of Justice determines that it does not have section 504 jurisdiction and is not the designated agency it shall promptly refer the complaint, and notify the complainant that it is referring the complaint to the Department of Justice.

(ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it shall refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

(3)(i) If the agency that receives a complaint has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the agency that receives a complaint does not have section 504 jurisdiction, but is the designated agency, it shall process the complaint according to the procedures established by this subpart.

(b) *Employment complaints.* (1) If a complaint alleges employment discrimination subject to title I of the Act, and the agency has section 504 jurisdiction, the agency shall follow the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.

(2) If a complaint alleges employment discrimination subject to title I of the Act, and the designated agency does not have section 504 jurisdiction, the agency shall refer the complaint to the Equal Employment Opportunity Commission for processing under title I of the Act.

(3) Complaints alleging employment discrimination subject to this part, but not to title I of the Act shall be processed in accordance with the procedures established by this subpart.

(c) *Complete complaints.* (1) A designated agency shall accept all complete complaints under this section and shall promptly notify the complainant and the public entity of the receipt and acceptance of the complaint.

(2) If the designated agency receives a complaint that is not complete, it shall notify the complainant and specify the additional information that is needed to make the complaint a complete complaint. If the complainant fails to complete the complaint, the designated agency shall close the complaint without prejudice.

§ 35.172 Resolution of complaints.

top

(a) The designated agency shall investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) Notice of the rights available under paragraph (b) of this section.

(b) If the designated agency finds noncompliance, the procedures in §§35.173 and 35.174 shall be followed. At any time, the complainant may file a private suit pursuant to section 203 of the Act, whether or not the designated agency finds a violation.

§ 35.173 Voluntary compliance agreements.

top

(a) When the designated agency issues a noncompliance Letter of Findings, the designated agency shall—

(1) Notify the Assistant Attorney General by forwarding a copy of the Letter of Findings to the Assistant Attorney General; and

(2) Initiate negotiations with the public entity to secure compliance by voluntary means.

(b) Where the designated agency is able to secure voluntary compliance, the voluntary compliance agreement shall—

(1) Be in writing and signed by the parties;

(2) Address each cited violation;

(3) Specify the corrective or remedial action to be taken, within a stated period of time, to come into compliance;

(4) Provide assurance that discrimination will not recur; and

(5) Provide for enforcement by the Attorney General.

§ 35.174 Referral.

top

If the 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 with a recommendation for appropriate action.

§ 35.175 Attorney's fees.

top

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and theUnited States shall be liable for the foregoing the same as a private individual.

§ 35.176 Alternative means of dispute resolution.

top

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 35.177 Effect of unavailability of technical assistance.

top

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including anyfailure in the development or dissemination of any technical assistance manual authorized by the Act.

§ 35.178 State immunity.

top

A State shall not be immune under the eleventh amendment to the Constitution ofthe United States from an action in Federal or State court ofcompetent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against anypublic or private entity other than a State.

§§ 35.179-35.189 [Reserved]

top

Subpart G—Designated Agencies

top

§ 35.190 Designated agencies.

top

(a) 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 efective implementation of the requirements of this part.

(b) The Federal agencies listed in paragraph (b) (1) through(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(1) *Department of Agriculture:* All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.

(2) *Department of Education:* All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries.

(3) *Department of Health and Human Services:* All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and daycare programs.

(4) *Department of Housing and Urban Development:* All programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral.

(5) *Department of Interior:* All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.

(6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

(7) *Department of Labor:* All programs, services, and regulatory activities relating to labor and the work force.

(8) *Department of Transportation:* All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

(c) Responsibility for the implementation of subpart F of this part for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specifc designated agencies by paragraph (b) of this section may be assigned to other specifc agencies by the Department of Justice.

(d) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

§§ 35.191-35.999 [Reserved]

top

Appendix A to Part 35—Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991)

top

Note: For the convenience of the reader, this appendix contains the text of the preamble to the final regulation on nondiscrimination on the basis of disability in State and local government services beginning at the heading "Section-by-Section Analysis" and ending before "List of Subjects in 28 CFR Part 35" (56 FR 35696, July 26, 1991).

Section-by-Section Analysis

Subpart A—General

Section 35.101 Purpose

Section 35.101 states the purpose ofthe rule, which is to effectuate subtitle A oftitle II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B oftitle II of the Act.

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in §35.104. Section 504 ofthe Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in §35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations ofthe entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use ofthe entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

Paragraph (b) of §35.102 explains that to the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition ofvehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by §35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated bypublic entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commenters asked for clarification about the responsibilitiesof public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are opento parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

Section 35.103 Relationship to Other Laws

Section 35.103 is derived from sections 501 (a) and (b) ofthe ADA. Paragraph (a) ofthis section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790–94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II ofthe ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions ofState and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 51 (1990) (hereinafer "Judiciary report") ; Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) (hereinafter "Education and Labor report"). Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Paragraph (b) makes clear that Congress did not intend todisplace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted bytitle II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State lawthat allows compensatory and punitive damages for discrimination on the basis ofphysical disability, but not on the basis of mental disability. In that situation, the State lawwould provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. Insuch a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

Section 35.104 Definitions

"Act." The word "Act" is used in this part to refer to the Americans with Disabilities Act of 1990, Public Law 101–336, which is also referred to as the "ADA."

"Assistant Attorney General." The term "Assistant Attorney General" refers to the Assistant Attorney General of the Civil Rights Division of the Department of Justice.

"Auxiliary aids and services." Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. The proposed definition in §35.104 provided a list of examples of auxiliary aids and services that were taken from the definition of auxiliary aids and services in section 3 (1) of the ADA and were supplemented by examples from regulations implementing section 504 in federally conducted programs (see 28 CFR 39.103).

A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.

Subparagraph (1) lists several examples, which would be considered auxiliary aids and services to make aurally delivered materials available to individuals with hearing impairments. The Department has changed the phrase used in the proposedrules, "orally delivered materials," to the statutory phrase, "aurally delivered materials," to track section 3 ofthe ADA and to include non-verbal sounds and alarms, and computer generated speech.

The Department has added videotext displays, transcription services, and closed and open captioning to the list of examples. Videotext displays have become an important means of accessing auditory communications through a public address system. Transcription services are used to relay aurally delivered material almost simultaneously in written form to persons who are deaf or hearing-impaired.

This technology is often used at conferences, conventions, and hearings. While the proposed rule expressly included television decoder equipment as an auxiliary aid or service, it did not mention captioning itself. The final rule rectifies this omission by mentioning both closed and open captioning.

Several persons and organizations requested that the Department replace the term "telecommunications devices for deaf persons" or "TDD's" with the term "text telephone." The Department has declined to do so. The Department is aware that the Architectural and Transportation Barriers Compliance Board (ATBCB) has used the phrase "text telephone" in lieu of the statutory term "TDD" in its final accessibility guidelines. Title IV of the ADA, however, uses the term "Telecommunications Device for the Deaf" and the Department believes it would be inappropriate to abandon this statutory term at this time.

Several commenters urged the Department to include in the definition of "auxiliary aids and services" devices that are now available or that may become available with emerging technology. The Department declines to do so in the rule. The Department, however, emphasizes that, although the definition would include "state of the art" devices, public entities are not required to use the newest or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication.

Subparagraph (2) lists examples of aids and services for making visually delivered materials accessible to persons with visual impairments. Many commenters proposed additional examples, such as signage or mapping, audio description services, secondary auditory programs, telebraillers, and reading machines. While the Department declines to add these items to the list, they are auxiliary aids and services and may be appropriate depending on the circumstances.

Subparagraph (3) refers to acquisition or modification of equipment or devices. Several commenters suggested the addition of current technological innovations in microelectronics and computerized control systems (e.g., voice recognition systems, automatic dialing telephones, and infrared elevator and light control systems) to the list of auxiliary aids. The Department interprets auxiliary aids and services as those aids and services designed to provide effective communications, i.e., making aurally and visually delivered information available to persons with hearing, speech, and vision impairments. Methods of making services, programs, or activities accessible to, or usable by individuals with mobility or manual dexterity impairments are addressed by other sections of this part, including the provision for modifications in policies, practices, or procedures (§35.130 (b)(7)).

Paragraph (b)(4) deals with other similar services and actions. Several commenters asked for clarification that "similar services and actions" include retrieving items from shelves, assistance in reaching a marginally accessible seat, pushing a barrier aside in order to provide an accessible route, or assistance in removing a sweater or coat. While retrieving an item from a shelf might be an "auxiliary aid or service" for a blind person who could not locate the item without assistance, it might be a method of providing program access for a person using a wheelchair who could not reach the shelf or a reasonable modification to a self-service policy for an individual who lacked the ability to grasp the item. As explained above, auxiliary aids and services are those aids and services required to provide effective communications. Other forms of assistance are more appropriately addressed by other provisions of the final rule.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the Federal agency designated under subpart G as responsible for investigation of a complaint to initiate its investigation.

"Current illegal use of drugs." The phrase "current illegal use of drugs" is used in §35.131. Its meaning is discussed in the preamble for that section.

"Designated agency." The term "designated agency" is used to refer to the Federal agency designated under subpart G of this rule as responsible for carrying out the administrative enforcement responsibilities established by subpart F of the rule.

"Disability." The definition of the term "disability" is the same as the definition in the title III regulation codified at 28 CFR part 36. It is comparable to the definition of the term "individual with handicaps" in section 7(8) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare (HEW) in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of

"individual with handicaps" represents an effort by Congress to make use of up-to-date, currently accepted terminology. As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability(Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should one be attributed to this change inphraseology.

The term "disability" means, with respect to an individual—

(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. If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test A—A physical or mental impairment that substantially limits one or more of the major life activities of such individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i) ofthe definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specifc learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, *e.g.*, 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary to add the term to the regulation, which only provides representative examples of physiological disorders.

It is not possible to include a list ofall the specific conditions, contagious and noncontagious 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 other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(ii) of the definition includes: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested the clarifcation was necessary.

The examples of "physical or mental impairments" in paragraph (1)(ii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based onthe committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections aforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal

opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such indviduals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st. Cong., 1st Sess. 346 (1989).

Paragraph (1)(iii) states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial Limitation of a Major Life Activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word "temporary" in the definition of "disability." The preamble indicated that impairments are not necessarily excluded from the definition of "disability" simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word "temporary" both because it is not in the statute and because it is not contained in the definition of "disability" set forth in the title I regulations of the Equal Employment Opportunity Commission (EEOC). The word "temporary" has been deleted from the final rule to conform with the statutory language.

The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well

as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

Test B—A record of such an impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C—Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

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

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline*, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

Thus, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either section 504 or the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100-430, section 6(b)).

"Drug." The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

Commenters raised questions about the applicability of this part to activities operated in mobile facilities, such as bookmobiles or mobile health screening units. Such activities would be covered by the requirement for program accessibility in §35.150, and would be included in the definition of "facility" as "other real or personal property," although standards for new construction and alterations of such facilities are not yet included in the accessibility standards adopted by §35.151. Sections 35.150 and 35.151 specifically address the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

"Historic preservation programs" and "Historic properties" are defined in order to aid in the interpretation of §§35.150 (a)(2) and (b)(2), which relate to accessibility of historic preservation programs, and §35.151 (d), which relates to the alteration of historic properties.

"Illegal use of drugs." The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

"Individual with a disability" means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public entity acts on the basis of such use. The phrase "current illegal use of drugs" is explained in §35.131.

"Public entity." The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; or the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

"Qualified individual with a disability." The definition of "qualified individual with a disability" is taken from section 201(2) of the Act, which is derived from the definition of "qualified handicapped person" in the Department of Health and Human Services' regulation implementing section 504 (45 CFR §84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment ("a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question") with the definition for other services at 45 CFR 84.3(k)(4) ("a handicapped person who meets the essential eligibility requirements for the receipt of such services").

Some commenters requested clarification of the term "essential eligibility requirements." Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition. The "essential eligibility requirements" for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an "essential eligibility requirement," because §35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the "essential eligibility requirements" may be more complex. Where questions of safety are involved, the principles established in §36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 CFR, part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance fom public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

"Qualified interpreter." The Department received substantial comment regarding the lack of a definition of "qualified interpreter." The proposed rule defined auxiliary aids and services to include the statutory term, "qualified interpreters" (§35.104), but did not define it. Section 35.160 requires the use of auxiliary aids including qualified interpreters and commenters stated that a lack of guidance on what the term means would create confusion among those trying to secure interpreting services and often result in less than effective communication.

Many commenters were concerned that, without clear guidance on the issue of "qualified" interpreter, the rule would be interpreted to mean "available, rather than qualified" interpreters. Some claimed that few public entities would understand the diference between a qualified interpreter and a person who simply knows a few signs or how to fingerspell.

In order to clarify what is meant by "qualified interpreter" the Department has added a definition of the term to the final rule. A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.

Public comment also revealed that public entities have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member of friend is able to interpret or is a certifed interpreter, the family member or friend may not be qualified to render the necessary interpretation because offactors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret effectively, accurately, and impartially."

The definition of "qualified interpreter" in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the defnition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

"Section 504." The Department added a definition of "section 504" because the term is used extensively in subpart F of this part.

"State." The definition of "State" is identical to the statutory definition in section 3(3) of the ADA.

Section 35.105 Self-evaluation

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part. As noted in the discussion of §35.102, activities covered by the Department of Transportation's regulation implementing subtitle B of title II are not required to be included in the self-evaluation required by this section.

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA.

All public entities are required to do a self-evaluation. However, only those that employ 50 or more persons are required to maintain the self-evaluation on file and make it available for public inspection for three years. The number 50 was derived from the Department of Justice's section 504 regulations for federally assisted programs, 28 CFR 42.505(c). The Department received comments critical of this limitation, some suggesting the requirement apply to all public entities and others suggesting that the number be changed from 50 to 15. The final rule has not been changed. Although many regulations implementing section 504 for federally assisted programs do use 15 employees as the cut-off for this record-keeping requirement, the Department believes that it would be inappropriate to extend it to those smaller public entities covered by this regulation that do not receive Federal financial assistance. This approach has the benefit of minimizing paperwork burdens on small entities.

Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be reexamining all of their policies and programs. Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, Public Law No. 100–259, 102 Stat. 28 (1988), which broadened the definition of a covered "program or activity."

Several commenters suggested that the Department clarify public entities' liability during the one-year period for compliance with the self-evaluation requirement. The self-evaluation requirement does not stay the effective date of the statute nor of this part. Public entities are, therefore, not shielded from discrimination claims during that time.

Other commenters suggested that the rule require that every self-evaluation include an examination of training efforts to assure that individuals with disabilities are not subjected to discrimination because of insensitivity, particularly in the law enforcement area. Although the Department has not added such a specific requirement to the rule, it would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.

Section 35.106 Notice

Section 35.106 requires a public entityto disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections aforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast ofinformation by television or radio. In providing the notice, a public entitymust comply with the requirements for effective communication in §35.160. The preamble to that section gives guidance on howto effectively communicate with individuals with disabilities.

Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Consistent with §35.105, self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning §35.107. Commenters recommended either that all public entities be subject to §35.107, or that "50 or more persons" be changed to "15 or more persons." As explained in the discussion of§35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular employee and dissemination of information about howto locate that employee helps to ensure that individuals dealing with large agencies are able to easilyfind a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agencywho may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delayin filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under §35.170(b).

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, §35130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of §35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training oflaw enforcement personnel to recognize the diference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires lawenforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in §35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifes that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses nd to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation

of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in §35.130(b)(1)(iv), and section 302 (b)(1)(B) includes the same requirement for "the most integrated setting appropriate" as in §35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander* v. *Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by

design." *Id.* at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in §35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see §35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so case law under section 504 will be applicable to its interpretation. In *Southeastern Community College v. Davis,* 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," *id.* Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certifed entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (*see, e.g.,* 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to

individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that §35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, *e.g.*, Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71–72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through

mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by §35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in §35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep.

No. 596, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem"

Paragraph (a)(2)(i) specifes that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifes that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention fom the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 35.131(c) clarifes that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs." A commenter argued that the rule should permit testing for lawful use of prescription drugs, but most commenters preferred that tests must be limited to unlawful use in order to avoid revealing the lawful use of prescription medicine used to treat disabilities.

Section 35.132 Smoking

Section 35.132 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II. Some commenters argued that this section is too limited in scope, and that the regulation should prohibit smoking in all facilities used by public entities. The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

Section 35.133 Maintenance of Accessible Features

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by individuals with disabilities. This section recognizes that it is not

sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further details are not necessary.

Section 35.134 Retaliation or Coercion

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of §35.134 provides that no private or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. For example, it would be a violation of the Act and this part for a private individual to harass or intimidate an individual with a disability in an effort to prevent that individual from attending a concert in a State-owned park. It would, likewise, be a violation of the Act and this part for a private entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

Section 35.135 Personal Devices and Services

The final rule includes a new §35.135, entitles "Personal devices and services," which states that the provision of personal devices and services is not required by title II. This new section, which serves as a limitation on all of the requirements of the regulation, replaces §35.160(b)(2) of the proposed rule, which addressed the issue of personal devices and services explicitly only in the context of communications. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not only to auxiliary aids and services but across-the-board to include other relevant areas such as, for example, modifications in policies, practices, and procedures (§35.130(b)(7)). The language of §35.135 parallels an analogous provision in the Department's title III regulations (28 CFR 36.306) but preserves the explicit reference to "readers for personal use or study" in §35.160(b)(2) of the proposed rule. This section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Subpart C—Employment

Section 35.140 Employment Discrimination Prohibited

Title II of the ADA applies to all activities of public entities, including their employment practices. The proposed rule cross-referenced the definitions, requirements, and procedures of title I of the ADA, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630. This proposal would have resulted in use, under §35.140, of the title I definition of "employer," so that a public entity with 25 or more employees would have become subject to the requirements of §35.140 on July 26, 1992, one with 15 to 24 employees on July 26, 1994, and one with fewer than 15 employees would have been excluded completely.

The Department received comments objecting to this approach The commenters asserted that Congress intended to establish nondiscrimination requirements for employment by all public entities, including those that employ fewer than 15 employees; and that Congress intended the employment requirements of title II to become effective at the same time that the other requirements of this regulation become effective, January 26, 1992. The Department has reexamined the statutory language and legislative history of the ADA on this issue and has concluded that Congress intended to cover the employment practices of all public entities and that the applicable effective date is that of title II.

The statutory language of section 204(b) of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 CFR part 41. The coordination regulation specifically requires nondiscrimination in employment, 28 CFR 41.52–41.55, and does not limit coverage based on size of employer. Moreover, under all section 504 implementing regulations issued in accordance with the Department's coordination regulation, employment coverage under section 504 extends to all employers with federally assisted programs or activities, regardless of size, and the effective date for those employment requirements has always been the same as the effective date for nonemployment requirements established in the same regulations. The Department therefore concludes that §35.140 must apply to all public entities upon the efective date of this regulation.

In the proposed regulation the Department cross-referenced the regulations implementing title I of the ADA, issued by the Equal Employment Opportunity Commission at 29 CFR part 1630, as a compliance standard for §35.140 because, as proposed, the scope of coverage and effective date of coverage under title II would have been coextensive with title I. In the final regulation this language is modified slightly. Subparagraph (1) of new paragraph (b) makes it clear that the standards established by the Equal Employment Opportunity Commission in 29 CFR part 1630 will be the applicable compliance standards if the public entity is subject to title I. If the public entity is not covered by title I, or until it is covered by title I, subparagraph (b)(2) cross-references section 504 standards for what constitutes employment discrimination, as established by the Department of Justice in 28 CFR part 41. Standards for title I of the ADA and section 504 of the Rehabilitation Act are for the most part identical because title I of the ADA was based on requirements set forth in regulations implementing section 504.

The Department, together with the other Federal agencies responsible for the enforcement of Federal laws prohibiting employment discrimination on the basis of disability, recognizes the potential for jurisdictional overlap that exists with respect to coverage of public entities and the need to avoid problems related to overlapping coverage. The other Federal agencies include the Equal Employment Opportunity Commission, which is the agency primarily responsible for enforcement of title I of the ADA, the Department of Labor, which is the agency responsible for enforcement of section 503 of the Rehabilitation Act of 1973, and 26 Federal agencies with programs of Federal financial assistance, which are responsible for enforcing section 504 in those programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of the Rehabilitation Act. Although the ADA does not specifically require inclusion of employment complaints under title II in the coordinating mechanisms required by title I, Federal investigations of title II employment complaints will be coordinated on a government-wide basis also. The Department is currently working with the EEOC and other afected Federal agencies to develop effective coordinating mechanisms, and final regulations on this issue will be issued on or before January 26, 1992.

Subpart D—Program Accessibility

Section 35.149 Discrimination Prohibited

Section 35.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§35.150 and 35.151.

Section 35.150 Existing Facilities

Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR part 39). The concept of "program accessibility" was first used in the section 504 regulation adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.

Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§35.150(a)(1)). Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is "readily achievable," or to provide goods and services through alternative methods, where those methods are "readily achievable," title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. A similar limitation is provided in §35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with §35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of §35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by public entities and their components. The intention of this paragraph is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.

Any person who believes that he or she or any specific class of persons has been injured by the public entity head's decision or failure to make a decision may file a complaint under the compliance procedures established in subpart F.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 FR 36035 (August 14, 1978). Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying. "Manifestly exceptional" cases in which carrying would be permitted might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of §35.151 for alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Historic Preservation Programs

In order to avoid possible conflict between the congressional mandates to preserve historic properties, on the one hand, and to eliminate discrimination against individuals with disabilities on the other, paragraph (a)(2) provides that a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. The special limitation on program accessibility set forth in paragraph (a)(2) is applicable only to historic preservation programs, as defined in §35.104, that is, programs that have preservation of historic properties as a primary purpose. Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program, the public entity is not required to use a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might threaten or destroy significant historic features of the historic property. Thus, government programs located in historic properties, such as an historic State capitol, are not excused from the requirement for program access.

Paragraph (a)(2), therefore, will apply only to those programs that uniquely concern the preservation and experience of the historic property itself. Because the primary benefit of an historic preservation program is the experience of the historic property, paragraph (b)(2) requires the public entity to give priority to methods of providing program accessibility that permit individuals with disabilities to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the public entity administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities (§35.130(d)). Only when providing physical access would threaten or destroy the historic significance of an historic property, or would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens, may the public entity adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in paragraph (b)(2).

Time Periods

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. Like the regulations for federally assisted programs (e.g., 28 CFR 41.57(b)), paragraph (c) requires the public entity to make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

The proposed rule provided that, aside from structural changes, all other necessary steps to achieve compliance with this part must be taken within sixty days. The sixty day period was taken from regulations implementing section 504, which generally were effective no more than thirty days after publication. Because this regulation will not be effective until January 26, 1992, the Department has concluded that no additional transition period for non-structural changes is necessary, so the sixty day period has been omitted in the final rule. Of course, this section does not reduce or eliminate any obligations that are already applicable to a public entity under section 504.

Where structural modifications are required, paragraph (d) requires that a transition plan be developed by an entity that employs 50 or more persons, within six months of the effective date of this regulation. The legislative history of title II of the ADA makes it clear that, under title II, "local and state governments are required to provide curb cuts on public streets." Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, "The employment, transportation, and public accommodation sections of * * * (the ADA) would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." Id. Section 35.151(e), which establishes accessibility requirements for new construction and alterations, requires that all newly constructed or altered streets, roads, or highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and all newly constructed or altered street level pedestrian walkways must have curb ramps or other sloped areas at intersections to streets, roads, or highways. A new paragraph (d)(2) has been added to the final rule to clarify the application of the general requirement for program accessibility to the provision of curb cuts at existing crosswalks. This paragraph requires that the transition plan include a schedule for providing curb ramps or other sloped areas at existing pedestrian walkways, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, public accommodations, and employers, followed by walkways serving other areas. Pedestrian "walkways" include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

Similarly, a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

Paragraph (d)(3) provides that, if a public entity has already completed a transition plan required by a regulation implementing section 504, the transition plan required by this part will apply only to those policies and practices that were not covered by the previous transition plan. Some commenters suggested that the transition plan should include all aspects of the public entity's operations, including those that may have been covered by a previous transition plan under section 504. The Department believes that such a duplicative requirement would be inappropriate. Many public entities may find, however, that it will be simpler to include all of their operations in the transition plan than to attempt to identify and exclude specifically those that were addressed in a previous plan. Of course, entities covered under section 504 are not shielded from their obligations under that statute merely because they are included under the transition plan developed under this section.

Section 35.151 New Construction and Alterations

Section 35.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed or altered to be readily accessible to and usable by individuals with disabilities if the construction was commenced after the effective date of this part. Facilities under design on that date will be governed by this section if the date that bids were invited falls after the effective date. This interpretation is consistent with Federal practice under section 504.

Section 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (hereinafter ADAAG) shall be deemed to comply with the requirements of this section with respect to those facilities except that, if ADAAG is chosen, the elevator exemption contained at §§36.401(d) and 36.404 does not apply. ADAAG is the standard for private buildings and was issued as guidelines by the Architectural and Transportation Barriers Compliance Board (ATBCB) under title III of the ADA. It has been adopted by the Department of Justice and is published as appendix A to the Department's title III rule in today's Federal Register. Departures from particular requirements of these standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Use of two standards is a departure from the proposed rule.

The proposed rule adopted UFAS as the only interim accessibility standard because that standard was referenced by the regulations implementing section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to many State and local government entities subject to this rule. The Department, however, received many comments objecting to the adoption of UFAS. Commenters pointed out that, except for the elevator exemption, UFAS is not as stringent as ADAAG. Others suggested that the standard should be the same to lessen confusion.

Section 204(b) of the Act states that title II regulations must be consistent not only with section 504 regulations but also with "this Act." Based on this provision, the Department has determined that a public entity should be entitled to choose to comply either with ADAAG or UFAS.

Public entities who choose to follow ADAAG, however, are not entitled to the elevator exemption contained in title III of the Act and implemented in the title III regulation at §36.401(d) for new construction and §36.404 for alterations. Section 303(b) of title III states that, with some exceptions, elevators are not required in facilities that are less than three stories or have less than 3000 square feet per story. The section 504 standard, UFAS, contains no such exemption. Section 501 of the ADA makes clear that nothing in the Act may be construed to apply a lesser standard to public entities than the standards applied under section 504. Because permitting the elevator exemption would clearly result in application of a lesser standard than that applied under section 504, paragraph (c) states that the elevator exemption does not apply when public entities choose to follow ADAAG. Thus, a two-story courthouse, whether built according to UFAS or ADAAG, must be constructed with an elevator. It should be noted that Congress did not include an elevator exemption for public transit facilities covered by subtitle B of title II, which covers public transportation provided by public entities, providing further evidence that Congress intended that public buildings have elevators.

Section 504 of the ADA requires the ATBCB to issue supplemental Minimum Guidelines and Requirements for Accessible Design of buildings and facilities subject to the Act, including title II. Section 204(c) of the ADA provides that the Attorney General shall promulgate regulations implementing title II that are consistent with the ATBCB's ADA guidelines. The ATBCB has announced its intention to issue title II guidelines in the future. The Department anticipates that, after the ATBCB's title II guidelines have been published, this rule will be amended to adopt new accessibility standards consistent with the ATBCB's rulemaking. Until that time, however, public entities will have a choice of following UFAS or ADAAG, without the elevator exemption.

Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in §35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of §35.151.

The Department received many comments urging that the Department require that public entities lease only accessible buildings. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Section 204(b) of the Act states that, in the area of "program accessibility, existing facilities," the title II regulations must be consistent with section 504 regulations. Thus, the Department has adopted the section 504 principles for these types of leased buildings. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the same program accessibility standard should apply to both owned and leased existing buildings. Similarly, requiring that public entities only lease accessible space would significantly restrict the options of State and local governments in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas.

On the other hand, the more accessible the leased space is, the fewer structural modifications will be required in the future for particular employees whose disabilities may necessitate barrier removal as a reasonable accommodation. Pursuant to the requirements for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published under the Architectural Barriers Act by the ATBCB, 36 CFR 1190.34, the Federal Government may not lease a building unless it contains (1) One accessible route fom an accessible entrance to those areas in which the principal activities for which the building is leased are conducted,(2) accessible toilet facilities, and (3) accessible parking facilities, if a parking area is included within the lease (36 CFR 1190.34). Although these requirements are not applicable to buildings leased by public entities covered by this regulation, such entities are encouraged to look for the most accessible space available to lease and to attempt to find space complying at least with these minimum Federal requirements.

Section 35.151(d) gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize the national interest in preserving significant historic structures. Commenters criticized the Department's use of descriptive terms in the proposed rule that are diferent from those used in the ADA to describe eligible historic properties. In addition, some commenters criticized the Department's decision to use the concept of "substantially impairing" the historic features of a property, which is a concept employed in regulations implementing section 504 of the Rehabilitation Act of 1973. Those commenters recommended that the Department adopt the criteria of "adverse effect" published by the Advisory Council on Historic Preservation under the National Historic Preservation Act, 36 CFR 800.9, as the standard for determining whether an historic property may be altered.

The Department agrees with these comments to the extent that they suggest that the language of the rule should conform to the language employed by Congress in the ADA. A definition of "historic property," drawn from section 504 of the ADA, has been added to §35.104 to clarify that the term applies

to those properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law

The Department intends that the exception created by this section be applied only in those very rare situations in which it is not possible to provide access to an historic property using the special access provisions established by UFAS and ADAAG. Therefore, paragraph (d)(1) of §35.151 has been revised to clearly state that alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG. Paragraph (d)(2) has been revised to provide that, if it has been determined under the procedures established in UFAS and ADAAG that it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access shall be provided pursuant to the requirements of §35.150.

In response to comments, the Department has added to the final rule a new paragraph (e) setting out the requirements of §36.151 as applied to curb ramps. Paragraph (e) is taken fom the statement contained in the preamble to the proposed rule that all newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and that all newly constructed or altered street level pedestrian walkways must have curb ramps at intersections to streets, roads, or highways.

Subpart E—Communications

Section 35.160 General

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b)(1) requires the public entity to furnish appropriate auxiliary aids and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (§35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under §35.164.

Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. For instance, some courtrooms are now equipped for "computer-assisted transcripts," which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for someone who uses sign language.

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

Several commenters asked that the rule clarify that the provision of readers is sometimes necessary to ensure access to a public entity's services, programs or activities. Reading devices or readers should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity, such as reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. The importance of providing qualified readers for examinations administered by public entities is discussed under §35.130. Reading devices and readers are appropriate auxiliary aids and services where necessary to permit an individual with a disability to participate in or benefit from a service, program, or activity.

Section 35.160(b)(2) of the proposed rule, which provided that a public entity need not furnish individually prescribed devices, readers for personal use or study, or other devices of a personal nature, has been deleted in favor of a new section in the final rule on personal devices and services (see §35.135).

In response to comments, the term "auxiliary aids and services" is used in place of "auxiliary aids" in the final rule. This phrase better reflects the range of aids and services that may be required under this section.

A number of comments raised questions about the extent of a public entity's obligation to provide access to television programming for persons with hearing impairments. Television and videotape programming produced by public entities are covered by this section. Access to audio portions of such programming may be provided by closed captioning.

Section 35.161 Telecommunication Devices for the Deaf (TDD's)

Section 35.161 requires that, where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems be used to communicate with individuals with impaired speech or hearing.

Problems arise when a public entity which does not have a TDD needs to communicate with an individual who uses a TDD or vice versa. Title IV of the ADA addresses this problem by requiring establishment of telephone relay services to permit communications between individuals who communicate by TDD and individuals who communicate by the telephone alone. The relay services required by title IV would involve a relay operator using both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user.

Section 204(b) of the ADA requires that the regulation implementing title II with respect to communications be consistent with the Department's regulation implementing section 504 for its federally conducted programs and activities at 28 CFR part 39. Section 35.161, which is taken from §39.160(a)(2) of that regulation, requires the use of TDD's or equally effective telecommunication systems for communication with people who use TDD's. Of course, where relay services, such as those required by title IV of the ADA are available, a public entity may use those services to meet the requirements of this section.

Many commenters were concerned that public entities should not rely heavily on the establishment of relay services. The commenters explained that while relay services would be of vast benefit to both public entities and individuals who use TDD's, the services are not sufficient to provide access to all telephone services. First, relay systems do not provide effective access to the increasingly popular automated systems that require the caller to respond by pushing a button on a touch tone phone. Second, relay systems cannot operate fast enough to convey messages on answering machines, or to permit a TDD user to leave a recorded message. Third, communication through relay systems may not be appropriate in cases of crisis lines pertaining to rape, domestic violence, child abuse, and drugs. The Department believes that it is more appropriate for the Federal Communications Commission to address these issues in its rulemaking under title IV.

Some commenters requested that those entities with frequent contacts with clients who use TDD's have on-site TDD's to provide for direct communication between the entity and the individual. The Department encourages those entities that have extensive telephone contact with the public such as city halls, public libraries, and public aid ofices, to have TDD's to insure more immediate access. Where the provision of telephone service is a major function of the entity, TDD's should be available.

Section 35.162 Telephone Emergency Services

Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including "911" services—are clearly an important public service whose reliability can be a matter of life or death. The legislative history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunication technology (Conference report at 67; Education and Labor report at 84-85).

Proposed §35.162 mandated that public entities provide emergency telephone services to persons with disabilities that are "functionally equivalent" to voice services provided to others. Many commenters urged the Department to revise the section to make clear that direct access to telephone emergency services is required by title II of the ADA as indicated by the legislative history (Conference report at 67–68; Education and Labor report at 85). In response, the final rule mandates "direct access," instead of "access that is functionally equivalent" to that provided to all other telephone users. Telephone emergency access through a third party or through a relay service would not satisfy the requirement for direct access.

Several commenters asked about a separate seven-digit emergency call number for the 911 services. The requirement for direct access disallows the use of a separate seven-digit number where 911 service is available. Separate seven-digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use. A standard emergency 911 number is easier to remember and would save valuable time spent in searching in telephonebooks for a local seven-digit emergency number.

Many commenters requested the establishment of minimum standards of service (e.g., the quantity and location of TDD's and computer modems needed in a given emergency center). Instead of establishing these scoping requirements, the Department has established a performance standard through the mandate for direct access.

Section 35.162 requires public entities to take appopriate steps, including equipping their emergency systems with modern technology, as may be necessary to promptly receive and respond to a call fom users of TDD's and computer modems. Entities are allowed the flexibility to determine what is the appropriate technology for their particular needs. In order to avoid mandating use of particular technologies that may become outdated, the Department has eliminated the references to the Baudd and ASCII formats in the proposed rule.

Some commenters requested that the section require the installation of a voice amplification device on the handset of the dispatcher's telephone to amplify the dispatcher's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of the dispatchers' telephones would respond to that situation. The Department encourages their use.

Several commenters emphasized the need for proper maintenance of TDD's used in telephone emergency services. Section 35.133, which mandates maintenance of accessible features, requires public entities to maintain in operable working condition TDD's and other devices that provide direct access to the emergency system.

Section 35.163 Information and Signage

Section 35.163(a) requires the public entity to provide information to individuals with disabilities concerning accessible services, activities, and facilities. Paragraph (b) requires the public entity to provide signage at all inaccessible entrances to each of its facilities that directs users to an accessible entrance or to a location with information about accessible facilities.

Several commenters requested that, where TDD-equipped pay phones or portable TDD's exist, clear signage should be posted indicating the location of the TDD. The Department believes that this is required by paragraph (a). In addition, the Department recommends that, in large buildings that house TDD's, directional signage indicating the location of available TDD's should be placed adjacent to banks of telephones that do not contain a TDD.

Section 35.164 Duties

Section 35.164, like paragraph (a)(3) of §35.150, is taken from the section 504 regulations for federally conducted programs. Like paragraph (a)(3), it limits the obligation of the public entity to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it. It also includes specific requirements for determining the existence of undue financial and administrative burdens. The preamble discussion of §35.150(a) regarding that determination is applicable to this section and further explains the public entity's obligation to comply with §§35.160–35.164. Because of the essential nature of the services provided by telephone emergency systems, the Department assumes that §35.164 will rarely be applied to §35.162.

Subpart F—Compliance Procedures

Subpart F sets out the procedures for administrative enforcement of this part. Section 203 of the Act provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) for enforcement of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement of title II. Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d–4a). Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, is enforced by the Federal agencies that provide the Federal financial assistance to the covered programs and activities in question. If voluntary compliance cannot be achieved, Federal agencies enforce title VI either by the termination of Federal

funds to a program that is found to discriminate, following an administrative hearing, or by a referral to this Department for judicial enforcement.

Title II of the ADA extended the requirements of section 504 to all services, programs, and activities of State and local governments, not only those that receive Federal financial assistance. The House Committee on Education and Labor explained the enforcement provisions as follows:

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, * * * the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

Education & Labor report at 98. See also S. Rep. No 116, 101st Cong., 1st Sess., at 57-58 (1989).

Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that is, where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance. Because the Civil Rights Restoration Act (Pub. L. 100-259) extended the application of section 504 to all of the operations of the public entity receiving the Federal financial assistance, many activities of State and local governments are already covered by section 504. The procedures in subpart F apply to complaints concerning services, programs, and activities of public entities that are covered by the ADA.

Subpart G designates the Federal agencies responsible for enforcing the ADA with respect to specific components of State and local government. It does not, however, displace existing jurisdiction under section 504 of the various funding agencies. Individuals may still file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The substantive standards adopted in this part for title II of the ADA are generally the same as those required under section 504 for federally assisted programs, and public entities covered by the ADA are also covered by the requirements of section 504 to the extent that they receive Federal financial assistance. To the extent that title II provides greater protection to the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II and this part in processing complaints covered by both this part and section 504, except that fund termination procedures may be used only for violations of section 504.

Subpart F establishes the procedures to be followed by the agencies designated in subpart G for processing complaints against State and local government entities when the designated agency does not have jurisdiction under section 504.

Section 35.170 Complaints

Section 35.170 provides that any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part within 180 days of the date of the alleged discrimination, unless the time for filing is extended by the agency for good cause. Although §35.107 requires public entities that employ 50 or more persons to establish grievance procedures for resolution of complaints, exhaustion of those procedures is not a prerequisite to filing a complaint under this section. If a complainant chooses to follow the public entity's grievance procedures, however, any resulting delay may be considered good cause for extending the time allowed for filing a complaint under this part.

Filing the complaint with any Federal agency will satisfy the requirement for timely filing. As explained below, a complaint filed with an agency that has jurisdiction under section 504 will be processed under the agency's procedures for enforcing section 504.

Some commenters objected to the complexity of allowing complaints to be filed with different agencies. The multiplicity of enforcement jurisdiction is the result of following the statutorily mandated enforcement scheme. The Department has, however, attempted to simplify procedures for complainants by making the Federal agency that receives the complaint responsible for referring it to an appropriate agency.

The Department has also added a new paragraph (c) to this section providing that a complaint may be filed with any agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice. Under §35.171 (a)(2), the Department of Justice will refer complaints for which it does not have jurisdiction under section 504 to an agency that does have jurisdiction under section 504, or to the agency designated under subpart G as responsible for complaints filed against the public entity that is the subject of the complaint or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission. Complaints filed with the Department of Justice may be sent to the Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice, Washington, DC 20035-6118.

Section 35.171 Acceptance of Complaints

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The final rule provides complainants an opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated under subpart G as responsible for that public entity, the agency must refer the complaint to the Department of Justice, which will be responsible for referring it either to an agency that does have jurisdiction under section 504 or to the appropriate designated agency, or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

Whenever an agency receives a complaint over which it has jurisdiction under section 504, it will process the complaint under its section 504 procedures. When the agency designated under subpart G receives a complaint for which it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart.

Section 35.171 also describes agency responsibilities for the processing of employment complaints. As described in connection with §35.140, additional procedures regarding the coordination of employment complaints will be established in a coordination regulation issued by DOJ and EEOC. Agencies with jurisdiction under section 504 for complaints alleging employment discrimination also covered by title I will follow the procedures established by the coordination regulation for those complaints. Complaints covered by title I but not section 504 will be referred to the EEOC, and complaints covered by this part but not title I will be processed under the procedures in this part.

Section 35.172 Resolution of Complaints

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the public entity a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

Section 35.173 Voluntary Compliance Agreements

Section 35.173 requires the agency to attempt to resolve all complaints in which it finds noncompliance through voluntary compliance agreements enforceable by the Attorney General.

Section 35.174 Referral

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to

obtain voluntary compliance.

Section 35.175 Attorney's Fees

Section 35.175 states that courts are authorized toward attorneys fees, including litigation expenses and costs, as provided in section 505 ofthe Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of"attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in *Christiansburg Garment Co.*v. *Equal Employment Opportunity Commission,*434 U.S. 412 (1978). (Judiciaryreport at 73.)

Section 35.176 Alternative Means of Dispute Resolution

Section 35.176 restates section 513 ofthe Act, which encourages use ofalternative means of dispute resolution.

Section 35.177 Effect of Unavailability of Technical Assistance

Section 35.177 explains that, as provided in section 506(e) of the Act, a public entity is not excused from compliance with the requirements of this part because ofany failure to receive technical assistance.

Section 35.178 State Immunity

Section 35.178 restates the provision of section 502 of the Act that a State is not immune under the eleventh amendment to the Constitution ofthe United States from an action in Federal or State court for violations of the Act, and that the same remedies are available for any such violations as are available in an action against an entityother than a State.

Subpart G—Designated Agencies

Section 35.190 Designated Agencies

Subpart G designates the Federal agencies responsible for investigating complaints under this part. At least 26 agencies currentlyadminister programs of Federal financial assistance that are subject to the nondiscrimination requirements of section 504 as well as other civil rights statutes. A majority of these agencies administer modest programs of Federal financial assistance and/or devote minimal resources exclusively to "external" civil rights enforcement activities. Under Executive Order 12250, the Department of Justice has encouraged the use ofdelegation agreements under which certain civil rights compliance responsibilities for a class of recipients funded by more than one agency are delegated by an agency or agencies to a "lead" agency. For example, many agencies that fund institutions of higher education have signed agreements that designate the Department of Education as the "lead" agency for this class of recipients.

The use of delegation agreements reduces overlap and duplication ofeffort, and thereby strengthens overall civil rights enforcement. However, the use of these agreements to date generally has been limited to education and health care recipients. These classes of recipients are funded by numerous agencies and the logical connection to a lead agency is clear (e.g., the Department of Education for colleges and universities, and the Department of Health and Human Services for hospitals).

The ADA's expanded coverage of State and local government operations further complicates the process of establishing Federal agencyjurisdiction for the purpose of investigating complaints of discrimination on the basis ofdisability. Because all operations of public entities now are covered irrespective of the presence or absence ofFederal financial assistance, many additional State and local government functions and organizations noware subject to Federal jurisdiction. In some cases, there is no historical or single clear-cut subject matter relationship with a Federal agency as was the case in the education example described above. Further, the 33,000 governmental jurisdictions subject to the ADA differ greatly in their organization, making a detailed and workable division of Federal agency jurisdiction by individual State, county, or municipal entity unrealistic.

This regulation applies the delegation conceptto the investigation of complaints of discrimination on the basis of disability by public entities under the ADA. It designates eight agencies, rather than all agencies currently administering programs of Federal financial assistance, as responsible for investigating complaints under this part. These "designated agencies" generally have the largest civil rights

compliance staffs, the most experience in complaint investigations and disability issues, and broad yet clear subject area responsibilities. This division of responsibilities is made functionally rather than by public entity type or name designation. For example, all entities (regardless of their title) that exercise responsibilities, regulate, or administer services or programs relating to lands and natural resources fall within the jurisdiction of the Department of Interior.

Complaints under this part will be investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. For example, a complaint against a State medical board, where such a board is a recognizable entity will be investigated by the Department of Health and Human Services (the designated agency for regulatory activities relating to the provision of health care), even if the board is part of a general umbrella department of planning and regulation (for which the Department of Justice is the designated agency). If two or more agencies have apparent responsibility over a complaint, §35.190(c) provides that the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

Thirteen commenters, including four proposed designated agencies, addressed the Department of Justice's identification in the proposed regulation of nine "designated agencies" to investigate complaints under this part. Most comments addressed the proposed specific delegations to the various individual agencies. The Department of Justice agrees with several commenters who pointed out that responsibility for "historic and cultural preservation" functions appropriately belongs with the Department of Interior rather than the Department of Education. The Department of Justice also agrees with the Department of Education that "museums" more appropriately should be delegated to the Department of Interior, and that "preschool and daycare programs" more appropriately should be assigned to the Department of Health and Human Services, rather than to the Department of Education. The final rule reflects these decisions.

The Department of Commerce opposed its listing as the designated agency for "commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business". The Department of Commerce cited its lack of a substantial existing section 504 enforcement program and experience with many of the specific functions to be delegated. The Department of Justice accedes to the Department of Commerce's position, and has assigned itself as the designated agency for these functions.

In response to a comment from the Department of Health and Human Services, the regulation's category of "medical and nursing schools" has been clarified to read "schools of medicine, dentistry, nursing, and other health-related fields". Also in response to a comment from the Department of Health and Human Services, "correctional institutions" have been specifically added to the public safety and administration of justice functions assigned to the Department of Justice.

The regulation also assigns the Department of Justice as the designated agency responsible for all State and local government functions not assigned to other designated agencies. The Department of Justice, under an agreement with the Department of the Treasury, continues to receive and coordinate the investigation of complaints filed under the Revenue Sharing Act. This entitlement program, which was terminated in 1986, provided civil rights compliance jurisdiction for a wide variety of complaints regarding the use of Federal funds to support various general activities of local governments. In the absence of any similar program of Federal financial assistance administered by another Federal agency, placement of designated agency responsibilities for miscellaneous and otherwise undesignated functions with the Department of Justice is an appropriate continuation of current practice.

The Department of Education objected to the proposed rule's inclusion of the functional area of "arts and humanities" within its responsibilities, and the Department of Housing and Urban Development objected to its proposed designation as responsible for activities relating to rent control, the real estate industry and housing code enforcement. The Department has deleted these areas from the lists assigned to the Departments of Education and Housing and Urban Development, respectively, and has added a new paragraph (c) to §35.190, which provides that the Department of Justice may assign responsibility for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section to other appropriate agencies. The Department believes that this approach will provide more flexibility in determining the appropriate agency for investigation of complaints involving those components of State and local governments not specifically addressed by the listings in paragraph (b). As provided in §§35.170 and 35.171, complaints filed with the Department of Justice will be referred to the appropriate agency.

Several commenters proposed a stronger role for the Department of Justice, especially with respect to the receipt and assignment of complaints, and the overall monitoring of the effectiveness of the

enforcement activities of Federal agencies. As discussed above, §§35.170 and 35.171 have been revised to provide for referral of complaints by the Department of Justice to appropriate enforcement agencies. Also, language has been added to §35.190(a) of the final regulation stating that the Assistant Attorney General shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of this part.

Browse Previous | Browse Next

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Title 34: Education

Browse Previous | Browse Next

PART 104—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Section Contents

Subpart A—General Provisions

Subpart B—Employment Practices

Subpart C—Accessibility

Subpart D—Preschool, Elementary, and Secondary Education

Authority: 20 U.S.C. 1405; 29 U.S.C. 794.

Source: 45 FR 30936, May 9, 1980, unless otherwise noted.

Subpart A—General Provisions

top

§ 104.1 Purpose.

top

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

§ 104.2 Application.

top

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

[65 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.3 Definitions.

top

As used in this part, the term

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

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

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

(d) *Department* means the Department of Education.

(e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.

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

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

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

(1) Funds;

(2) Services of Federal personnel; or

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

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

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

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

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

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

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic

disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) anymental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

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

(k) *Program or activity* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 29 U.S.C. 794(b))

(l) *Qualified handicapped person* means:

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

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

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

program or activity;

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

(m) *Handicap* means any condition or characteristic that renders a person ahandicapped person as defined in paragraph (j) of this section.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.4 Discrimination prohibited.

top

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

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

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

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

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

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

(v) Aid or perpetuate discrimination against a qualifed handicapped person byproviding significant assistance to an agency, organization, or person that discriminates on the basis ofhandicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

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

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

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

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunityto participate in such aid, benefits, or services that are not separate or diferent.

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

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

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

(c) *Aid, benefits, or services limited by Federal law* The exclusion of nonhandicapped persons fom aid, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons fom aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited bythis part.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.5 Assurances required.

top

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

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

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

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

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

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

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

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

top

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

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

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

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

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

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

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

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

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

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

top

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

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

applicants for admission to postsecondary educational institutions.

§ 104.8 Notice.

top

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to §104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.9 Administrative requirements for small recipients.

top

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

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

top

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

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

Subpart B—Employment Practices

top

§ 104.11 Discrimination prohibited.

top

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

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

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

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

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

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

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

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

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

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

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

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

(8) Employer sponsored activities, including those that are social or recreational; and

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

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.12 Reasonable accommodation.

top

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

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or

devices, the provision of readers or interpreters, and other similar actions.

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

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

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

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

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

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.13 Employment criteria.

top

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

top

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

(b) When a recipient is taking remedial action to correct the efects of past discrimination pursuant to §104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §104.6(b), or when a recipient is taking affirmative action pursuant to section 503of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided,* That:

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

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) ofthis section, that refusal to provide it will not subject the

applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient fom conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That:

(1) All entering employees are subjected to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

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

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

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

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

Subpart C—Accessibility

top

§ 104.21 Discrimination prohibited.

top

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

§ 104.22 Existing facilities.

top

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

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of §104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

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

alternative, refer the handicapped person to other providers of those services that are accessible.

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

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

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

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

(3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paagraph (a) of this section and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

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

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.23 New construction.

top

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

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

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with phusical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

Subpart D—Preschool, Elementary, and Secondary Education

top

§ 104.31 Application of this subpart.

top

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.32 Location and notification.

top

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

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

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

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.33 Free appropriate public education.

top

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

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs ofhandicapped persons as adequatelyas the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) ofthis section.

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

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the

requirements of this subpart. Nothing in this section shall beconstrued to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

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

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

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and §104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regardingwhether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of§104.36.

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.34 Educational setting.

top

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

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and theservices and activities set forth in §104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

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

§ 104.35 Evaluation and placement.

top

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or

related services before taking any action with respect to the initial placement of the person in regular or special education and anysubsequent significant change in placement.

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

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

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

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

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.36 Procedural safeguards.

top

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.37 Nonacademic services.

top

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

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped

persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

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

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

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or diferent.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.38 Preschool and adult education.

top

A recipient to which this subpart applies that provides preschool education or daycare or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits or services to be provided.

[65 FR 68055, Nov. 13, 2000]

§ 104.39 Private education.

top

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within that recipient's program or activity.

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

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of §§104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§104.34, 104.37, and 10438.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart E—Postsecondary Education

top

§ 104.41 Application of this subpart.

top

Subpart E applies to postsecondaryeducation programs or activities, including postsecondaryvocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.42 Admissions and recruitment.

top

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

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

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

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

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

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

(c) *Preadmission inquiry exception.*When a recipient is taking remedial action to correct the efects of past discrimination pursuant to §104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

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

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

(d) *Validity studies.* For the purpose ofparagraph (b)(2) ofthis section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion ofoverall success in the education programor activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

top

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

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

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

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.44 Academic adjustments.

top

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

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

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

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

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.45 Housing.

top

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

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

§ 104.46 Financial and employment assistance to students.

top

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualifed handicapped persons, a recipient to which this subpart applies may not,

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualifed handicapped persons on the basis of handicap.

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

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

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

§ 104.47 Nonacademic services.

top

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

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

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

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart F—Health, Welfare, and Social Services

top

§ 104.51 Application of this subpart.

top

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

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.52 Health, welfare, and other social services.

top

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

(1) Deny a qualified handicapped person thesebenefits or services;

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

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in §104.4(b)) as the benefits or services provided to others;

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

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

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

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

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

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

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

§ 104.53 Drug and alcohol addicts.

top

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

§ 104.54 Education of institutionalized persons.

top

A recipient to which this subpart applies and that operates or supervises a program or activity that provides aid, benefits or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in §104.3(k)(2), in its program or activity is provided an appropriate education, as defined in §104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart G—Procedures

top

§ 104.61 Procedures.

top

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§100.6–100.10 and part 101 of this title.

Appendix A to Part 104—Analysis of Final Regulation

top

Subpart A—General Provisions

Definitions—1. *Recipient.* Section 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of §104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *Federal financial assistance.* In §104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifcally excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

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

3. *Handicapped person.* Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

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

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

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

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

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

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

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

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life

activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

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

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

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

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

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

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

5. *Qualified handicapped person.* Paragraph (k) of §104.3 defines the term "qualified handicapped

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

Section 104.3(k)(1) defnes a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the defnition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of §104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defnes qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of §104.6(a)(3), however, persons beyond the age limits prescribed in §104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3–18 as of September 1978, and 3–21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defnes qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term *technical standards* refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

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

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

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A newparagraph (b)(3) has also been added to §104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's programto discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's programor activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response tocomment in order to make explicit the prohibition against denying qualified handicapped persons the opportunityto serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret §104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hillyterrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of §104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each ofits programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought reliefrom the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities byrequesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

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

9. *Remedial action.* Where there has been a finding of discrimination, §104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

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

10. *Voluntary action.* In §104.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use ofthe latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose ofthe paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

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

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

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details ofsuch procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and ofthe programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to bemade available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

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

A number of comments asked whether compliance with this section or the notice requirements of §104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly §84.9) sets forth requirements for dissemination of statements of nondicrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake amajor public information effort to inform persons of their rights under section 504 and this regulation. In §104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of §104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use ofmaterials that might give the impression that a recipient excludes qualified handicapped persons fom its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new §104.9 the Assistant Secretarymay, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes ofsmall recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis ofhandicap.

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

Subpart B—Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (34 CFR, part 106) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requries certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B ofthe Education ofthe Handicapped Act, as amended (EHA). Section 606 ofthe EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congess chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (afirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of §104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of §104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation ofits program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

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

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in §104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised §104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, §104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

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

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that

have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

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

19. *Specific acts of Discrimination.* Sections 104.15 (recruitment), 104.16 (compensation), 104.17 (job classification and structure) and 104.18 (finge benefits) have been deleted from the regulation as unnecessarily duplicative of §104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

A proposed section, concerning finge benefits, had allowed for differences in benefits or contributions between handicapped and nonhandcapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifcally allowing for differences in benefits or contributions.

Subpart C—Program Accessibility

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

20. *Existing facilities.* Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under §104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with §104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

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

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

All recipients that provide health, welfare, or other social services may also comply with §104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised §104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

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

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

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with §104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but §104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See §104.4(c)(2)(iv), prohibiting unnecessarily separate treatment; §104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new §104.43(d), applying the same standard to postsecondary education.

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

21. *New construction.* Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place". Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

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

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

Subpart D—Preschool, Elementary, and Secondary Education

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

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§104.32 and 104.33 apply only to public programs and §104.39 applies only to private programs; §§104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94–142 (the EHA).

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

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

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under §104.33(a), a recipient is responsible for providing a free

appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts ofboth domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a programthat is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist ofeducation in regular classes, education in regular classes with the use of supplementary services, or special education and relatedservices. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of §104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in questionand appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new §104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of §104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program he or she may make use of the procedures establishedin §104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

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

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

The EHA requires a free appropriate education to beprovided to handicapped children"no later than September 1, 1978," but section 504 contains no authorityfor delaying enforcement. To resolve this problem, a new paragraph (d) has been addedto §104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program This provision against exclusion is consistent with the order of providing services set forth in section 612(3) ofthe EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs ofthe handicapped person in question. A handicapped student may be removed from the regular educational setting onlywhere the recipient can showthat the needs of the student would, on balance, be served by placement in another setting.

Although under §104.34, the needs ofthe handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular

classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under §104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§104.34 and 104.36.

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

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, §104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§104.35 and 10436, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of §104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

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

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

The proposed regulation would have required a complete individual reevaluation of the student each

year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly §104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under §104.36, a recipient must establish a system of due process procedures to be aforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of §104.34, be provided in the most integrated setting appropriate.

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

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under §104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of §104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

Subpart E—Postsecondary Education

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

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in §104.42(a), the regulation delineates, in §104.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 104.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been

validated as a predictor ofacademic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that §104.42(b)(2)(ii) could beinterpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent ofthe provision and, therefore, it has been amended to place the burden on the Assistant Secretaryfor Civil Rights, rather than onthe recipient, to identify alternate tests.

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

Section 104.42(b)(3) also requires a recipient to assure itselfthat admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 104.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this contex, "on the whole" means that not all of the facilities need be accessibile so long as a suficient number of facilities are available to handicapped persons.

Revised §104.42(b)(4) generallyprohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §104.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

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

Proposed §104.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education programor activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated bythe college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teachingassignments afforded nonhandicapped students.

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

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

31. *Academic adjustments.* Paragraph (a) of §104.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It shoud be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

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

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§104.42(b)) and will be similarly interpreted.

Under §104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students fee of charge in order to reduce the number of readers needed for visually impaired students.

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

32. *Housing.* Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with §104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of §104.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation

to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 104.46(a), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

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

Commenters on §104.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under §104.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as §104.43(b) to include the "as a whole" concept and will be interpreted in the same manner as §104.43(b).

35. *Nonacademic services.* Section 104.47 establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does §104.38 of subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F—Health, Welfare, and Social Services

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

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

Several commenters asked whether subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, §1044(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state social service agencies to take an active role in the enforcement of section 504 with regard to local social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.

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

36. *Health, welfare, and other social service providers.* Section 104.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§104.4(b)(ii) and 104.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in §104.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 104.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to diferent eligibility standards. One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specifc section in question has been eliminated. Section 104.4(c) makes clear that special programs for handicapped persons are permitted.

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

Section 104.52(b) has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualifed handicapped persons are not denied efective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tacticle devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Section 104.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 104.52(c), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Assistant Secretary may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service.

37. *Treatment of Drug Addicts and Alcoholics.* Section 104.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. Section 104.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains §104.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or daycare centers.

Subpart G—Procedures

In §104.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedureal regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

[45 FR 30936, May 9, 1980, as amended at 55 FR 52141, Dec. 19, 1990]

Appendix B to Part 104—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

top

Editorial Note: For the text of these guidelines, see 34 CFR part 100, appendix B.

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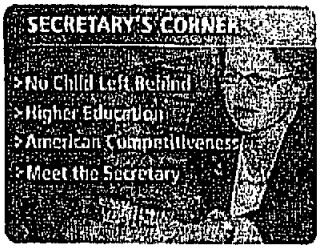

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Auxiliary Aids and Services for Postsecondary Students with Disabilities

Higher Education's Obligations Under Section 504 and Title II of the ADA

U.S. Department of Education
Office for Civil Rights
Washington, D.C.

Revised September 1998

Section 504 of the Rehabilitation Act of 1973

In 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 (Section 504), a law that prohibits discrimination on the basis of physical or mental disability (29 U.S.C. Section 794). It states:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .

The Office for Civil Rights in the U.S. Department of Education enforces regulations implementing Section 504 with respect to programs and activities that receive funding from the Department. The Section 504 regulation applies to all recipients of this funding, including colleges, universities, and postsecondary vocational education and adult education programs. Failure by these higher education schools to provide auxiliary aids to students with disabilities that results in a denial of a program benefit is discriminatory and prohibited by Section 504.

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits state and local governments from discriminating on the basis of disability. The Department enforces Title II in public colleges, universities, and graduate and professional schools. The requirements regarding the provision of auxiliary aids and services in higher education institutions described in the Section 504 regulation are generally included in the general nondiscrimination provisions of the Title II regulation.

Postsecondary School Provision of Auxiliary Aids

The Section 504 regulation contains the following requirement relating to a postsecondary school's obligation to provide auxiliary aids to qualified students who have disabilities:

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

The Title II regulation states:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

It is, therefore, the school's responsibility to provide these auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine their eligibility under Section 504 or the ADA, the recipient must provide auxiliary aids in the interim.

Postsecondary Student Responsibilities

A postsecondary student with a disability who is in need of auxiliary aids is obligated to provide notice of the nature of the disabling condition to the college and to assist it in identifying appropriate and effective auxiliary aids. In elementary and secondary schools, teachers and school specialists may have arranged support services for students with disabilities. However, in postsecondary schools, the students themselves must identify the need for an auxiliary aid and give adequate notice of the need. The student's notification should be provided to the appropriate representative of the college who, depending upon the nature and scope of the request, could be the school's Section 504 or ADA coordinator, an appropriate dean, a faculty advisor, or a professor. Unlike elementary or

secondary schools, colleges may ask the student, in response to a request for auxiliary aids, to provide supporting diagnostic test results and professional prescriptions for auxiliary aids. A college also may obtain its own professional determination of whether specific requested auxiliary aids are necessary.

Examples of Auxiliary Aids

Some of the various types of auxiliary aids and services may include:

- taped texts
- notetakers
- interpreters
- readers
- videotext displays
- television enlargers
- talking calculators
- electronic readers
- Braille calculators, printers, or typewriters
- telephone handset amplifiers
- closed caption decoders
- open and closed captioning
- voice synthesizers
- specialized gym equipment
- calculators or keyboards with large buttons
- reaching device for library use
- raised-line drawing kits
- assistive listening devices
- assistive listening systems
- telecommunications devices for deaf persons.

Technological advances in electronics have improved vastly participation by students with disabilities in educational activities. Colleges are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of a student with a disability. An institution has flexibility in choosing the specific aid or service it provides to the student, as long as the aid or service selected is effective. These aids should be selected after consultation with the student who will use them.

Effectiveness of Auxiliary Aids

No aid or service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the education program or activity. Not all students with a similar disability benefit equally from an identical auxiliary aid or service. The regulation refers to this complex issue of effectiveness in several sections, including:

> Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services

and actions.

There are other references to effectiveness in the general provisions of the Section 504 regulation which state, in part, that a recipient may not:

> Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; or
>
> Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

The Title II regulation contains comparable provisions.

The Section 504 regulation also states:

> [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

The institution must analyze the appropriateness of an aid or service in its specific context. For example, the type of assistance needed in a classroom by a student who is hearing-impaired may vary, depending upon whether the format is a large lecture hall or a seminar. With the one-way communication of a lecture, the service of a notetaker may be adequate, but in the two-way communication of a seminar, an interpreter may be needed. College officials also should be aware that in determining what types of auxiliary aids and services are necessary under Title II of the ADA, the institution must give primary consideration to the requests of individuals with disabilities.

Cost of Auxiliary Aids

Postsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in

obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Personal Aids and Services

An issue that is often misunderstood by postsecondary officials and students is the provision of personal aids and services. Personal aids and services, including help in bathing, dressing, or other personal care, are not required to be provided by postsecondary institutions. The Section 504 regulation states:

> Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Title II of the ADA similarly states that personal services are not required.

In order to ensure that students with disabilities are given a free appropriate public education, local education agencies are required to provide many services and aids of a personal nature to students with disabilities when they are enrolled in elementary and secondary schools. However, once students with disabilities graduate from a high school program or its equivalent, education institutions are no longer required to provide aids, devices, or services of a personal nature.

Postsecondary schools do not have to provide personal services relating to certain individual academic activities. Personal attendants and individually prescribed devices are the responsibility of the student who has a disability and not of the institution. For example, readers may be provided for classroom use but institutions are not required to provide readers for personal use or for help during individual study time.

Questions Commonly Asked by Postsecondary Schools and Their Students

Q: What are a college's obligations to provide auxiliary aids for library study?

A: Libraries and some of their significant and basic materials must be made accessible by the recipient to students with disabilities. Students with disabilities must have the appropriate auxiliary aids needed to locate and obtain library resources. The college library's basic index of holdings (whether formatted on-line or on index cards) must be accessible. For example, a screen and keyboard (or card file) must be placed within reach of a student using a wheelchair. If a Braille index of holdings is not available for blind students, readers must be provided for necessary assistance.

Articles and materials that are library holdings and are required for course work must be accessible to all students enrolled in that course. This means that if material is required for the class, then its text must be read for a blind student or provided in Braille or on tape. A student's actual study time and use of these articles are considered personal study time and the institution has no further obligation to provide additional auxiliary aids.

Q: What if an instructor objects to the use of an auxiliary or personal aid?

A: Sometimes postsecondary instructors may not be familiar with Section 504 or ADA requirements regarding the use of an auxiliary or personal aid in their classrooms. Most often, questions arise when a student uses a tape recorder. College teachers may believe recording lectures is an infringement upon their own or other students' academic freedom, or constitutes copyright violation.

The instructor may not forbid a student's use of an aid if that prohibition limits the student's participation in the school program. The Section 504 regulation states:

> A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

In order to allow a student with a disability the use of an effective aid and, at the same time, protect the instructor, the institution may require the student to sign an agreement so as not to infringe on a potential copyright or to limit freedom of speech.

Q: What if students with disabilities require auxiliary aids during an examination?

A: A student may need an auxiliary aid or service in order to successfully complete a course exam. This may mean that a student be allowed to give oral rather than written answers. It also may be possible for a student to present a tape containing the oral examination response. A test should ultimately measure a student's achievements and not the extent of the disability.

Q: Can postsecondary institutions treat a foreign student with disabilities who needs auxiliary aids differently than American students?

A: No, an institution may not treat a foreign student who needs auxiliary aids differently than an American student. A postsecondary institution

must provide to a foreign student with a disability the same type of auxiliary aids and services it would provide to an American student with a disability. Section 504 and the ADA require that the provision of services be based on a student's disability and not on such other criteria as nationality.

Q: Are institutions responsible for providing auxiliary services to disabled students in filling out financial aid and student employment applications, or other forms of necessary paperwork?

A: Yes, an institution must provide services to disabled students who may need assistance in filling out aid applications or other forms. If the student requesting assistance is still in the process of being evaluated to determine eligibility for an auxiliary aid or service, help with this paperwork by the institution is mandated in the interim.

Q: Does a postsecondary institution have to provide auxiliary aids and services for a nondegree student?

A: Yes, students with disabilities who are auditing classes or who otherwise are not working for a degree must be provided auxiliary aids and services to the same extent as students who are in a degree-granting program.

For More Information

For more information on Section 504 and the ADA and their application to auxiliary aids and services for disabled students in postsecondary schools, or to obtain additional assistance, see the list of OCR's 12 enforcement offices containing the address and telephone number for the office that serves your area, or call 1-800-421-3481.

Top

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Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities

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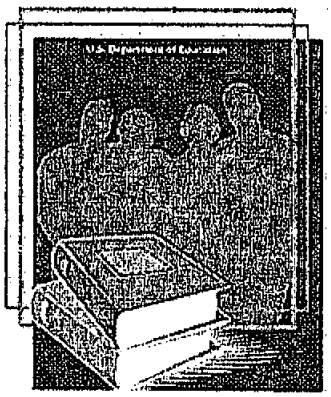
Students With Disabilities Preparing For Postsecondary Education: Know Your Rights and Responsibilities

More and more high school students with disabilities are planning to continue their education in postsecondary schools, including vocational and career schools, two- and four- year colleges, and universities. As a student with a disability, you need to be well informed about your rights and responsibilities as well as the responsibilities postsecondary schools have toward you. Being well informed will help ensure you have a full opportunity to enjoy the benefits of the postsecondary education experience without confusion

or delay.

The information in this pamphlet, provided by the Office for Civil Rights (OCR) in the U. S. Department of Education, explains the rights and responsibilities of students with disabilities who are preparing to attend postsecondary schools. This pamphlet also explains the obligations of a postsecondary school to provide academic adjustments, including auxiliary aids and services, to ensure the school does not discriminate on the basis of disability.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibit discrimination on the basis of disability. Practically every school district and postsecondary school in the United States is subject to one or both of these laws, which have similar requirements.*/

Although both school districts and postsecondary schools must comply with these same laws, the responsibilities of postsecondary schools are significantly different from those of school districts.

Moreover, you will have responsibilities as a postsecondary student that you do not have as a high school student. OCR strongly encourages you to know your responsibilities and those of postsecondary schools under Section 504 and Title II. Doing so will improve your opportunity to succeed as you enter postsecondary education.

The following questions and answers provide more specific information to help you succeed.

As a student with a disability leaving high school and entering postsecondary education, will I see differences in my rights and how they are addressed?

Yes. Section 504 and Title II protect elementary, secondary and postsecondary students from discrimination. Nevertheless, several of the requirements that apply through high school are different from the requirements that apply beyond high school. For instance, Section 504 requires a school district to provide a free appropriate public education (FAPE) to each child with a disability in the district's jurisdiction. Whatever the disability, a school district must identify an individual's education needs and provide any regular or special education and related aids and services necessary to meet those needs as well as it is meeting the needs of students without disabilities.

Unlike your high school, your postsecondary school is not required to provide FAPE. Rather, your postsecondary school is required to provide appropriate academic adjustments as necessary to ensure that it does not discriminate on the basis of disability. In addition, if your postsecondary school provides housing to nondisabled students, it must

provide comparable, convenient and accessible housing to students with disabilities at the same cost.

Other important differences you need to know, even before you arrive at your postsecondary school, are addressed in the remaining questions.

May a postsecondary school deny my admission because I have a disability?

No. If you meet the essential requirements for admission, a postsecondary school may not deny your admission simply because you have a disability.

Do I have to inform a postsecondary school that I have a disability?

No. However, if you want the school to provide an academic adjustment, you must identify yourself as having a disability. Likewise, you should let the school know about your disability if you want to ensure that you are assigned to accessible facilities. In any event, your disclosure of a disability is always voluntary.

What academic adjustments must a postsecondary school provide?

The appropriate academic adjustment must be determined based on your disability and individual needs. Academic adjustments may include auxiliary aids and modifications to academic requirements as are necessary to ensure equal educational opportunity. Examples of such adjustments are arranging for priority registration; reducing a course load; substituting one course for another; providing note takers, recording devices, sign language interpreters, extended time for testing and; if telephones are provided in dorm rooms, a TTY in your dorm room; and equipping school computers with screen-reading, voice recognition or other adaptive software or hardware.

In providing an academic adjustment, your postsecondary school is not required to lower or effect substantial modifications to essential requirements. For example, although your school may be required to provide extended testing time, it is not required to change the substantive content of the test. In addition, your postsecondary school does not have to make modifications that would fundamentally alter the nature of a service, program or activity or would result in undue financial or administrative burdens. Finally, your postsecondary school does not have to provide personal attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature, such as tutoring and typing.

If I want an academic adjustment, what must I

do?

You must inform the school that you have a disability and need an academic adjustment. Unlike your school district, your postsecondary school is not required to identify you as having a disability or assess your needs.

Your postsecondary school may require you to follow reasonable procedures to request an academic adjustment. You are responsible for knowing and following these procedures. Postsecondary schools usually include, in their publications providing general information, information on the procedures and contacts for requesting an academic adjustment. Such publications include recruitment materials, catalogs and student handbooks, and are often available on school Web sites. Many schools also have staff whose purpose is to assist students with disabilities. If you are unable to locate the procedures, ask a school official, such as an admissions officer or counselor.

When should I request an academic adjustment?

Although you may request an academic adjustment from your postsecondary school at any time, you should request it as early as possible. Some academic adjustments may take more time to provide than others. You should follow your school's procedures to ensure that your school has enough time to review your request and provide an appropriate academic adjustment.

Do I have to prove that I have a disability to obtain an academic adjustment?

Generally, yes. Your school will probably require you to provide documentation that shows you have a current disability and need an academic adjustment.

What documentation should I provide?

Schools may set reasonable standards for documentation. Some schools require more documentation than others. They may require you to provide documentation prepared by an appropriate professional, such as a medical doctor, psychologist or other qualified diagnostician. The required documentation may include one or more of the following: a diagnosis of your current disability; the date of the diagnosis; how the diagnosis was reached; the credentials of the professional; how your disability affects a major life activity; and how the disability affects your academic performance. The documentation should provide enough information for you and your school to decide what is an appropriate academic adjustment.

Although an individualized education program (IEP) or Section 504 plan, if you have one, may help identify services that have been effective for you, it

generally is not sufficient documentation. This is because postsecondary education presents different demands than high school education, and what you need to meet these new demands may be different. Also in some cases, the nature of a disability may change.

If the documentation that you have does not meet the postsecondary school's requirements, a school official should tell you in a timely manner what additional documentation you need to provide. You may need a new evaluation in order to provide the required documentation.

Who has to pay for a new evaluation?

Neither your high school nor your postsecondary school is required to conduct or pay for a new evaluation to document your disability and need for an academic adjustment. This may mean that you have to pay or find funding to pay an appropriate professional for an evaluation. If you are eligible for services through your state vocational rehabilitation agency, you may qualify for an evaluation at no cost to you. You may locate your state vocational rehabilitation agency through the following Web page: http://www.jan.wvu.edu/SBSES/VOCREHAB.HTM.

Once the school has received the necessary documentation from me, what should I expect?

The school will review your request in light of the essential requirements for the relevant program to help determine an appropriate academic adjustment. It is important to remember that the school is not required to lower or waive essential requirements. If you have requested a specific academic adjustment, the school may offer that academic adjustment or an alternative one if the alternative would also be effective. The school may also conduct its own evaluation of your disability and needs at its own expense.

You should expect your school to work with you in an interactive process to identify an appropriate academic adjustment. Unlike the experience you may have had in high school, however, do not expect your postsecondary school to invite your parents to participate in the process or to develop an IEP for you.

What if the academic adjustment we identified is not working?

Let the school know as soon as you become aware that the results are not what you expected. It may be too late to correct the problem if you wait until the course or activity is completed. You and your school should work together to resolve the problem.

May a postsecondary school charge me for providing an academic adjustment?

No. Furthermore, it may not charge students with disabilities more for participating in its programs or activities than it charges students who do not have disabilities.

What can I do if I believe the school is discriminating against me?

Practically every postsecondary school must have a person—frequently called the Section 504 Coordinator, ADA Coordinator, or Disability Services Coordinator—– who coordinates the school's compliance with Section 504 or Title II or both laws. You may contact this person for information about how to address your concerns.

The school must also have grievance procedures. These procedures are not the same as the due process procedures with which you may be familiar from high school. However, the postsecondary school's grievance procedures must include steps to ensure that you may raise your concerns fully and fairly and must provide for the prompt and equitable resolution of complaints.

School publications, such as student handbooks and catalogs, usually describe the steps you must take to start the grievance process. Often, schools have both formal and informal processes. If you decide to use a grievance process, you should be prepared to present all the reasons that support your request.

If you are dissatisfied with the outcome from using the school's grievance procedures or you wish to pursue an alternative to using the grievance procedures, you may file a complaint against the school with OCR or in a court. You may learn more about the OCR complaint process from the brochure *How to File a Discrimination Complaint with the Office for Civil Rights*, which you may obtain by contacting us at the addresses and phone numbers below, or at http://www.ed.gov/ocr/docs/howto.html.

If you would like more information about the responsibilities of postsecondary schools to students with disabilities, read the OCR brochure *Auxiliary Aids and Services for Postsecondary Students with Disabilities: Higher Education's Obligations Under Section 504 and Title II of the ADA*. You may obtain a copy by contacting us at the address and phone numbers below, or at http://www.ed.gov/ocr/docs/auxaids.html.

Students with disabilities who know their rights and responsibilities are much better equipped to succeed in postsecondary school. We encourage you to work with the staff at your school because they, too, want you to succeed. Seek the support of family, friends and fellow students, including those with disabilities. Know your talents and capitalize on them, and believe in yourself as you embrace new challenges in your education.

To receive more information about the civil rights of students with disabilities in education institutions, you may contact us at :

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U.S. Department of Education
Washington, D.C. 20202-1100
Phone: 1-800-421-3481
TDD: 1- 877-521-2172
Email: ocr@ed.gov
Web site: www.ed.gov/ocr

*/You may be familiar with another federal law that applies to the education of students with disabilities—the Individuals with Disabilities Education Act (IDEA). That law is administered by the Office of Special Education Programs in the Office of Special Education and Rehabilitative Services in the U.S. Department of Education. The IDEA and its Individualized Education Program (IEP) provisions do not apply to postsecondary schools. This pamphlet does not discuss the IDEA or state and local laws that may apply.

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OCR Letter: University of Massachusetts - Amherst

Dr. David Scott
Chancellor
University of Massachusetts-Amherst
375 Whitmore Administration Building
Amherst, Massachusetts 01003
Complaint No. 01-93-2011

On December 3, 1992, this complaint was filed against the University of Massachusetts at Amherst (University) with the Office for Civil Rights (OCR). The Complainant alleged that the University does not provide adequate parking spaces designated for persons with disabilities at the Admissions Center, the Robson Memorial Visitor Center, and at all other parking areas on campus. The Complainant also alleged that parking spaces and the cafeteria at the Newman Center (Center) are not accessible to persons with disabilities. The Center, although not owned or operated by the University, was alleged to receive significant Federal financial assistance from the U.S. Department of Education (Department) through the University.

OCR investigates complaints alleging discrimination against persons with disabilities pursuant to its enforcement responsibilities under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, and its implementing regulation found at 34 C.F.R. Part 104 (Section 504), which prohibit discrimination in any program or activity receiving or benefiting from Federal financial assistance extended by the Department. The University receives such Federal funding, and is, therefore, subject to the provisions of Section 504.

OCR also investigates these types of complaints under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12134, and its implementing regulation found at 28 C.F.R. Part 35 (ADA), which prohibit discrimination on the basis of disability by public postsecondary education systems. As a public postsecondary education system, the University is also subject to the provisions of the ADA.
OCR sent data requests to the University on March 12, 1993 and May 13, 1993. The University responded on April 1, 1993, May 10 and 18, and June 14, 1993. In addition, OCR conducted an on-site investigation on June 14, 1993 of selected University parking lots.

OCR found that the University failed to provide adequate accessible parking to persons with disabilities in violation of Section 504 and the ADA. OCR also found that the University provided significant financial assistance to the Center and that the Center failed to provide adequate parking and an accessible cafeteria. The reasons for OCR's findings are presented below.

Legal Standards

Under the Section 504 regulation, a recipient is responsible not only for prohibiting discrimination in its own programs and activities, but also for not participating in contracts or other arrangements which have the result of subjecting individuals to discrimination on the basis of disability. The regulation at 34 C.F.R. § 104.4(b)(4) states:

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

The ADA similarly requires, at 28 C.F.R. § 35.130(b)(3):
A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the

objectives of the public entity program with respect to individuals with disabilities; or (iii) that perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same state.

As a result, a recipient violates Section 504, and a public entity violates the ADA, if it renders assistance to or enters into arrangements with a non-recipient or a private entity that discriminates against individuals with disabilities. Since the Center is not a recipient, OCR would normally review the accessibility of Federally funded programs only, except that the scope of the complaint was limited to parking and the cafeteria. OCR considers these services essential to the accessibility of all programs at the Center, including the Federally supported programs. In the current case, in order to determine if the University violated the regulations cited above, OCR considered whether the programs and activities at the Center are accessible to individuals with disabilities.

Section 504 provides a dual legal standard to assess program accessibility. Buildings constructed prior to June 3, 1977, the effective date of the regulation, are regarded as "existing facilities" and must comply with 34 C.F.R. § 104.22. Facilities constructed after June 3, 1977, and parts of existing facilities altered after that date, are deemed "new construction" and must comply with 34 C.F.R. § 104.23.

Section 104.22 requires for "existing facilities" that a recipient's programs or activities in an existing facility, when viewed in their entirety, must be accessible to persons with disabilities. The recipient is not required to make each of its existing facilities or every part of an existing facility accessible to persons with disabilities, if each program or activity as a whole is accessible.

Section 104.23 requires for "new construction" that the facility itself, or part of the facility that has been altered or renovated after June 3, 1977, must be accessible to persons with disabilities.

A checklist based on the Uniform Federal Accessibility Standards (UFAS) is used as a guide in determining the physical accessibility of programs and activities in existing facilities. The applicable regulations state that where a recipient operates a program or activity in an existing facility, the program or activity, when viewed in its entirety, must be readily accessible to and usable by persons with disabilities. A recipient may comply with this requirement through such means as

redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the regulatory requirements for new construction, or any other methods that result in making its programs or activities accessible to persons with disabilities. Because OCR uses UFAS only as a guide in determining compliance for existing facilities, departures from the particular requirements of UFAS by the use of other methods are permitted when it can be demonstrated that the recipient's programs and activities are accessible to persons with disabilities.

Title II of the ADA has adopted virtually identical requirements to the Section 504 regulation with respect to the physical accessibility of programs, activities, and facilities administered by state and local government agencies. Under the ADA, however, the date used to distinguish "existing facilities" from "new construction" is January 26, 1992.

Regarding program accessibility, the ADA regulation provides a dual legal standard similar to the Section 504 standard. Buildings constructed prior to January 26, 1992, the effective date of the Title II regulation, are regarded as existing facilities and must comply with 28 C.F.R. § 35.150. Facilities constructed after January 26, 1992, and parts of existing facilities altered after that date, are deemed new construction and must comply with 28 C.F.R. § 35.151. Section 35.150 requires that a recipient's programs or activities in an existing facility, when viewed in their entirety, be accessible to persons with disabilities. Section 35.151 requires for new construction that the facility itself, or part of the facility that has been altered or renovated after January 26, 1992, be readily accessible to and usable by persons with disabilities.

To meet the "readily accessible" requirement for new construction under 28 C.F.R. § 35.151, a public entity may show compliance through conformance with either UFAS or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). OCR uses UFAS and ADAAG to determine whether new construction complies with the regulations at 28 C.F.R. § 35.151. Departures from the particular requirements of UFAS or ADAAG for new construction by the use of other methods are permitted when it is clearly evident that equivalent access to the facility or part of the facility

is provided.

For construction initiated prior to January 26, 1992, OCR uses ADAAG, UFAS, ANSI or whatever standard was in effect at the time of the construction, to determine whether programs and activities in an existing facility, when viewed in their entirety, are accessible to disabled persons. Departures from the requirements of ADAAG, UFAS, ANSI or other standards are permissible as long as access to programs and activities is provided.

Since OCR is an agency that has Section 504 jurisdiction, Title II of the ADA requires us to process ADA complaint investigations under our procedures for enforcing Section 504. Although we use Section 504 procedures, our findings will reflect determinations of compliance with both Section 504 and the ADA.

Issue One: Newman Center

OCR investigated the following issue:
Whether the University, directly or through contractual or other arrangements, utilized criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [34 C.F.R. § 104.4(b)(4), and 28 C.F.R. § 35.130(b)(3)].

Findings of Facts

The Director of the Center (Director) described the Center as an ecumenical center serving all members of the University's community, providing counseling, educational activities, and fellowship as well as serving as a Catholic cultural center. The single largest function area of the Center is its cafeteria which has a capacity of 400, serves 3,000 persons daily and is open everyday of the year, according to the Director.

The University informed OCR that at the time the complaint was filed, the University had placed two federally assisted work study students to perform administrative duties in support of programs and activities at the Center. OCR found that the Center provided the University's School of Management with classroom and meeting space on request and the University lists the Center's Director and two others as University Chaplains in its directory, providing them with University identification cards giving them access to University facilities. OCR has jurisdiction to investigate alleged accessibility problems at the Center

since the Center benefitted from Federal financial assistance received by the University.

OCR applied, as guidelines, the regulatory standards for program access for existing facilities found at 34 C.F.R. § 104.22, and 28 C.F.R. § 35.150(a) and (b), based on the Center's construction date, to determine whether the Center discriminated against individuals with disabilities by denying them access to its essential programs.

OCR found that the Center is located in a three-story building which was constructed over thirty years ago. The Center is on privately owned land and, although a private entity, received benefits from the University establishing OCR's jurisdiction.

In a telephone inquiry with the Center's Director and as confirmed by the on-site inspection, OCR determined that the Center's cafeteria is located on a mezzanine level with three steps to a level entrance. Also, the designated accessible parking is not located within a reasonable distance to the nearest level entrance and the designated accessible parking does not have an access aisle which means that persons disembarking must traverse a vehicular route to get to the entrance.

Conclusion

OCR concluded that the University is in violation of Section 504 at 34 C.F.R. § 104.4(b)(4) and the ADA at 28 C.F.R. § 35.130(b)(3) because it participates in contractual or other arrangements that subject individuals with disabilities to discrimination on the basis of disability by denying them access to programs and activities at the Center.

Issue Two: University Parking

OCR investigated the following issue:

Whether the University discriminates against persons with disabilities by failing to ensure that its programs and activities, when viewed in their entirety, are accessible to and usable by persons with disabilities. [34 C.F.R. §§ 104.22 and 104.23 and 28 C.F.R. § 35.150]

Findings of Fact

OCR found that some of the University's parking areas were built prior to June 3, 1977, although there have been some renovations since 1977. Thus, the Section 504 requirements for existing facilities found at 34 C.F.R. § 104.22 apply to some of the parking areas, and the requirements for new construction at 34 C.F.R. § 104.23 apply only to

the portions of the facilities that have been modified since 1977. OCR found that no renovations to the University's parking areas were completed after January 26, 1992, but some construction was in progress. Thus, OCR applied the ADA standards at 28 C.F.R. § 35.150 for these facilities.

The University provided OCR with a list of 42 parking areas, with 152 designated accessible spaces out of a grand total of 11,178 spaces on campus. OCR randomly selected from that list eight parking areas for inspection. OCR also inspected the three other parking areas identified by the Complainant. OCR inspected lots 22, 24, 27, 49, 64, 71, 74, E Perimeter, North Village, Robson Memorial Visitor Center, Admissions Center (52), and the Center. The Center had an additional 46 parking spaces. These 11 parking areas had 53 designated accessible spaces, out of 4,624 spaces in those areas, according to the University.

Lot Designator Designated Accessible Spaces Total Spaces

22 (also "D" or soccer lot) 0 802
24 Tilson Farm 0 65
27 Physical plant 0 7
49 Orchard Hill 9 642
52 Admissions Center 3 24
64 Dickenson Central Campus 20 281
71 Administration 12 229
E Perimeter 0 2,207
North Village 4 309
Robson Memorial Visitor Center 2 12
Newman Center (Center) 3 46

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53 4,624

OCR found one or more of the following deficiencies in each of the parking areas inspected: no post-mounted "accessible parking" signs; spaces too narrow; lack of access aisles; access aisles too narrow; designated accessible spaces were not within a reasonable distance near the entrance; the spaces were not located on an accessible route because persons with disabilities were required to cross hazardous unmarked vehicle lanes; designated space lane markers were not painted or were worn out; access route to be used required traversing a loading area used by large trucks; van access was not designated;

and passenger loading zones for accessible shuttle vans not designated or marked.

Although some parking areas did not have any designated accessible parking e.g., "E" lots on the perimeter of the campus, this may not be a violation under certain conditions. The "E" lots are remote parking areas, whose permits are the least expensive and may be used for extended periods by some students or cost conscious commuters, but are far from services and entrances. The "E" lots are unimproved with gravel surfaces. The University constructed the "E" lots in 1967. The University told OCR that it provides designated accessible parking in other lots closer to services and entrances and that persons with disabilities do not need to pay any parking fee to use such spaces. There is no time limit for their use according to University staff. As long as the designated parking in other lots provides greater access at the same or less cost than is available in the "E" lots, then the absence of designated accessible parking in the "E" lots would not be a violation. Similarly, lot 27, another gravel lot, was located in a nonpublic area for use by physical plant staff and designated accessible parking was available in other lots nearby, closer to services used by the public. Thus, under those circumstances lot 27 may not need to have designated accessible spaces. However, OCR was not given any reason by the University why lots 22 and 24 did not have designated accessible parking.

Conclusion

Although the University provided some designated parking for persons with disabilities, the parking provided for persons with disabilities does not meet the accessibility provisions of UFAS or other accessibility standards. The lack of accessible parking has the effect of denying persons with disabilities access to the University's programs and activities in violation of Section 504 and the ADA and their implementing regulations at 34 C.F.R. § 104.22; § 104.23 and 28 C.F.R. § 35.150.

On June 14, 1993, OCR initiated negotiations with the University. As a result of these negotiations, the University signed a Corrective Action Plan (Agreement) (copy enclosed) and agreed to take corrective actions to remedy the violations. Based on the University's written assurance that the remedial actions set forth in the Agreement will be completed by the dates specified in the Agreement, OCR considers the University to be currently fulfilling its obligations under Section 504 and

the ADA.

Therefore, this complaint is closed effective the date of this letter. Continued compliance is contingent upon the University carrying out the stipulated corrective actions to which it has agreed. Failure to perform the corrective actions may result in a finding of noncompliance and enforcement action. In accordance with the ADA, enforcement action may include referral of this matter to the United States Department of Justice.

As is our standard practice, OCR will monitor the University's progress in implementing the agreed upon corrective actions. In order to monitor the implementation of the Agreement, OCR requires that the University submit an initial report by October 15, 1993, which will include a description of its attempts to have the Center comply with the Agreement. The report should describe actions to be taken by the Center to render the parking and cafeteria programs and activities accessible to individuals with disabilities.

If a determination is made, in accordance with the Agreement, that the Center will not correct the problems identified, the report should describe the University actions, with supporting documentation, to ensure that the Center does not benefit from Federal financial assistance to the University.
The findings of this letter address only the issues discussed herein and should not be interpreted as a determination of the University's compliance or noncompliance with Section 504 or the ADA in any other respect.

Under the Freedom of Information Act, 5 U.S.C. Section 552, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.
If you have any questions, do not hesitate to contact me at 617/223-9667 or J. Michael Burns, Deputy Regional Director at 617/223-4146.

Thomas J. Hibino
Regional Director

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U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Americans with Disabilities Act

ADA TA

Technical Assistance
Updates from the U.S. Department of Justice

Common Questions:
Readily Achievable Barrier Removal

Design Details:
Van Accessible Parking Spaces

Van
Accessible

Number 1.

August 1996

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Disclaimer

The ADA authorizes the Department of Justice to provide technical assistance to individuals and entities that have rights or responsibilities under the Act. This document provides informal guidance to assist you in understanding the ADA and the Department's regulation. However, this technical assistance does not constitute a legal interpretation of the statute.

Introduction

ADA-TA, a series of technical assistance (TA) updates from the Disability Rights Section of the Civil Rights Division of the Department of Justice, provides practical information on how to comply with the Americans with Disabilities Act (ADA). Each ADA-TA highlights specific topics of interest to business owners and managers, State and local government officials, architects, engineers, contractors, product designers and manufacturers, and all others who seek a better understanding of accessible design and the ADA. The goal of the series is to clarify potential misunderstandings about the requirements of the ADA, and to highlight its flexible, common sense approach to accessibility.

Each ADA-TA has two standard features: **Common Questions** and **Design Details**. **Common Questions** answers questions that have been brought to our attention through complaints, compliance reviews, calls to our information line, or letters from the public. **Design Details** provides supplemental information and illustrations of specific design requirements.

ADA-TA complements the Department's ADA documents, including the regulations issued under titles II and III of the ADA and the Department's technical assistance manuals. ADA-TA is not a legal interpretation of the ADA. Instead it provides practical solutions on how to comply with the ADA while avoiding costly and common mistakes.

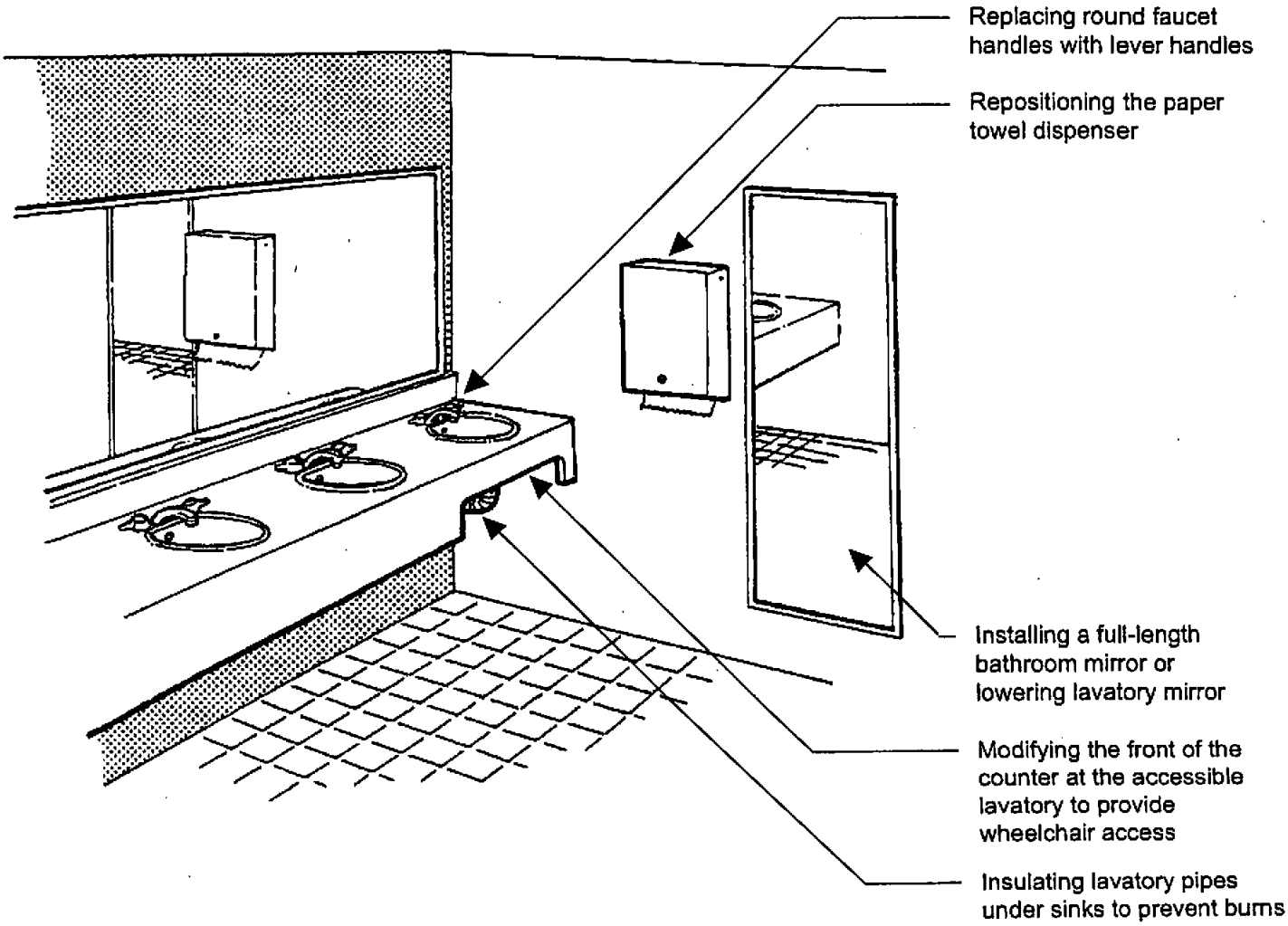
Obtaining additional ADA information may be as easy as a trip to your local library. The Department of Justice has sent an ADA Information File containing 70 technical assistance documents to 15,000 libraries across the country. Most libraries maintain this file at the reference desk.

The Department's ADA publications are also available electronically, including ADA regulations and technical assistance materials, through the Internet or by calling the Department's electronic bulletin board (BBS). Materials can be accessed on the World Wide Web at http://www.usdoj.gov/crt/ada/adahom1.htm or by using gopher client software (gopher://justice2.usdoj.gov:70/11/crt/ada). The materials can be also downloaded from the Department of Justice ADA-BBS by dialing (202) 514-6193. You can also reach this BBS through the Internet using the telenet fedworld gateway (telenet fedworld.gov). At the main menu, choose "U" (Utilities/Files/Mail), then choose "D" (gateway system) followed by "D" (connect to gov't sys/database) and then #9 ADA-BBS (DOJ).

To order copies of the Department's regulations, technical assistance manuals and other publications, or obtain answers to specific questions, CALL:

(800) 514-0301 (voice)

(800) 514-0383 (TDD).



Selected Examples of Barrier Removal

Common Questions:
Readily Achievable Barrier Removal

The ADA requires companies providing goods and services to the public to take certain limited steps to improve access to existing places of business. This mandate includes the obligation to remove barriers from existing buildings when it is readily achievable to do so. Readily achievable means *easily accomplishable and able to be carried out without much difficulty or expense.*

Many building features that are common in older facilities such as narrow doors, a step or a round door knob at an entrance door, or a crowded check-out or store aisle are barriers to access by people with disabilities. Removing barriers by ramping a curb, widening an entrance door, installing visual alarms, or designating an accessible parking space is often essential to ensure equal opportunity for people with disabilities. Because removing these and other common barriers can be simple and inexpensive in some cases and difficult and costly in others, the regulations for the ADA provide a flexible approach to compliance. This practical approach requires that barriers be removed in existing facilities only when it is readily achievable to do so. The ADA does not require existing buildings to meet the ADA's standards for newly constructed facilities.

Individuals with disabilities may not be denied the full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations"

The ADA states that individuals with disabilities may not be denied the full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations" that the business provides -- in other words, whatever type of good or service a business provides to its customers or clients. A business or other private entity that serves the public must ensure equal opportunity for people with disabilities.

In the following section, we answer some of the most commonly asked questions we receive from our toll-free ADA Information Line about the barrier removal requirement and how it differs from those requirements that apply to new construction and alteration of buildings.

■ ***I own three buildings, two of which were designed and constructed prior to the enactment of the ADA. I have been told I have to make them all accessible. Is this true? Does the ADA require me to make them all accessible?***

The ADA establishes different requirements for existing facilities and new construction.

The ADA establishes different requirements for existing facilities and new construction. In existing facilities where retrofitting may be expensive, the requirement to provide access through barrier removal is less than it is in new construction where accessibility can be incorporated in the initial stages of design and construction without a significant increase in cost.

The requirement to remove barriers in existing buildings applies only to a private entity that owns, leases, leases to or operates a "place of public accommodation." Further, barriers must be removed only where it is "readily achievable" to do so. Readily achievable means *easily accomplishable and able to be carried out without much difficulty or expense.*

■ ***Is my business required to remove barriers?***

If your business provides goods and services to the public, you are required to remove barriers if doing so is readily achievable. Such a business is called a public accommodation because it serves the public. If your business is not open to the public but is only a place of employment like a warehouse, manufacturing facility or office building, then there is no requirement to remove barriers. Such a facility is called a commercial facility. While the operator of a commercial facility is not required to remove barriers, you must comply with the ADA Standards for Accessible Design when you alter, renovate or expand your facility.

■ ***What is a "place of public accommodation"?***

A place of public accommodation is a facility whose operations affect commerce and fall within at least one of the following 12 categories set out in the ADA:

The types of facilities listed in each category are examples — they are not intended to be an exhaustive list of all covered facilities.

1) Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
2) Establishments serving food or drink (e.g., restaurants and bars);
3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
6) Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services,

funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);

7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
8) Places of public display or collection (e.g., museums, libraries, galleries);
9) Places of recreation (e.g., parks, zoos, amusement parks);
10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

■ ***I operate a restaurant that opened in 1991. The city required that the restaurant comply with the local accessibility code. Is the restaurant "grandfathered" and not required to remove barriers as required by the ADA?***

No. A restaurant is a public accommodation and a place of public accommodation must remove barriers when it is readily achievable to do so. Although the facility may be "grandfathered" according to the local building code, the ADA does not have a provision to "grandfather" a facility. While a local building authority may not require any modifications to bring a building "up to code" until a renovation or major alteration is done, the ADA requires that a place of public accommodation remove barriers that are readily achievable even when no alterations or renovations are planned.

...the ADA does not have a provision to "grandfather" a facility...

■ ***Do I, as the owner, have to pay for removing barriers?***

Yes, but tenants and management companies also have an obligation. Any private entity who owns, leases, leases to, or operates a place of public accommodation shares in the obligation to remove barriers.

■ ***If I do remove barriers, is my business entitled to any tax benefit to help pay for the cost of compliance?***

As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers (Section 190).

To learn more about tax credits and deductions for barrier removal and providing accessibility contact the IRS at (800) 829-1040 (voice) or (800) 829-4059 (TDD) or call the Department of Justice ADA Information Line (800) 514-0301 voice, (800) 514-0383 TDD.

The 1990 amendment also permits eligible small businesses to receive a tax credit (Section 44) for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

■ ***What design standards apply when I'm removing barriers?***

When you undertake to remove a barrier, you should use the alterations provisions of the ADA Standards for Accessible Design (Standards). These Standards were published in Appendix A to the Department of Justice's Title III regulations, 28 CFR Part 36, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities.* Deviations from the Standards are acceptable when full compliance with those requirements is not "readily achievable". In such cases, barrier removal measures may be taken that do not fully comply with the Standards, so long as the measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

> *ILLUSTRATION: As a first step toward removing architectural barriers, the owner of a small shop decides to widen the shop's 26-inch wide front door. Because of space constraints the shop owner can only widen the door to provide a 30-inch clear width, not the full 32-inch clearance required for alterations under the* Standards. *Full compliance with the* Standards *is not in this case readily achievable. The 30-inch clear width will allow most people who use crutches or wheelchairs to get through the door and will not pose a significant risk to their health or safety.*

Copies of the regulations, which include the Standards can be ordered 24 hours a day from the Department's ADA Information line.

■ ***How can I get a copy of the ADA Standards for Accessible Design?***

Copies of the regulations, which include the Standards, are available from the Department of Justice's ADA Information Line and may also be available in your local library. The Department of Justice distributed an ADA Information File containing regulations and technical assistance materials to over 15,000 libraries nationwide. Copies of the regulations can be ordered 24 hours a day from the Department's ADA Information line (1-800-514-0301 Voice or 1-800-514-0383 TDD).

■ ***How do I determine what is readily achievable?***

"Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. Determining if barrier removal is readily achievable is, by necessity, a case-by-case judgment. Factors to consider include:

1) The nature and cost of the action;
2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

...readily achievable will have to be determined on a case-by-case basis in light of the nature and cost of the barrier removal and the resources available.

If the public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, you must consider the resources of both the local facility and the parent entity to determine if removal of a particular barrier is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

■ ***Can you tell me what barriers it will be "readily achievable" to remove?***

The Department's regulation contains a list of 21 examples of modifications that may be readily achievable. These include installing ramps, making curb cuts in sidewalks and at entrances, repositioning telephones, adding raised markings on elevator control buttons, installing visual alarms, widening doors, installing offset hinges to widen doorways, insulating lavatory pipes under sinks, repositioning a paper towel dispenser, installing a full-length mirror, rearranging toilet partitions to increase maneuvering space or installing an accessible toilet stall. The list is not exhaustive and is only intended to be illustrative. Each of these

modifications will be readily achievable in many instances, but not in all. Whether or not any of these measures is readily achievable will have to be determined on a case-by-case basis in light of the nature and cost of the barrier removal and the resources available.

■ ***Does the ADA permit me to consider the effect of a modification on the operation on my business?***

Yes. The ADA permits consideration of factors other than the initial cost of the physical removal of a barrier.

ILLUSTRATION: CDE convenience store determines that it would be inexpensive to remove shelves to provide access to wheelchair users throughout the store. However, this change would result in a significant loss of selling space that would have an adverse effect on its business. In this case, the removal of all the shelves is not readily achievable and, thus, is not required by the ADA. However, it may be readily achievable to remove some shelves.

■ ***If an area of my store is reachable only by a flight of steps, would I be required to add an elevator?***

Usually no. A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. The readily achievable standard does not require barrier removal that requires burdensome expense. Thus, where it is not readily achievable to do so, the ADA would not require a public accommodation to provide access to an area reachable only by a flight of stairs.

■ ***I have a portable ramp that we use for deliveries - can't I just use that?***

Yes, you could, but only if the installation of a permanent ramp is not readily achievable. In order to promote safety, a portable ramp should have railings, a firm, stable, nonslip surface and the slope should not exceed one to twelve (one unit of rise for every twelve units horizontal distance). It should also be properly secured and staff should be trained in its safe use.

■ ***Because one of my buildings is very inaccessible, I don't know what to fix first. Is guidance available?***

Yes. The Department recommends priorities for removing barriers in existing facilities because you may not have sufficient resources to remove all existing barriers at one time. These priorities are not mandatory. You are free to exercise discretion in determining the most effective "mix" of barrier removal measures for your facilities.

The **first priority** is enabling individuals with disabilities to enter the facility. This priority on "getting through the door" recognizes that providing physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The **second priority** is providing access to those areas where goods and services are made available to the public. For example, in a hardware store these areas would include the front desk and the retail display areas of the store.

The **third priority** is providing access to restrooms (if restrooms are provided for use by customers or clients).

The **fourth priority** is removing any remaining barriers, for example, lowering telephones.

Our priorities for barrier removal are not mandatory. Public accommodations are free to exercise discretion in determining the most effective "mix" of barrier removal measures to undertake in their facilities.

■ ***What about my employee areas? Must I remove barriers in areas used only by employees?***

No. The "readily achievable" obligation to remove barriers in existing facilities does not extend to areas of a facility that are used exclusively by employees. Of course, it may be necessary to remove barriers in response to a request for "reasonable accommodation" by a qualified employee or applicant as required by Title I of the ADA. For more information, contact the Equal Employment Opportunity Commission (EEOC) which enforces Title I of the ADA.

■ ***How can a public accommodation decide what needs to be done?***

One effective approach is to conduct a "self-evaluation" of the facility to identify existing barriers. While not required by the ADA, a serious effort at self-assessment and consultation can save resources by identifying the most efficient means of providing required access and can diminish the threat of litigation. It serves as evidence of a good faith effort to comply with the barrier removal requirements of the ADA. This process should include consultation with individuals with disabilities or with organizations representing them and procedures for annual reevaluations.

...public accommodations are urged to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements.

■ ***If a public accommodation determines that its facilities have barriers that should be removed, but it is not readily achievable to undertake all of the modifications now, what should it do?***

The Department recommends that a public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements. Such a plan, if appropriately designed and executed, could serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

...when barrier removal is not readily achievable, then goods and services must be made available through alternative methods, if such methods are readily achievable.

■ ***What if I'm not able to remove barriers at this time due to my financial situation? Does that mean I'm relieved of current responsibilities?***

No, when you can demonstrate that the removal of barriers is not readily achievable, you must make your goods and services available through alternative methods, if undertaking such methods is readily achievable. Examples of alternative methods include having clerks retrieve merchandise located on inaccessible shelves or delivering goods or services to the customers at curbside or in their homes. Of course, the obligation to remove barriers when readily achievable is a continuing one. Over time, barrier removal that initially was not readily achievable may later become so because of your changed circumstances.

■ ***If the obligation is continuing, do you mean there are no limits on what I must do to remove barriers?***

No. There are limits. In removing barriers, a public accommodation does not have to exceed the level of access required under the alterations provisions contained in the Standards (or the new construction provision where the Standards do not provide specific provisions for alterations).

ILLUSTRATION 1: An office building that houses places of public accommodation is removing barriers in public areas. The alterations provisions of the Standards explicitly state that areas of rescue assistance are not required in buildings that are being altered. Because barrier removal is not required to exceed the alterations standard, the building owner need not establish areas of rescue assistance.

ILLUSTRATION 2: A grocery store has more than 5000 square feet of selling space and prior to the ADA had six inaccessible check-out aisles. Because the Standards do not contain specific provisions applicable to the alteration of check-out aisles one must look to the new construction provisions of the Standards for the upper limit of the barrier removal obligation. These provisions require only two of the six check-out aisles to be accessible. Because the store found it readily achievable in 1993 and 1994 to remove barriers and make two of check-out aisles accessible, the store has fulfilled its obligation and is not required to make more check-out aisles accessible.

■ ***What is the difference between barrier removal and alterations? Aren't they both very similar?***

Not really . Under the ADA, barrier removal is done by a place of public accommodation to remove specific barriers that limit or prevent people with disabilities from obtaining access to the goods and services offered to the public. This is an ongoing obligation for the business that has limits determined by resources, size of the company and other factors (see pages 7 & 8). An alteration is replacement, renovation or addition to an element or space of a facility. Generally alterations are done to improve the function of the business, to accommodate a change or growth in services, or as part of a general renovation. The requirements for alterations are greater than those for barrier removal because the alteration is part of a larger construction or replacement effort.

■ ***One of the buildings that I own is a small factory with offices. Do I have to make that accessible?***

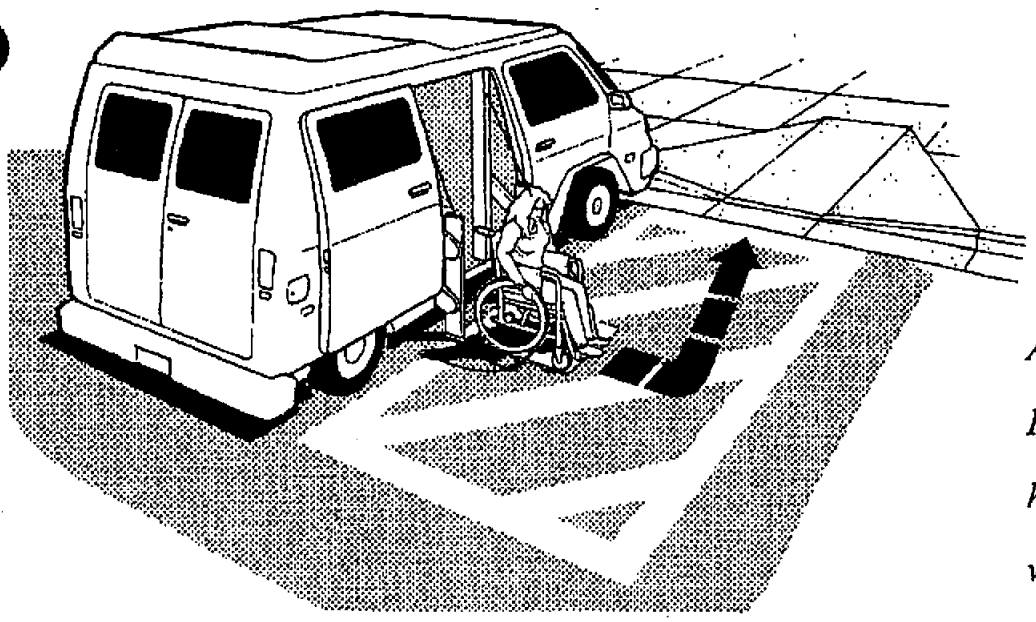
No, commercial facilities such as factories, warehouses, and office buildings that do not contain places of public accommodation are considered "commercial facilities" and are not required to remove barriers in existing facilities. They are, however, covered by the ADA's requirements for accessible design in new construction or alterations.

Commercial facilities that do not contain places of public accommodation are not required to remove barriers in existing facilities except to provide access to employment.

Design Details:
Van Accessible Parking Spaces

Vans equipped with lifts are an essential mode of transportation for many people who use wheelchairs and three-wheeled scooters. The lift-equipped van permits people to enter and exit the vehicle independently without having to leave their wheelchair.

The ADA creates new requirements for van accessible parking spaces. The ADA Standards for Accessible Design or Standards cover public accommodations, commercial facilities and certain State and local governments. State and local governments may choose between these Standards and the Uniform Federal Accessibility Standards (UFAS). Because UFAS does not specify how many van accessible parking spaces are required, only those State and local governments that have chosen the Standards as their ADA accessibility standard have specific, numerical requirements for van accessible parking. Requirements for State and local government agencies that have chosen the Uniform Federal Accessibility Standard (UFAS) are not addressed by this document.



A Van Accessible Parking Space always has a minimum 96-inch wide access aisle next to the van

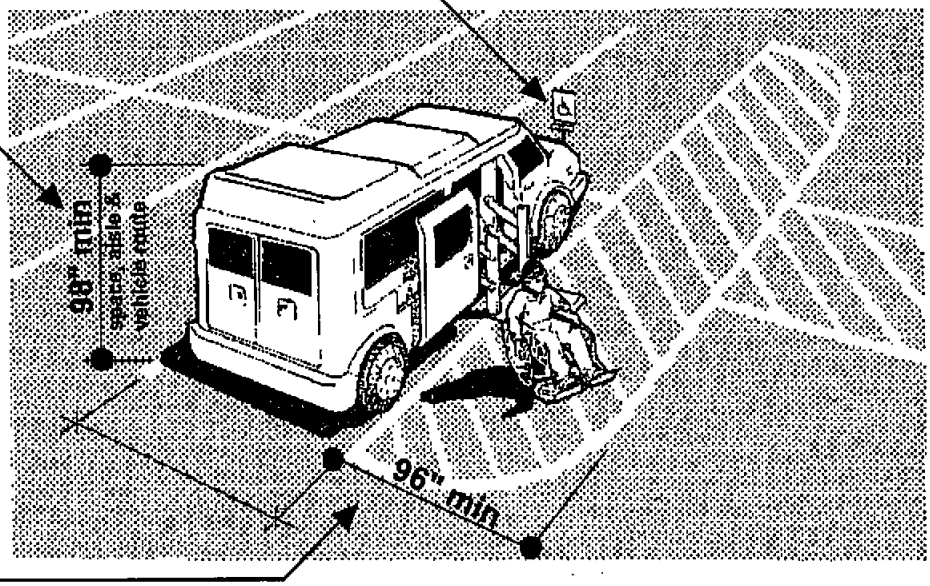
The new requirement for van accessible parking spaces is an important one for van users but its implementation has caused some confusion among people responsible for providing parking.

The following section provides information about the design requirements for van accessible parking spaces and explains when these spaces are required, what features are required, and where to locate them on a site.

Design Requirements for Van Accessible Parking Spaces

Van accessible parking spaces are identical to accessible parking spaces for cars except for the following:

- the access aisle must be at least eight-feet wide (as opposed to five-feet wide) to accommodate a wheelchair lift mounted at the side of a van;
- vertical clearance of at least 98 inches is required along the vehicular route to the parking space, at the van parking space, and along the route from the space to the exit to accommodate the height of most vans; and
- the required sign must have the words "van accessible" below the international symbol of accessibility (see 4.6.4 of the Standards).



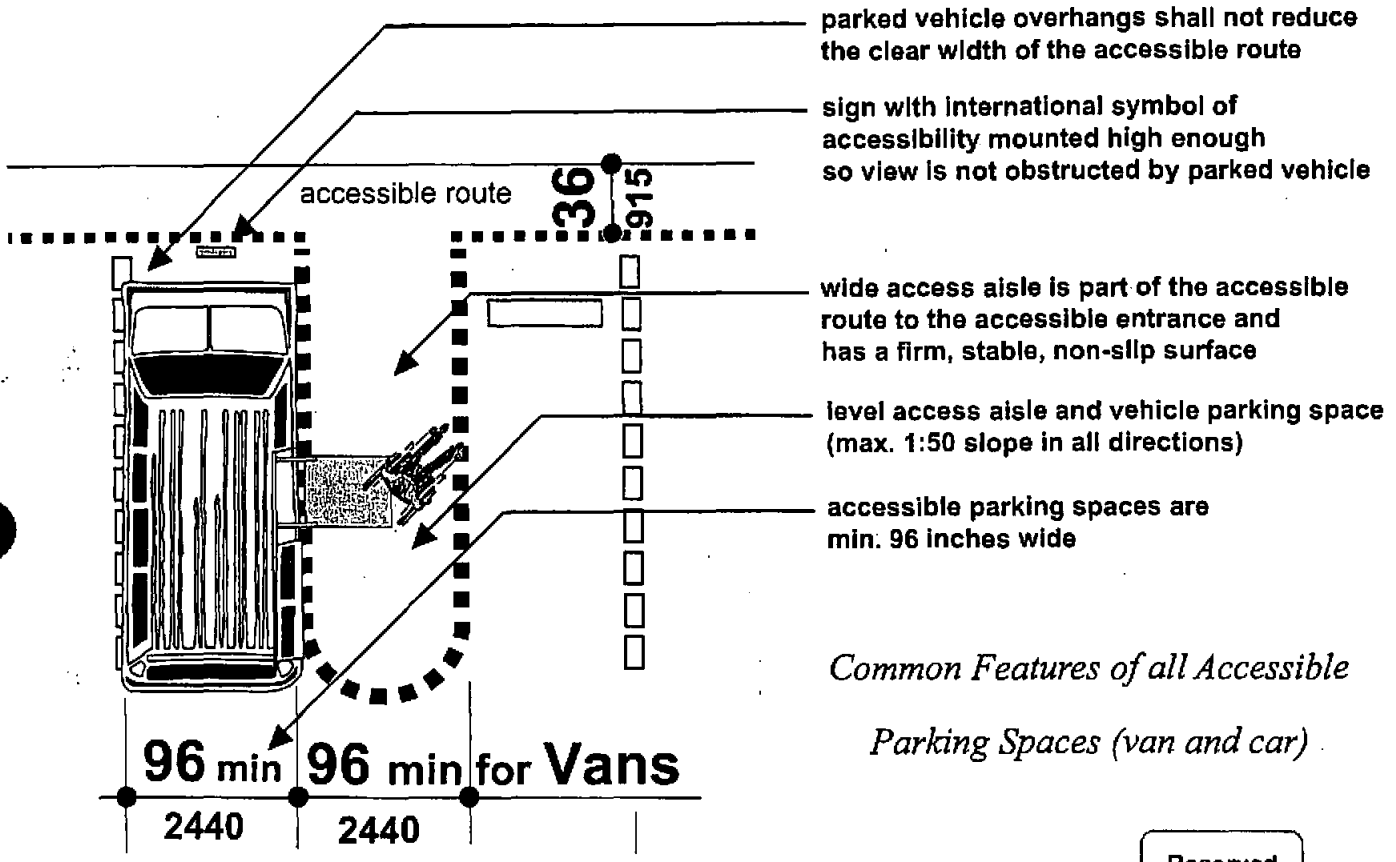
Unique Features of a Van Accessible Parking Space

The other required features of van accessible parking spaces are the same as those for accessible parking spaces for cars. These include:

- the parking space for the vehicle must be at least 96 inches wide;
- the parking space for the vehicle and the entire access aisle must be level (with a maximum slope of 1:50[1] in all directions);
- the access aisle must have a firm, stable, non-slip surface;

1 A 1:50 slope is nearly level and is usually adequate for drainage. The ratio means that a change in vertical height of no more than one unit can occur for every fifty units of distance. For example, a change of one inch in height over a distance of fifty inches.

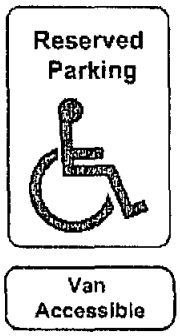
- the access aisle must be part of an accessible route to a facility or building entrance(s), and
- a sign that complies with 4.6.4 of the Standards must be mounted in front of where the vehicle parks to designate the accessible parking space.



Common Features of all Accessible Parking Spaces (van and car)

The access aisle must be located on a 36-inch-wide accessible route to the building entrance(s). Section 4.3 of the Standards contains requirements for accessible routes and includes specifications for width, passing space to permit two people using wheelchairs to pass, head room, ground surfaces along the route, slope, changes in levels, and doors. The accessible route must not be obstructed by any objects including vehicles that may extend into the accessible route, a curb, outdoor furniture, or shrubbery.

If an accessible route crosses a curb, a curb ramp must be used. However, a built-up curb ramp may not project into the minimum required space for the access aisle at an accessible parking space. When an accessible route crosses a vehicular way, a marked crosswalk may be part of the accessible route.

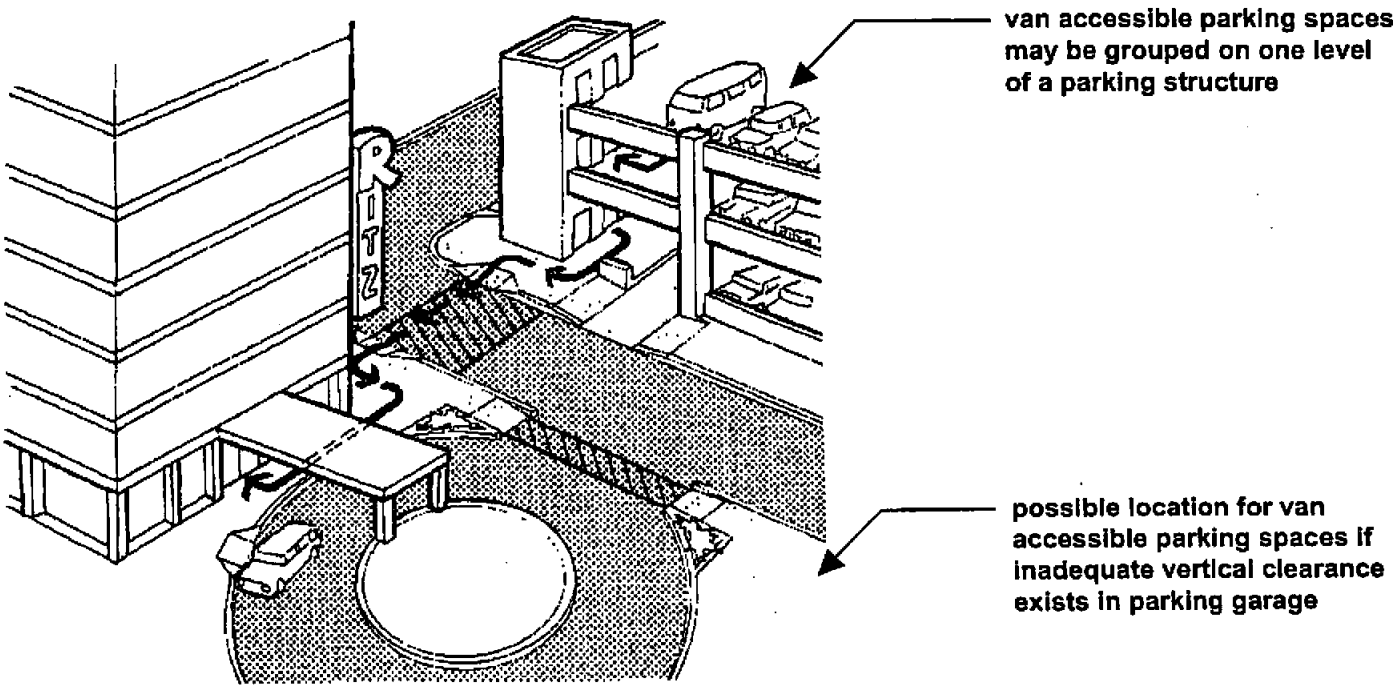


Sample sign for a van accessible parking space

Location and Dispersion of Parking Spaces

Section 4.6.2 of the Standards requires that accessible parking spaces, including van accessible spaces, be located on the shortest accessible route from adjacent parking to the accessible entrance of the building or facility. Accessible parking spaces and the required accessible route should be located where individuals with disabilities do not have to cross a vehicular lane. When parking cannot be located immediately adjacent to a building and the accessible route must cross a vehicular route, then it is recommended that a marked crossing must be used where the accessible route crosses the vehicular route. In facilities that have multiple accessible entrances with adjacent parking spaces, the accessible parking spaces must be dispersed.

When parking spaces are located in a parking garage, the Standards permit the van accessible parking spaces to be grouped on one floor (Standards 4.1.2 (5) (b)).



When Van Accessible Spaces are Required

When you provide parking at a newly constructed place of public accommodation or at a commercial facility you must provide accessible parking spaces including van accessible parking spaces.

When you alter or renovate a parking lot or facility the following may apply.

- If you repave or otherwise alter the parking lot, you must add as many accessible parking spaces, including van spaces, as needed to comply.
- If you restripe the parking area, you must restripe so that you provide the correct number of accessible parking spaces, including van accessible parking.
- Existing physical site constraints may make it "technically infeasible" to comply fully with the Standards. However, in most cases a "technically infeasible" condition exists only in a portion of a lot, and other suitable locations for accessible parking spaces are often available.

Number of Van Accessible Spaces Required

Section 4.1.2 (5) of the Standards specifies the minimum number of accessible parking spaces to be provided including van accessible parking spaces. One out of every eight accessible spaces provided must be a van accessible space. When only one accessible parking space is required, the space provided must be a van accessible parking space. Van accessible spaces can serve vans and cars because they are not designated for vans only.

In larger parking lots, both van accessible and accessible car spaces must be provided. For example, in a parking lot for 250 spaces where seven accessible parking spaces are required, one van accessible space would be required along with six accessible car parking spaces. In a parking lot for 450 spaces where nine accessible spaces are required, then two van accessible spaces would be required along with seven accessible car parking spaces.

Two van accessible parking spaces may share an access aisle.

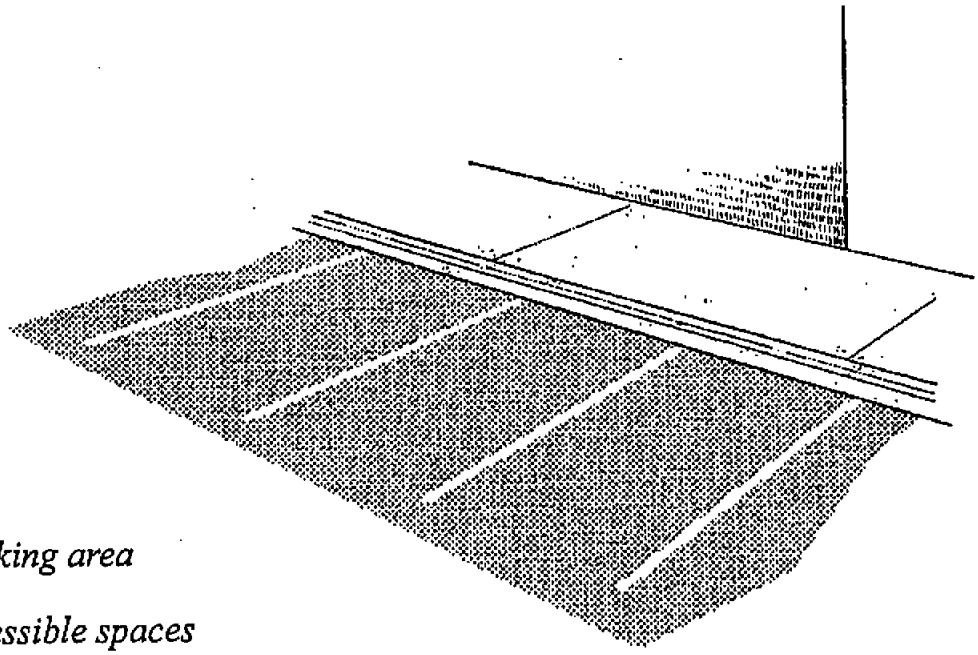
When accessible spaces are required for new construction and during alterations, van accessible parking spaces must always be provided.

Readily Achievable Barrier Removal:
Van Accessible Parking Spaces

Public accommodations must remove architectural barriers that are structural in nature in existing facilities when it is "readily achievable" to do so. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense.

The ADA provides flexibility for public accommodations undertaking barrier removal and does not require that the ADA Standards for Accessible Design (Standards) be complied with fully if it is not readily achievable to do so. Rather, the Standards serve as guidelines for barrier removal that should be met if physical conditions and cost permit. Deviation from the Standards is permitted unless it results in a safety hazard to people with disabilities or others.

Because removing barriers to accessible parking generally involves relatively low cost, it may be readily achievable for many public accommodations.



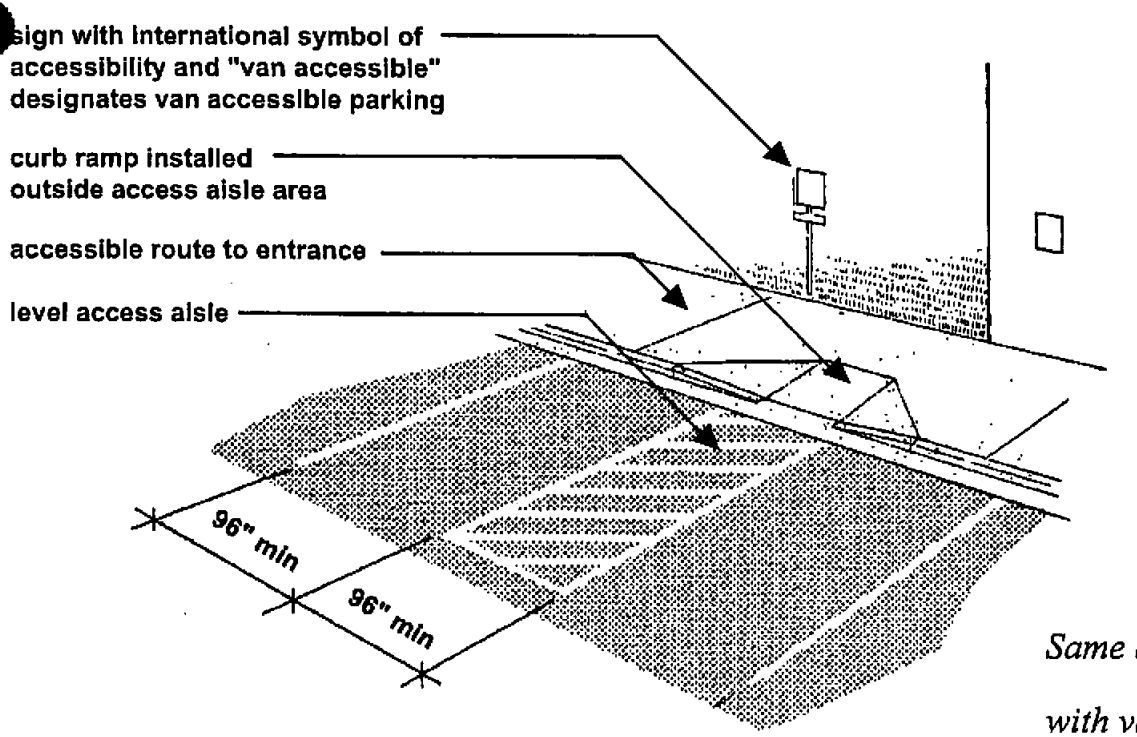
Existing parking area without accessible spaces

If readily achievable, the first accessible parking space that is provided as part of barrier removal activities should be a van accessible space. This type of parking space can be used by both vans and by cars and can be used by anyone who needs accessible parking.

Examples of barrier removal related to accessible parking may include restriping a section or sections of a parking lot to provide accessible parking spaces with designated access aisles, installing signs that designate accessible parking spaces, providing an accessible route from the accessible parking spaces to the building entrance, and providing a marked crossing where the accessible route crosses a vehicular way.

If readily achievable, the first accessible parking space that is provided should be a van accessible space.

Where parking lot surfaces slope more than 1:50, select the most nearly level area that is available for the accessible parking spaces. When selecting the area for the accessible parking spaces, consider the location of the accessible route that must connect the access aisle to the facility's accessible entrance(s).



Same area with van accessible parking space added

Requirements for readily achievable barrier removal permit businesses to consider the effect of barrier removal on the operation of their businesses.

Requirements for readily achievable barrier removal permit businesses to consider the effect of barrier removal on the operation of their business.

For example, a small independently owned store has only three parking spaces for its customers. It determines that restriping the parking area to provide an accessible parking space could be easily accomplished without significant expense. However, to provide a fully complying van accessible parking space would reduce the available parking for other customers who do not have disabilities from three spaces to one. This loss of parking (not just the cost of the paint for restriping) can be considered in determining whether the barrier removal is readily achievable.

The ADA provides flexibility for the store to implement a solution that complies with the law but does not result in loss of business. For example, if it is not readily achievable to provide a fully compliant van accessible parking space, one can provide a space that has an access aisle that is narrower than required by the Standards if the result does not cause a safety hazard. Or, the store may provide the service (to a customer with a disability) in an alternative manner, such as curb service or home delivery. In some cases, providing a van accessible parking space that does not fully comply with the Standards will often be the preferred alternative approach, if doing so is readily achievable, because many people with disabilities will benefit from having a designated accessible parking space, even if it is not usable by everyone. If an accessible parking space is provided with a narrow access aisle, then a "Van Accessible" sign should not be provided and the store should be prepared to offer service in an alternative manner, if it is readily achievable to do so, to van users who cannot park in the space.

Information Sources
ADA Technical Assistance

The Department of Justice, through the Disability Rights Section, has responsibility for coordinating government-wide ADA technical assistance activities. Information and direct technical assistance are available from the agencies listed below. Use the list to select the agency responsible for ADA requirements in your area of interest. Some provide free publications in addition to other information services.

For State and local government programs, privately-operated businesses and services, access to facilities, design standards enforceable under the ADA, and information on tax credits and deductions contact:

U.S. Department of Justice
ADA Information Line
(800) 514-0301
(800) 514-0383 (TDD)
ADA-BBS:
(202) 514-6193
Internet:
http://www.usdoj.gov/crt/ada/adahom1.htm
gopher://justice2.usdoj.gov:70/11/crt/ada

For information about Tax Credits and Deductions, contact:

Internal Revenue Service
(800) 829-1040
(800) 829-4059 (TDD)

For employment issues, contact:

Equal Employment Opportunity Commission (EEOC)
(800) 669-4000
(800) 669-6820 (TDD)

For transportation, contact:

U.S. Department of Transportation
(202) 366-1656
(202) 366-4567 (TDD)
Internet:
http://www.fta.dot.gov

For information on the ADA Accessibility Guidelines, contact:

Access Board
(800) 872-2253
(800) 993-2822 (TDD)
Internet:
http://www.access-board.gov/

For additional ADA information and referral sources from Federally funded grantees, contact:

Job Accommodation Network
(800) 526-7234 (V/TDD)
Internet:
http://www.janweb.icdi.wvu.edu/

Disability and Business Technical Assistance Centers
(800) 949-4232 (V/TDD)

Disability Rights Education and Defense Fund (DREDF)
(800) 466-4232 (V/TDD)

Uniform Federal Accessibility Standards (UFAS)

Federal Facilities | Guidelines and Standards

TABLE OF CONTENTS

ARCHITECTURAL BARRIERS ACT OF 1968 AS AMENDED

INTRODUCTION

This document presents uniform standards for the design, construction and alteration of buildings so that physically handicapped persons will have ready access to and use of them in accordance with the Architectural Barriers Act, 42 U.S.C. 4151-4157. The document embodies an agreement to minimize the differences between the standards previously used by four agencies (the General Services Administration, the departments of Housing and Urban Development and Defense, and the United States Postal Service) that are authorized to issue standards under the Architectural Barriers Act, and between those standards and the access standards recommended for facilities that are not federally funded or constructed.

The four standard-setting agencies establish and enforce standards for design, construction, and alteration of particular types of buildings and facilities. The General Services Administration (GSA) prescribes standards for all buildings subject to the Architectural Barriers Act that are not covered by standards issued by the other three standard-setting agencies; the Department of Defense (DoD) prescribes standards for DoD installations; the Department of Housing and Urban Development (HUD) prescribes standards for residential structures covered by the Architectural Barriers Act except those funded or constructed by DoD; and the U.S. Postal Service (USPS) prescribes standards for postal facilities. Each of the four agencies issues standards in accordance with its statutory authority.

To ensure compliance with the standards, Congress established the Architectural and Transportation Barriers Compliance Board (ATBCB) in Section 502 of the Rehabilitation Act of 1973 (the Rehabilitation Act), 29 U.S.C. 792.

The ATBCB is composed of members representing eleven Federal agencies (the four standard-setting agencies; the departments of Education, Health and Human Services, Interior, Justice, Labor, and Transportation; and the Veterans Administration) and eleven members appointed by the President from the general public. A 1978 amendment to Section 502 of the Rehabilitation Act added to the ATBCB's functions the responsibility to issue minimum guidelines (Guidelines) and requirements for the standards established by the four standard-setting agencies. The final rule that established the

Guidelines now in effect was published in the FEDERAL REGISTER on August 4, 1982 (47 FR 33862) and is codified at 36 CFR part 1190.

The four standard-setting agencies determined that the uniform standards adopted by them would, as much as possible, not only comply with the Guidelines adopted by the ATBCB but also be consistent with the standards published by the American National Standards Institute (ANSI) for general use. ANSI is a nongovernmental national organization that publishes a wide variety of recommended standards. ANSI's standards for barrier-free design are developed by a committee made up of 52 organizations representing associations of handicapped people, rehabilitation professionals, design professionals, builders, and manufacturers. The standards, which are called ANSI A117.1, "Specifications for Making Buildings and Facilities Accessible to, and Usable by, Physically Handicapped People," are developed using the consensus process.

The original ANSI A117.1, adopted in 1961, formed the technical basis for the first accessibility standards adopted by the federal government and most state governments. The current edition, ANSI A117.1-1980, is based on research funded by HUD. It has generally been accepted by the private sector and has been recommended for use in model state and local building codes by the Council of American Building Officials.

In keeping with the objective of uniformity between federal requirements and those commonly applied by state and local governments, the Uniform Federal Accessibility Standards (UFAS) follows ANSI A117.1-1980 in format. Both the UFAS scope provisions, which establish the minimum number of elements and spaces required to comply with standards, and the UFAS technical requirements meet or exceed the comparable provisions of the Guidelines.

The UFAS was published in the FEDERAL REGISTER on August 7, 1984 (49 FR 31528). Each of the standard-setting agencies has taken action in accordance with its own procedures, including internally prescribed rulemaking and the Administrative Procedure Act where applicable, to incorporate the UFAS in its own standards, regulations, or other directives. GSA adopted the UFAS in 41 CFR 101-19.6, effective August 7, 1984. HUD adopted the UFAS in 24 CFR part 40, effective October 4, 1984. USPS adopted the UFAS in Handbook RE-4, "Standards for Facility Accessibility by the Physically Handicapped," effective November 15, 1984. DoD adopted the UFAS by revising Chapter 18 of DoD 4270.1-M, "Construction Criteria," by memorandum dated May 8, 1985.

[Note: Handbook RE-4, was amended effective April 16, 1986, by the addition of Interim Standards, Section 4.1.8, "Accessible Buildings: Leasing of Space in Existing Buildings." While Handbook RE-4, not UFAS, sets forth the governing standards for Postal facility accessibility. Handbook RE-4 may be further amended.]

1. PURPOSE.

This document sets standards for facility accessibility by physically handicapped persons for Federal and federally-funded facilities. These standards are to be applied during the design, construction, and alteration of buildings and facilities to the extent required by the Architectural Barriers Act of 1968, as amended.

2. GENERAL.

2.1 AUTHORITY. These standards were jointly developed by the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service, under the authority of sections 2, 3, 4, and 4a, respectively, of the Architectural Barriers Act of 1968, as amended, Pub. L. No. 90-480, 42 U.S.C. 4151-4157.

2.2 PROVISIONS FOR ADULTS. The specifications in these standards are based upon adult dimensions and anthropometrics.

3. MISCELLANEOUS INSTRUCTIONS AND DEFINITIONS.

3.1 GRAPHIC CONVENTIONS. Graphic conventions are shown in **Table 1**. Dimensions that are not marked "minimum" or "maximum" are absolute, unless otherwise indicated in the text or captions.

3.2 DIMENSIONAL TOLERANCES. All dimensions are subject to conventional building industry tolerances for field conditions.

3.3 NOTES. The text of these standards does not contain notes or footnotes. Additional information, explanations, and advisory materials are located in the Appendix. Paragraphs marked with an asterisk have related, nonmandatory material in the Appendix. In the Appendix, the corresponding paragraph numbers are preceded by an A.

3.4 GENERAL TERMINOLOGY.

COMPLY WITH. Meet one or more specifications of this standard.

IF, IF...THEN. Denotes a specification that applies only when the conditions described are present.

MAY. Denotes an option or alternative.

SHALL. Denotes a mandatory specification or requirement.

SHOULD. Denotes an advisory specification or recommendation.

3.5 DEFINITIONS. The following terms shall, for the purpose of these standards, have the meaning indicated in this section.

ACCESS AISLE. An accessible pedestrian space between elements, such as parking spaces, seating, and desks, that provides clearances appropriate for use of the elements.

ACCESSIBLE. Describes a site, building, facility, or portion thereof that complies with these standards and that can be approached, entered, and used by physically disabled people.

ACCESSIBLE ELEMENT. An element specified by these standards (for example, telephone, controls, and the like).

ACCESSIBLE ROUTE. A continuous unobstructed path connecting all accessible elements and spaces in a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps, and lifts.

ACCESSIBLE SPACE. Space that complies with these standards.

ADAPTABILITY. The ability of certain building spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered so as to accommodate the needs of either disabled or nondisabled persons, or to accommodate the needs of persons with different types or degrees of disability.

ADDITION. An expansion, extension, or increase in the gross floor area of a building or facility.

ADMINISTRATIVE AUTHORITY. A governmental agency that adopts or enforces regulations and standards for the design, construction, or alteration of buildings and facilities.

ALTERATION. As applied to a building or structure, means a change or rearrangement in the structural parts or elements, or in the means of egress or in moving from one location or position to another. It does not include normal maintenance, repair, reroofing, interior decoration, or changes to mechanical and electrical systems.

ASSEMBLY AREA. A room or space accommodating fifty or more individuals for religious, recreational, educational, political, social, or amusement purposes, or for the consumption of food and drink, including all connected rooms or spaces with a common means of egress and ingress. Such areas as conference rooms would have to be accessible in accordance with other parts of this standard but would not have to meet all of the criteria associated with assembly areas.

AUTOMATIC DOOR. A door equipped with a power-operated mechanism and controls that open and close the door automatically upon receipt of a momentary actuating signal. The switch that begins the automatic cycle may be a photoelectric device, floor mat, or manual switch mounted on or near the door itself (see power-assisted door).

CIRCULATION PATH. An exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings.

CLEAR. Unobstructed.

COMMON USE. Refers to those interior and exterior rooms, spaces, or elements that are made available for the use of a restricted group of people (for example, residents of an apartment building, the occupants of an office building, or the guests of such residents or occupants).

CROSS SLOPE. The slope that is perpendicular to the direction of travel (see running slope).

CURB RAMP. A short ramp cutting through a curb or built up to it.

DWELLING UNIT. A single unit of residence which provides a kitchen or food preparation area, in addition to rooms and spaces for living, bathing, sleeping, and the like. A single family home is a dwelling unit, and dwelling units are to be found in such housing types as townhouses and apartment buildings.

EGRESS, MEANS OF. An accessible route of exit that meets all applicable code specifications of the regulatory building agency having jurisdiction over the building or facility.

ELEMENT. An architectural or mechanical component of a building, facility, space, or site, e.g., telephone, curb ramp, door, drinking fountain, seating, water closet.

ENTRANCE. Any access point to a building or portion of building or facility used for the purpose of entering. An entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s). The principal entrance of a building or facility is the main door through which most people enter.

ESSENTIAL FEATURES. Those elements and spaces that make a building or facility usable by, or serve the needs of, its occupants or users. Essential features include but are not limited to entrances, toilet rooms, and accessible routes. Essential features do not include those spaces that house the major activities for which the building or facility is intended, such as classrooms and offices.

EXTRAORDINARY REPAIR. The replacement or renewal of any element of an existing building or facility for purposes other than normal maintenance.

FACILITY. All or any portion of a building, structure, or area, including the site on which such building,

structure or area is located, wherein specific services are provided or activities performed.

FULL AND FAIR CASH VALUE. Full and fair cash value is calculated for the estimated date on which work will commence on a project and means:

(1) The assessed valuation of a building or facility as recorded in the assessor's office of the municipality and as equalized at one hundred percent (100%) valuation, or

(2) The replacement cost, or

(3) The fair market value.

FUNCTIONAL SPACES. The rooms and spaces in a building or facility that house the major activities for which the building or facility is intended.

HOUSING. A building, facility, or portion thereof, excluding inpatient health care facilities, that contains one or more dwelling units or sleeping accommodations. Housing may include, but is not limited to, one and two-family dwellings, apartments, group homes, hotels, motels, dormitories, and mobile homes.

MARKED CROSSING. A crosswalk or other identified path intended for pedestrian use in crossing a vehicular way.

MULTIFAMILY DWELLING. Any building containing more than two dwelling units.

OPERABLE PART. A part of a piece of equipment or appliance used to insert or withdraw objects, or to activate, deactivate, or adjust the equipment or appliance (for example, coin slot, pushbutton, handle).

PHYSICALLY HANDICAPPED. An individual who has a physical impairment, including impaired sensory, manual or speaking abilities, which results in a functional limitation in access to and use of a building or facility.

POWER-ASSISTED DOOR. A door used for human passage with a mechanism that helps to open the door, or relieve the opening resistance of a door, upon the activation of a switch or a continued force applied to the door itself. If the switch or door is released, such doors immediately begin to close or close completely within 3 to 30 seconds (see automatic door).

PUBLIC USE. Describes interior or exterior rooms or spaces that are made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned.

RAMP. A walking surface in an accessible space that has a running slope greater than 1:20.

RUNNING SLOPE. The slope that is parallel to the direction of travel (see cross slope).

SERVICE ENTRANCE. An entrance intended primarily for delivery of services.

SIGNAGE. Verbal, symbolic, tactile, and pictorial information.

SITE. A parcel of land bounded by a property line or a designated portion of a public right-of-way.

SITE IMPROVEMENT. Landscaping, paving for pedestrian and vehicular ways, outdoor lighting, recreational facilities, and the like, added to a site.

SLEEPING ACCOMMODATIONS. Rooms in which people sleep, for example, dormitory and hotel or motel guest rooms.

SPACE. A definable area, e.g., toilet room, hall, assembly area, entrance, storage room, alcove, courtyard, or lobby.

STRUCTURAL IMPRACTICABILITY. Changes having little likelihood of being accomplished without removing or altering a load-bearing structural member and/or incurring an increased cost of 50 percent or more of the value of the element of the building or facility involved.

TACTILE. Describes an object that can be perceived using the sense of touch.

TACTILE WARNING. A standardized surface texture applied to or built into walking surfaces or other elements to warn visually impaired people of hazards in the path of travel.

TEMPORARY. Applies to facilities that are not of permanent construction but are extensively used or essential for public use for a given (short) period of time, for example, temporary classrooms or classroom buildings at schools and colleges, or facilities around a major construction site to make passage accessible, usable, and safe for everybody. Structures directly associated with the actual processes of major construction, such as porto potties, scaffolding, bridging, trailers, and the like, are not included. Temporary as applied to elements means installed for less than 6 months and not required for safety reasons.

VEHICULAR WAY. A route intended for vehicular traffic, such as a street, driveway, or parking lot.

WALK. An exterior pathway with a prepared surface intended for pedestrian use, including general pedestrian areas such as plazas and courts.

4. ACCESSIBLE ELEMENTS AND SPACES: SCOPE AND TECHNICAL REQUIREMENTS.

4.1 MINIMUM REQUIREMENTS.

4.1.1 ACCESSIBLE SITES AND EXTERIOR FACILITIES: NEW CONSTRUCTION. An accessible site shall meet the following minimum requirements:

(1) At least one accessible route complying with 4.3 shall be provided within the boundary of the site from public transportation stops, accessible parking spaces, passenger loading zones if provided, and public streets or sidewalks to an accessible building entrance.

(2) At least one accessible route complying with 4.3 shall connect accessible buildings, facilities, elements, and spaces that are on the same site.

(3) All objects that protrude from surfaces or posts into circulation paths shall comply with 4.4.

(4) Ground surfaces along accessible routes and in accessible spaces shall comply with 4.5.

(5) (a) If parking spaces are provided for employees or visitors, or both, then accessible spaces, complying with 4.6, shall be provided in each such parking area in conformance with the following table:

Total Parking in Lot	Required Minimum Number of Accessible Spaces
1 to 25	1
26 to 50	2
51 to 75	3

76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	*
1001 and over	**

* 2 percent of total.
** 20 plus 1 for each 100 over 1000.

EXCEPTION: The total number of accessible parking spaces may be distributed among parking lots, if greater accessibility is achieved.

EXCEPTION: This does not apply to parking provided for official government vehicles owned or leased by the government and used exclusively for government purposes.

(b) If passenger loading zones are provided, then at least one passenger loading zone shall comply with 4.6.5.

(c) Parking spaces for side lift vans are accessible parking spaces and may be used to meet the requirements of this paragraph.

(d) Parking spaces at accessible housing complying with 4.6 shall be provided in accordance with the following:

(i) Where parking is provided for all residents, one accessible parking space shall be provided for each accessible dwelling unit; and

(ii) Where parking is provided for only a portion of the residents, an accessible parking space shall be provided on request of the occupant of an accessible dwelling unit;

(iii) Where parking is provided for visitors, 2 percent of the spaces, or at least one, shall be accessible.

(e) Parking spaces at health care facilities complying with 4.6 shall be provided in accordance with the following:

(i) General health care facilities, employee and visitor parking: Comply with Table 4.1.1(5)(a);

(ii) Outpatient facilities: 10 percent of the total number of parking spaces provided;

(iii) Spinal cord injury facilities, employee and visitor parking: 20 percent of total parking spaces provided.

(6) If toilet facilities are provided on a site, then each such public or common use toilet facility shall comply with 4.22. If bathing facilities are provided on a site, then each such public or common use bathing facility shall comply with 4.23.

EXCEPTION: These provisions are not mandatory for single user portable toilet or bathing units clustered at a single location; however, at least one toilet unit complying with 4.22 or one bathing unit complying with 4.23 should be installed at each location whenever standard units are provided.

(7) All signs shall comply with 4.30. Elements and spaces of accessible facilities which shall be

identified by the International Symbol of Accessibility are:

(a) Parking spaces designated as reserved for physically handicapped people;

(b) passenger loading zones;

(c) accessible entrances;

(d) accessible toilet and bathing facilities.

4.1.2 ACCESSIBLE BUILDINGS: NEW CONSTRUCTION. Accessible buildings and facilities shall meet the following minimum requirements:

(1) At least one accessible route complying with 4.3 shall connect accessible building or facility entrances with all accessible spaces and elements within the building or facility.

(2) All objects that overhang circulation paths shall comply with 4.4.

(3) Ground and floor surfaces along accessible routes and in accessible rooms and spaces shall comply with 4.5.

(4) Stairs connecting levels that are not connected by an elevator shall comply with 4.9.

(5) One passenger elevator complying with 4.10 shall serve each level in all multi-story buildings and facilities. If more than one elevator is provided, each elevator shall comply with 4.10.

EXCEPTION: Elevator pits, elevator penthouses, mechanical rooms, piping or equipment catwalks are excepted from this requirement.

EXCEPTION: Accessible ramps complying with 4.8 or, if no other alternative is feasible, accessible platform lifts complying with 4.11 may be used in lieu of an elevator.

(6) Windows. (Reserved).

(7) Doors:

(a) At each accessible entrance to a building or facility, at least one door shall comply with 4.13.

(b) Within a building or facility, at least one door at each accessible space shall comply with 4.13.

(c) Each door that is an element of an accessible route shall comply with 4.13.

(d) Each door required by 4.3.10, Egress, shall comply with 4.13.

EXCEPTION: In multiple-story buildings and facilities where at-grade egress from each floor is impossible, either of the following is permitted: the provision within each story of approved fire and smoke partitions that create horizontal exits, or, the provision within each floor of areas of refuge approved by agencies having authority for safety.

(8) At least one principal entrance at each grade floor level to a building or facility shall comply with 4.14, Entrances. When a building or facility has entrances which normally serve any of the following functions: transportation facilities, passenger loading zones, accessible parking facilities, taxi stands, public streets and sidewalks, or accessible interior vertical access, then at least one of the entrances

serving each such function shall comply with 4.14, Entrances. Because entrances also serve as emergency exits, whose proximity to all parts of buildings and facilities is essential, it is preferable that all or most exits be accessible.

(9) If drinking fountains or water coolers are provided, approximately 50 percent of those provided on each floor shall comply with 4.15 and shall be on an accessible route. If only one drinking fountain or water cooler is provided on any floor, it shall comply with 4.15.

(10) If toilet facilities are provided, then each public and common use toilet room shall comply with 4.22. Other toilet rooms shall be adaptable. If bathing facilities are provided, then each public and common use bathroom shall comply with 4.23. Accessible toilet rooms and bathing facilities shall be on an accessible route.

(11) If storage facilities such as cabinets, shelves, closets, and drawers are provided in accessible spaces, at least one of each type provided shall contain storage space complying with 4.25. Additional storage may be provided outside of the dimensions shown in Fig 38.

(12) Controls and operating mechanisms in accessible spaces, along accessible routes, or as parts of accessible elements (for example, light switches and dispenser controls) shall comply with 4.27.

(13) If emergency warning systems are provided, then they shall include both audible alarms complying with 4.28.2 and visual alarms complying with 4.28.3. In facilities with sleeping accommodations, the sleeping accommodations shall have an alarm system complying with 4.28.4. Emergency warning systems in health care facilities may be modified to suit standard health care alarm design practice.

(14) Tactile warnings shall be provided at hazardous conditions as specified in 4.29.3.

(15) If signs are provided, they shall comply with 4.30.1, 4.30.2 and 4.30.3. In addition, permanent signage that identifies rooms and spaces shall also comply with 4.30.4 and 4.30.6.

EXCEPTION: The provisions of 4.30.4 are not mandatory for temporary information on room and space signage, such as current occupant's name, provided the permanent room or space identification complies with 4.30.4.

(16) Public telephones:

(a) If public telephones are provided, then accessible public telephones shall comply with 4.31, Telephones, and the following table:

Number of public telephones provided on each floor:	**Number of telephones required to be accessible:***
1 or more single unit installations	1 per floor
1 bank**	1 per floor 1 per bank.
2 or more banks**	Accessible unit may be installed as a single unit in proximity (either visible or with signage) to the bank. At least one public telephone per floor shall meet the requirements for a forward reach telephone.***

*** Additional public telephones may be installed at any height. Unless otherwise specified, accessible telephones may be either forward or side reach telephones.**

**** A bank consists of two or more adjacent public telephones, often installed as a unit.**

***** *EXCEPTION:* For exterior installations only, if dial tone first service is not available, then a side reach telephone may be installed instead of the required forward reach telephone (i.e., one telephone in proximity to each bank shall comply with 4.31).**

(b) At least one of the public telephones complying with 4.31, Telephones, shall be equipped with a volume control. The installation of additional volume controls is encouraged, and these may be installed on any public telephone provided.

(17) If fixed or built-in seating, tables, or work surfaces are provided in accessible spaces, at least 5 percent, but always at least one, of seating spaces, tables, or work surfaces shall comply with 4.32.

(18) Assembly areas:

(a) If places of assembly are provided, they shall comply with the following table:

Capacity of Seating & Assembly Areas	Number of Required Wheelchair Locations
50 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1,000	*
over 1,000	**

*** 2 percent of total**

**** 20 plus 1 for each 100 over 1,000.**

(b) Assembly areas with audio-amplification systems shall have a listening system complying with 4.33 to assist a reasonable number of people, but no fewer than two, with severe hearing loss. For assembly areas without amplification systems and for spaces used primarily as meeting and conference rooms, a permanently installed or portable listening system shall be provided. If portable systems are used for conference or meeting rooms, the system may serve more than one room.

4.1.3 ACCESSIBLE HOUSING. Accessible housing shall comply with the requirements of 4.1 and 4.34 except as noted below:

(1) ELEVATORS. Where provided, elevators shall comply with 4.10. Elevators or other accessible means of vertical movement are not required in residential facilities when:

(a) No accessible dwelling units are located above or below the accessible grade level; and

(b) At least one of each type of common area and amenity provided for use of residents and visitors is available at the accessible grade level.

(2) ENTRANCES. Entrances complying with 4.14 shall be provided as necessary to achieve access to and egress from buildings and facilities.

EXCEPTION: In projects consisting of one-to-four family dwellings where accessible entrances would be extraordinarily costly due to site conditions or local code restrictions, accessible entrances are

required only to those buildings containing accessible dwelling units.

(3) COMMON AREAS. At least one of each type of common area and amenity in each project shall be accessible and shall be located on an accessible route to any accessible dwelling unit.

4.1.4 OCCUPANCY CLASSIFICATIONS. Buildings and facilities shall comply with these standards to the extent noted in this section for various occupancy classifications, unless otherwise modified by a special application section. Occupancy classifications, and the facilities covered under each category include, but are not necessarily limited to, the listing which follows:

(1) GENERAL EXCEPTIONS. Accessibility is not required to elevator pits, elevator penthouses, mechanical rooms, piping or equipment catwalks, lookout galleries, electrical and telephone closets, and general utility rooms.

(2) MILITARY EXCLUSIONS. The following facilities need not be designed to be accessible, but accessibility is recommended since the intended use of the facility may change with time.

(a) Unaccompanied personnel housing, closed messes, vehicle and aircraft maintenance facilities, where all work is performed by able-bodied military personnel and, in general, all facilities which are intended for use or occupancy by able-bodied military personnel only.

(b) Those portions of Reserve and National Guard facilities which are designed and constructed primarily for use by able-bodied military personnel. This exclusion does not apply to those portions of a building or facility which may be open to the public or which may be used by the public during the conduct of normal business or which may be used by physically handicapped persons employed or seeking employment at such building or facility. These portions of the building or facility shall be accessible.

(c) Where the number of accessible spaces required is determined by the design capacity of a facility (such as parking or assembly areas), the number of able-bodied military persons used in determining the design capacity need not be counted when computing the number of accessible spaces required.

(3) MILITARY HOUSING. In the case of military housing, which is primarily available for able-bodied military personnel and their dependents, at least 5 percent of the total but at least one unit (on an installation-by-installation basis) of all housing constructed will be designed and built to be either accessible or readily and easily modifiable to be accessible, but in any event, modification of individual units (including the making of adaptations), will be accomplished on a high priority basis when a requirement is identified. Common areas such as walks, streets, parking and play areas, and common entrances to multi-unit facilities shall be designed and built to be accessible.

(4) ASSEMBLY. Assembly occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, or awaiting transportation. A room or space used for assembly purposes by less than fifty (50) persons and accessory to another occupancy shall be included as a part of that major occupancy. For purposes of these standards, assembly occupancies shall include the following:

Facilities

Amusement arcades

Amusement park structures

Arenas

Armories

Art galleries

Auditoriums

Banquet halls

Bleachers

Bowling alleys

Carnivals

Churches

Clubs

Community halls

Courtrooms (public areas)

Dance halls

Drive-in theaters

Exhibition halls

Fairs

Funeral parlors

Grandstands

Gymnasiums

Motion picture theaters

Indoor & outdoor swimming pools

Indoor & outdoor tennis courts

Lecture halls

Libraries*

Museums

Night clubs

Passenger stations

Pool & billiard halls

Restaurants**

Skating rinks

Stadiums

Taverns & bars

Television studios admitting audiences

Theaters

*** See Part 8 for special applications.**

**** See Part 5 for special applications.**

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons.

(5) BUSINESS. Business occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service type transactions, including storage of records and accounts.

Facilities

Animal hospitals, kennels, pounds

Automobile and other motor vehicle showrooms

Banks

Barber shops

Beauty shops

Car wash

Civic administration

Clinic, outpatient

Dry cleaning

Educational above 12th grade

Electronic data processing

Fire stations

Florists & nurseries

Laboratories: testing & research

Laundries

Motor vehicle service stations

Police stations

Post offices*

Print shops

Professional services: attorney, dentist, physician, engineer, etc.

Radio & T.V. stations

Telephone exchanges

* See Part 9 for special applications.

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons.

(6) EDUCATIONAL. Educational occupancy includes, among others, the use of a building or structure, or portion thereof, by six or more persons at any time for educational purposes through the 12th grade.

Schools for business or vocational training shall conform to the requirements of the trade, vocation or business taught.

Facilities

Academies

Kindergarten

Nursery schools

Schools

Application

All areas shall comply.

(7) FACTORY INDUSTRIAL. Factory industrial occupancy includes, among others, the use of a building or structure, or portion thereof, for assembling, disassembling, fabricating, finishing, manufacturing, packaging, processing or other operations that are not classified as a Hazardous Occupancy.

Facilities

Aircraft

Appliances

Athletic equipment

Automobile and other motor vehicle

Bakeries

Beverages

Bicycles

Boats, building

Brick and masonry

Broom or brush

Business machines

Canvas or similar

Cameras and photo equipment

Carpets & rugs, including cleaning

Ceramic products

Clothing

Construction & agricultural machinery

Disinfectants

Dry cleaning & dyeing

Electronics

Engines, including rebuilding

Film, photographic

Food processing

Foundries

Furniture

Glass products

Gypsum

Hemp products

Ice

Jute products

Laundries

Leather products

Machinery

Metal

Motion pictures & television film

Musical instruments

Optical goods

Paper products

Plastic products

Printing or publishing

Recreational vehicles

Refuse incineration

Shoes

Soaps & detergents

Steel products: fabrication, assembly

Textiles

Tobacco

Trailers

Upholstering

Wood, distribution

Millwork

Woodworking, cabinet

Postal mail: processing facilities*

* See Part 9 for special applications.

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons.

(8) HAZARDOUS. Hazardous occupancy includes, among others, the use of a building or structure, or a portion thereof, that involves the manufacturing, processing, generation or storage of corrosive, highly toxic, highly combustible, flammable or explosive materials that constitute a high fire or explosive hazard, including loose combustible fibers, dust and unstable materials.

Facilities

Combustible dust

Combustible fibers

Combustible liquid

Corrosive liquids

Explosive material

Flammable gas

Flammable liquid

Liquified petroleum gas

Nitromethane

Oxidizing materials

Organic peroxide

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons.

(9) INSTITUTIONAL. Institutional occupancy includes, among others, the use of a building or structure, or any portion thereof, in which people have physical or medical treatment or care, or in which the liberty of the occupants is restricted. Institutional occupancies shall include the following subgroups:

(a) Institutional occupancies for the care of children, including:

Facilities

Child care facilities

Application

All public use, common use, or areas which may result in employment of physically handicapped persons.

(b) Institutional occupancies used for medical or other treatment or care of persons, some of whom are suffering from physical or mental illness, disease or infirmity, including:

Facilities	**Application**
Long Term Care Facilities: (including Skilled Nursing Facilities, Intermediate Care Facilities, Bed & Care, and Nursing Homes).	At least 50 percent of patient toilets and bedrooms; all public use, common use or areas which may result in employment of handicapped persons.
Outpatient Facilities:	All patient toilets and bedrooms, all public use, common use, or areas which may result in employment of physically handicapped persons.
Hospital*: General Purpose Hospital:	At least 10 percent of toilets and bedrooms, all public use, common use, or areas which may result in employment of physically handicapped persons.
Special Purpose Hospital: (Hospitals that treat conditions that affect mobility).	All patient toilets bedrooms, all public use, common use, or areas which may result in employment of physically handicapped persons.

*** See Part 6 for special applications.**

(c) Institutional occupancies where the occupants are under some degree of restraint or restriction for security reasons including:

Facilities

Jails

Prisons

Reformatories

Other detention or correctional facilities

Application

5 percent of residential units available, or at least one unit, whichever is greater; all common use, visitor use, or areas which may result in employment of physically handicapped persons.

(10) MERCANTILE*. Mercantile occupancy includes, among others, all buildings and structures or parts thereof, for the display and sale of merchandise, and involving stocks of goods, wares or merchandise incidental to such purposes and accessible to the public.

Facilities

Department stores

Drug stores

Markets

Retail stores

Shopping centers

Sales rooms

* See Part 7 for special applications.

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons.

(11) RESIDENTIAL. Residential occupancy includes, among others, the use of a building or structure, or portion thereof, for sleeping accommodations when not classed as an institutional occupancy. Residential occupancies shall comply with the requirements of 4.1 and 4.34 except as follows:

(a) Residential occupancies where the occupants are primarily transient in nature (less than 30 days) including:

Facilities

Hotels

Motels

Boarding houses

Application

5 percent of the total units, or at least one, whichever is greater, and all public use, common use, and areas which may result in employment of physically handicapped persons.

(b) Residential occupancies in multiple dwellings where the occupants are primarily permanent in nature, including:

Facilities	**Application**
Multifamily housing	
(Apartment houses):	
Federally assisted	5 percent of the total, or at least one unit, whichever is greater, in projects of 15 or more dwelling units, or as determined by the appropriate Federal agency following a local needs assessment conducted by local government bodies or states under applicable regulations.
Federally owned	5 percent of the total, or at least one unit, whichever is greater.
Dormitories	5 percent of the total or at least one unit, whichever is greater.

(c) Residential occupancies in one (1) and two (2) family dwellings where the occupancies are

primarily permanent in nature and not classified as preceding residential categories or as institutional.

Facilities	Application
One and two family dwelling:	
Federally assisted, rental	5 percent of the total, or at least one unit, whichever is greater, in projects of 15 or more dwelling units, or as determined by the appropriate Federal agency following a local needs assessment conducted by local government bodies or states under applicable regulations.
Federally assisted, homeownership	To be determined by home buyer.
Federally owned	5 percent of the total, or at least one unit, whichever is greater.

(12) STORAGE. Storage occupancy includes, among others, the use of a building or structure, or portion thereof, for storage that is not classified as a Hazardous Occupancy.

Facilities

Metal desks

Electrical coils

Electrical motors

Dry cell batteries

Metal parts

Empty cans

Stoves

Washers & Dryers

Metal cabinets

Glass bottles with noncombustible liquid

Mirrors

Foods in non-combustible containers

Frozen foods

Meats

Fresh fruits and vegetables

Dairy products

Beer or wine up to 12 percent alcohol

Distribution transformers

Cement in bags

Electrical insulators

Gypsum board

Inert pigments

Dry insecticides

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons shall comply.

(13) UTILITY AND MISCELLANEOUS. Utility and miscellaneous occupancies include, among others, accessory buildings and structures, such as:

Facilities

Fences over 6 ft. high

Tanks

Cooling towers

Retaining walls

Buildings of less than 1,000 sq. ft. such as: Private garages, Carports, Sheds, Agricultural buildings

Application

All areas for which the intended use will require public access or which may result in employment of physically handicapped persons shall comply.

4.1.5 ACCESSIBLE BUILDINGS: ADDITIONS. Each addition to an existing building shall comply with 4.1.1 to 4.1.4 of 4.1, Minimum Requirements, except as follows:

(1) ENTRANCES. If a new addition to a building or facility does not have an entrance, then at least one entrance in the existing building or facility shall comply with 4.1.4, Entrances.

(2) ACCESSIBLE ROUTE. If the only accessible entrance to the addition is located in the existing building or facility, then at least one accessible route shall comply with 4.3, Accessible Route, and shall provide access through the existing building or facility to all rooms, elements, and spaces in the new addition.

(3) TOILET AND BATHING FACILITIES. If there are no toilet rooms and bathing facilities in the addition and these facilities are provided in the existing building, then at least one toilet and bathing facility in the existing building shall comply with 4.22, Toilet Rooms, or 4.23, Bathrooms, Bathing Facilities, and Shower Rooms.

(4) ELEMENTS, SPACES, AND COMMON AREAS. If elements, spaces, or common areas are located in the existing building and they are not provided in the addition, then consideration should be given

to making those elements, spaces, and common areas accessible in the existing building.

EXCEPTIONS: Mechanical rooms, storage areas, and other such minor additions which normally are not frequented by the public or employees of the facility are excepted from 4.1.5.

(5) HOUSING: (Reserved).

4.1.6 ACCESSIBLE BUILDINGS. ALTERATIONS.

(1) GENERAL. Alterations to existing buildings or facilities shall comply with the following:

(a) If existing elements, spaces, essential features, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of 4.1.1 to 4.1.4 of 4.1, Minimum Requirements.

(b) If power-driven vertical access equipment (e.g., escalator) is planned or installed where none existed previously, or if new stairs (other than stairs installed to meet emergency exit requirements) requiring major structural changes are planned or installed where none existed previously, then a means of accessible vertical access shall be provided that complies with 4.7, Curb Ramps; 4.8, Ramps; 4.10, Elevators; or 4.11, Platform Lifts; except to the extent where it is structurally impracticable in transit facilities.

(c) If alterations of single elements, when considered together, amount to an alteration of a space of a building or facility, the entire space shall be made accessible.

(d) No alteration of an existing element, space, or area of a building shall impose a requirement for greater accessibility than that which would be required for new construction. For example, if the elevators and stairs in a building are being altered and the elevators are, in turn, being made accessible, then no accessibility modifications are required to the stairs connecting levels connected by the elevator.

(e) If the alteration work is limited solely to the electrical, mechanical, or plumbing system and does not involve the alteration of any elements and spaces required to be accessible under these standards, then 4.1.6(3) does not apply.

(f) No new accessibility alterations will be required of existing elements or spaces previously constructed or altered in compliance with earlier standards issued pursuant to the Architectural Barriers Act of 1968, as amended.

(g) Mechanical rooms and other spaces which normally are not frequented by the public or employees of the building or facility or which by nature of their use are not required by the Architectural Barriers Act to be accessible are excepted from the requirements of 4.1.6.

(2) Where a building or facility is vacated and it is totally altered, then it shall be altered to comply with 4.1.1 to 4.1.5 of 4.1, Minimum Requirements, except to the extent where it is structurally impracticable.

(3) Where substantial alteration occurs to a building or facility, then each element or space that is altered or added shall comply with the applicable provisions of 4.1.1 to 4.1.4 of 4.1, Minimum Requirements, except to the extent where it is structurally impracticable. The altered building or facility shall contain:

(a) At least one accessible route complying with 4.3, Accessible Route, and 4.1.6(a);

(b) At least one accessible entrance complying with 4.14, Entrances. If additional entrances are altered then they shall comply with 4.1.6(a); and

(c) The following toilet facilities, whichever is greater:

(i) At least one toilet facility for each sex in the altered building complying with 4.22, Toilet Rooms, and 4.23, Bathrooms, Bathing Facilities, and Shower Rooms.

(ii) At least one toilet facility for each sex on each substantially altered floor, where such facilities are provided, complying with 4.22, Toilet Rooms; and 4.23, Bathrooms, Bathing Facilities, and Shower Rooms.

(d) In making the determination as to what constitutes "substantial alteration," the agency issuing standards for the facility shall consider the total cost of all alterations (including but not limited to electrical, mechanical, plumbing, and structural changes) for a building or facility within any twelve (12) month period. For guidance in implementing this provision, an alteration to any building or facility is to be considered substantial if the total cost for this twelve month period amounts to 50 percent or more of the full and fair cash value of the building as defined in 3.5.

EXCEPTION: If the cost of the elements and spaces required by 4.1.6(3)(a), (b), or (c) exceeds 15 percent of the total cost of all other alterations, then a schedule may be established by the standard-setting and/or funding agency to provide the required improvements within a 5-year period.

EXCEPTION: Consideration shall be given to providing accessible elements and spaces in each altered building or facility complying with:

(i) 4.6, Parking and Passenger Loading Zones,

(ii) 4.15, Drinking Fountains and Water Coolers,

(iii) 4.25, Storage,

(iv) 4.28, Alarms,

(v) 4.31, Telephones,

(vi) 4.32, Seating, Tables, and Work Surfaces,

(vii) 4.33, Assembly Areas.

(4) Special technical provisions for alterations to existing buildings or facilities:

(a) Ramps. Curb ramps and ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises as shown in Table 2 if space limitations prohibit the use of a 1:12 slope or less.

Table 2 -- Allowable Ramp Dimensions for Construction in Existing Sites, Buildings, and Facilities

Slope*	Maximum Rise	Maximum Run
Steeper than 1:10 but no steeper than 1:8	3 in 75 mm	2 ft 0.6 m

Steeper than 1:12 but no steeper than 1:10	6 in 150 mm	5 ft 1.5 m

* A slope steeper than 1:8 not allowed.

(b) Stairs. Full extension of stair handrails shall not be required in alterations where such extensions would be hazardous or impossible due to plan configuration.

(c) Elevators.

(i) If a safety door edge is provided in existing automatic elevators, then the automatic door reopening devices may be omitted (see 4.10.6).

(ii) Where existing shaft or structural elements prohibit strict compliance with 4.10.9, then the minimum floor area dimensions may be reduced by the minimum amount necessary, but in no case shall they be less than 48 in by 48 in (1220 mm by 1220 mm).

(d) Doors.

(i) Where existing elements prohibit strict compliance with the clearance requirements of 4.13.5, a projection of 5/8 in (16 mm) maximum will be permitted for the latch side door stop.

(ii) If existing thresholds measure 3/4 in (19 mm) high or less, and are beveled or modified to provide a beveled edge on each side, then they may be retained.

(e) Toilet rooms. Where alterations to existing facilities make strict compliance with 4.22 and 4.23 structurally impracticable, the addition of one "unisex" toilet per floor containing one water closet complying with 4.16 and one lavatory complying with 4.19, located adjacent to existing toilet facilities, will be acceptable in lieu of making existing toilet facilities for each sex accessible.

EXCEPTION: In instances of alteration work where provision of a standard stall (**Fig. 30(a)**) is structurally impracticable or where plumbing code requirements prevent combining existing stalls to provide space, an alternate stall (**Fig. 30(b)**) may be provided in lieu of the standard stall.

(f) Assembly areas.

(i) In alterations where it is structurally impracticable to disperse seating throughout the assembly area, seating may be located in collected areas as structurally feasible. Seating shall adjoin an accessible route that also serves as a means of emergency egress.

(ii) In alterations where it is structurally impracticable to alter all performing areas to be on an accessible route, then at least one of each type shall be made accessible.

(5) HOUSING. (Reserved).

4.1.7 **ACCESSIBLE BUILDINGS: HISTORIC PRESERVATION.**

(1) APPLICABILITY.

(a) As a general rule, the accessibility provisions of part 4 shall be applied to "qualified" historic buildings and facilities. "Qualified" buildings or facilities are those buildings and facilities that are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a statute of the appropriate state or local government body. Comments of the Advisory Council

on Historic Preservation shall be obtained when required by Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 and 36 CFR Part 800, before any alteration to a qualified historic building.

(b) The Advisory Council shall determine, on a case-by-case basis, whether provisions required by part 4 for accessible routes (exterior and interior), ramps, entrances, toilets, parking, and displays and signage, would threaten or destroy the historic significance of the building or facility.

(c) If the Advisory Council determines that any of the accessibility requirements for features listed in 4.1.7(1) would threaten or destroy the historic significance of a building or facility, then the special application provisions of 4.1.7(2) for that feature may be utilized. The special application provisions listed under 4.1.7(2) may only be utilized following a written determination by the Advisory Council that application of a requirement contained in part 4 would threaten or destroy the historic integrity of a qualified building or facility.

(2) HISTORIC PRESERVATION: MINIMUM REQUIREMENTS.

(a) At least one accessible route complying with 4.3 from a site access point to an accessible entrance shall be provided.

EXCEPTION: A ramp with a slope no greater than 1:6 for a run not to exceed 2 ft (610 mm) may be used as part of an accessible route at an entrance.

(b) At least one accessible entrance which is used by the public complying with 4.14 shall be provided.

EXCEPTION: If it is determined that no entrance used by the public can comply with 4.14, then access at any entrance not used by the general public but open (unlocked) with directional signs at the primary entrance may be used.

(c) If toilets are provided, then at least one toilet facility complying with 4.22 and 4.1.6 shall be provided along an accessible route that complies with 4.3. Such toilet facility may be "unisex" in design.

(d) Accessible routes from an accessible entrance to all publicly used spaces on at least the level of the accessible entrance shall be provided. Access should be provided to all levels of a building or facility in compliance with 4.1 whenever practical.

(e) Displays and written information, documents, etc, should be located where they can be seen by a seated person. Exhibits and signage displayed horizontally, e.g., books, should be no higher than 44 in (1120 mm) above the floor surface.

4.2 **SPACE ALLOWANCE AND REACH RANGES.**

4.2.1* WHEELCHAIR PASSAGE WIDTH. The minimum clear width for single wheelchair passage shall be 32 in (815 mm) at a point and 36 in (915 mm) continuously (see **Fig. 1** and **24(e)**).

4.2.2 WIDTH FOR WHEELCHAIR PASSING. The minimum width for two wheelchairs to pass is 60 in (1525 mm) (see **Fig. 2**).

4.2.3* WHEELCHAIR TURNING SPACE. The space required for a wheelchair to make a 180-degree turn is a clear space of 60 in (1525 mm) diameter (see **Fig. 3(a)**) or a T-shaped space (see **Fig. 3 (b)**).

4.2.4* CLEAR FLOOR OR GROUND SPACE FOR WHEELCHAIRS.

4.2.4.1 SIZE AND APPROACH. The minimum clear floor or ground space required to accommodate a single, stationary wheelchair occupant is 30 in by 48 in (760 mm by 1220 mm) (see **Fig. 4(a)**). The minimum clear floor or ground space for wheelchairs may be positioned for forward or parallel approach to an object (see **Fig. 4(b)** and **(c)**). Clear floor or ground space for wheelchairs may be part of the knee space required under some objects.

4.2.4.2 RELATIONSHIP OF MANEUVERING CLEARANCE TO WHEELCHAIR SPACES.

One full unobstructed side of the clear floor or ground space for a wheelchair shall adjoin or overlap an accessible route or adjoin another wheelchair clear floor space. If a clear floor space is located in an alcove or otherwise confined on all or part of three sides, additional maneuvering clearances shall be provided as shown in **Fig. 4(d)** and **(e)**.

4.2.4.3 SURFACES FOR WHEELCHAIR SPACES. Clear floor or ground spaces for wheelchairs shall comply with 4.5.

4.2.5 FORWARD REACH. If the clear floor space only allows forward approach to an object, the maximum high forward reach allowed shall be 48 in (1220 mm) (see **Fig. 5(a)**). The minimum low forward reach is 15 in (380 mm). If the high forward reach is over an obstruction, reach and clearances shall be as shown in **Fig. 5(b)**.

4.2.6* SIDE REACH. If the clear floor space allows parallel approach by a person in a wheelchair, the maximum high side reach allowed shall be 54 in (1370 mm) and the low side reach shall be no less than 9 in (230 mm) above the floor (**Fig. 6(a)** and **(b)**). If the side reach is over an obstruction, the reach and clearances shall be as shown in **Fig. 6(c)**.

4.3 ACCESSIBLE ROUTE.

4.3.1* GENERAL. All walks, halls, corridors, aisles, and other spaces that are part of an accessible route shall comply with 4.3.

4.3.2 LOCATION.

(1) At least one accessible route within the boundary of the site shall be provided from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve.

(2) At least one accessible route shall connect accessible buildings, facilities, elements, and spaces that are on the same site.

(3) At least one accessible route shall connect accessible building or facility entrances with all accessible spaces and elements and with all accessible dwelling units within the building or facility.

(4) An accessible route shall connect at least one accessible entrance of each accessible dwelling unit with those exterior and interior spaces and facilities that serve the accessible dwelling unit.

4.3.3 WIDTH. The minimum clear width of an accessible route shall be 36 in (915 mm) except at doors (see 4.13.5). If a person in a wheelchair must make a turn around an obstruction, the minimum clear width of the accessible route shall be as shown in Fig. 7.

4.3.4 PASSING SPACE. If an accessible route has less than 60 in (1525 mm) clear width, then passing spaces at least 60 in by 60 in (1525 mm by 1525 mm) shall be located at reasonable intervals not to exceed 200 ft (61 m). A T-intersection of two corridors or walks is an acceptable passing place.

4.3.5 HEAD ROOM. Accessible routes shall comply with 4.4.2.

4.3.6 SURFACE TEXTURES. The surface of an accessible route shall comply with 4.5.

4.3.7 SLOPE. An accessible route with a running slope greater than 1:20 is a ramp and shall comply with 4.8. Nowhere shall the cross slope of an accessible route exceed 1:50.

4.3.8 CHANGES IN LEVELS. Changes in levels along an accessible route shall comply with 4.5.2. If an accessible route has changes in level greater than 1/2 in (13 mm), then a curb ramp, ramp, elevator, or platform lift shall be provided that complies with 4.7, 4.8, 4.10, or 4.11, respectively. Stairs shall not be part of an accessible route.

4.3.9 DOORS. Doors along an accessible route shall comply with 4.13.

4.3.10* EGRESS. Accessible routes serving any accessible space or element shall also serve as a means of egress for emergencies or connect to an accessible place of refuge. Such accessible routes and places of refuge shall comply with the requirements of the administrative authority having jurisdiction. Where fire code provisions require more than one means of egress from any space or room, then more than one accessible means of egress shall also be provided for handicapped people. Arrange egress so as to be readily accessible from all accessible rooms and spaces.

4.4 **PROTRUDING OBJECTS.**

4.4.1* GENERAL. Objects projecting from walls (for example, telephones) with their leading edges between 27 in and 80 in (685 mm and 2030 mm) above the finished floor shall protrude no more than 4 in (100 mm) into walks, halls, corridors, passageways, or aisles (see **Fig. 8(a)**). Objects mounted with their leading edges at or below 27 in (685 mm) above the finished floor may protrude any amount (see **Fig. 8(a)** and **(b)**). Free-standing objects mounted on posts or pylons may overhang 12 in (305 mm) maximum from 27 in to 80 in (685 mm to 2030 mm) above the ground or finished floor (see **Fig. 8(c)** and **(d)**). Protruding objects shall not reduce the clear width of an accessible route or maneuvering space (see **Fig. 8(e)**).

4.4.2 HEAD ROOM. Walks, halls, corridors, passageways, aisles, or other circulation spaces shall have 80 in (2030 mm) minimum clear head room (see **Fig. 8(a)**). If vertical clearance of an area adjoining an accessible route is reduced to less than 80 in (nominal dimension), a barrier to warn blind or visually-impaired persons shall be provided (see **Fig. 8(c)**).

4.5 **GROUND AND FLOOR SURFACES.**

4.5.1* GENERAL. Ground and floor surfaces along accessible routes and in accessible rooms and spaces, including floors, walks, ramps, stairs, and curb ramps, shall be stable, firm, slip-resistant, and shall comply with 4.5.

4.5.2 CHANGES IN LEVEL. Changes in level up to 1/4 in (6 mm) may be vertical and without edge treatment (see **Fig. 7(c)**). Changes in level between 1/4 in and 1/2 in (6 mm and 13 mm) shall be beveled with a slope no greater than 1:2 (see **Fig. 7(d)**). Changes in level greater than 1/2 in (13 mm) shall be accomplished by means of a ramp that complies with 4.7 or 4.8.

4.5.3* CARPET. If carpet or carpet tile is used on a ground or floor surface, then it shall be securely attached; have a firm cushion, pad, or backing or no cushion or pad; and have a level loop, textured loop, level cut pile, or level cut/uncut pile texture. The maximum pile height shall be 1/2 in (13 mm). Exposed edges of carpet shall be fastened to floor surfaces and have trim along the entire length of the exposed edge. Carpet edge trim shall comply with 4.5.2. If carpet tile is used on an accessible ground or floor surface, it shall have a maximum combined thickness of pile, cushion, and backing height of 1/2 in (13 mm) (see **Fig. 8(f)**).

4.5.4 GRATINGS. If gratings are located in walking surfaces, then they shall have spaces no greater than 1/2 in (13 mm) wide in one direction (see **Fig. 8(g)**). If gratings have elongated openings, then they shall be placed so that the long dimension is perpendicular to the dominant direction of travel (see **Fig. 8(h)**).

4.6 PARKING AND PASSENGER LOADING ZONES.

4.6.1 MINIMUM NUMBER. Parking spaces required to be accessible by 4.1 shall comply with 4.6.2 through 4.6.4. Passenger loading zones required to be accessible by 4.1 shall comply with 4.6.5 and 4.6.6.

4.6.2 LOCATION. Parking spaces for disabled people and accessible passenger loading zones that serve a particular building shall be the spaces or zones located closest to the nearest accessible entrance on an accessible route. In separate parking structures or lots that do not serve a particular building, parking spaces for disabled people shall be located on the shortest possible circulation route to an accessible pedestrian entrance of the parking facility.

4.6.3* PARKING SPACES. Parking spaces for disabled people shall be at least 96 in (2440 mm) wide and shall have an adjacent access aisle 60 in (1525 mm) wide minimum (see **Fig. 9**). Parking access aisles shall be part of an accessible route to the building or facility entrance and shall comply with 4.3. Two accessible parking spaces may share a common access aisle. Parked vehicle overhangs shall not reduce the clear width of an accessible circulation route. Parking spaces and access aisles shall be level with surface slopes not exceeding 1:50 in all directions.

EXCEPTION: If accessible parking spaces for vans designed for handicapped persons are provided, each should have an adjacent access aisle at least 96 in (2440 mm) wide complying with 4.5, Ground and Floor Surfaces.

4.6.4* SIGNAGE. Accessible parking spaces shall be designated as reserved for the disabled by a sign showing the symbol of accessibility (see 4.30.5). Such signs shall not be obscured by a vehicle parked in the space.

4.6.5 PASSENGER LOADING ZONES. Passenger loading zones shall provide an access aisle at least 60 in (1525 mm) wide and 20 ft (6 m) long adjacent and parallel to the vehicle pull-up space (see **Fig. 10**). If there are curbs between the access aisle and the vehicle pull-up space, then a curb ramp complying with 4.7 shall be provided. Vehicle standing spaces and access aisles shall be level with surface slopes not exceeding 1:50 in all directions.

4.6.6 VERTICAL CLEARANCE. Provide minimum vertical clearances of 114 in at accessible passenger loading zones and along vehicle access routes to such areas from site entrances. If accessible van parking spaces are provided, then the minimum vertical clearance should be 114 in.

4.7 CURB RAMPS.

4.7.1 LOCATION. Curb ramps complying with 4.7 shall be provided wherever an accessible route crosses a curb.

4.7.2 SLOPE. Slopes of curb ramps shall comply with 4.8.2. The slope shall be measured as shown in **Fig. 11**. Transitions from ramps to walks, gutters, or streets shall be flush and free of abrupt changes. Maximum slopes of adjoining gutters, road surface immediately adjacent to the curb ramp, or accessible route shall not exceed 1.20.

4.7.3 WIDTH. The minimum width of a curb ramp shall be 36 in (915 mm), exclusive of flared sides.

4.7.4 SURFACE. Surfaces of curb ramps shall comply with 4.5.

4.7.5 SIDES OF CURB RAMPS. If a curb ramp is located where pedestrians must walk across the ramp, or where it is not protected by handrails or guardrails, then it shall have flared sides; the maximum slope of the flare shall be 1:10 (see **Fig. 12(a)**). Curb ramps with returned curbs may be used where pedestrians would not normally walk across the ramp (see **Fig. 12(b)**).

4.7.6 BUILT-UP CURB RAMPS. Built-up curb ramps shall be located so that they do not project into vehicular traffic lanes (see **Fig. 13**).

4.7.7 WARNING TEXTURES. (Removed and reserved).

4.7.8 OBSTRUCTIONS. Curb ramps shall be located or protected to prevent their obstruction by parked vehicles.

4.7.9 LOCATION AT MARKED CROSSINGS. Curb ramps at marked crossings shall be wholly contained within the markings, excluding any flared sides (see **Fig. 15**).

4.7.10 DIAGONAL CURB RAMPS. If diagonal (or corner type) curb ramps have returned curbs or other well-defined edges, such edges shall be parallel to the direction of pedestrian flow. The bottom of diagonal curb ramps shall have 48 in (1220 mm) minimum clear space as shown in **Fig. 15(c)** and **(d)**. If diagonal curb ramps are provided at marked crossings, the 48 in (1220 mm) clear space shall be within the markings (see **Fig. 15(c)** and **(d)**). If diagonal curb ramps have flared sides, they shall also have at least a 24 in (610 mm) long segment of straight curb located on each side of the curb ramp and within the marked crossing (see **Fig. 15(c)**).

4.7.11 ISLANDS. Any raised islands in crossings shall be cut through level with the street or have curb ramps at both sides and a level area at least 48 in (1220 mm) long in the part of the island intersected by the crossings (see **Fig. 15(a)** and **(b)**).

4.7.12 UNCURBED INTERSECTIONS. (Removed and reserved).

4.8 RAMPS.

4.8.1* GENERAL. Any part of an accessible route with a slope greater than 1:20 shall be considered a ramp and shall comply with 4.8.

4.8.2* SLOPE AND RISE. The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be 1:12. The maximum rise for any run shall be 30 in (760 mm) (see **Fig. 16**). Curb ramps and ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises as shown in Table 2 if space limitations prohibit the use of a 1:12 slope or less (see 4.1.6).

4.8.3 CLEAR WIDTH. The minimum clear width of a ramp shall be 36 in (915 mm).

4.8.4 LANDINGS. Ramps shall have level landings at the bottom and top of each run. Landings shall have the following features:

(1) The landing shall be at least as wide as the ramp run leading to it.

(2) The landing length shall be a minimum of 60 in (1525 mm) clear.

(3) If ramps change direction at landings, the minimum landing size shall be 60 in by 60 in (1525 mm by 1525 mm).

(4) If a doorway is located at a landing, then the area in front of the doorway shall comply with

4.13.6.

4.8.5* HANDRAILS. If a ramp run has a rise greater than 6 in (250 mm) or a horizontal projection greater than 72 in (1830 mm), then it shall have handrails on both sides. Handrails are not required on curb ramps. Handrails shall comply with 4.26 and shall have the following features:

(1) Handrails shall be provided along both sides of ramp segments. The inside handrail on switchback or dogleg ramps shall always be continuous.

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top and bottom of the ramp segment and shall be parallel with the floor or ground surface.

(3) The clear space between the handrail and the wall shall be 1-1/2 in (38 mm).

(4) Gripping surfaces shall be continuous.

(5) Top of handrail gripping surfaces shall be mounted between 30 in and 34 in (760 mm and 865 mm) above ramp surfaces.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall or post.

(7) Handrails shall not rotate within their fittings.

4.8.6 CROSS SLOPE AND SURFACES. The cross slope of ramp surfaces shall be no greater than 1:50. Ramp surfaces shall comply with 4.5.

4.8.7 EDGE PROTECTION. Ramps and landings with drop-offs shall have curbs, walls, railings, or projecting surfaces that prevent people from slipping off the ramp. Curbs shall be a minimum of 2 in (50 mm) high (see **Fig. 17**).

4.8.8 OUTDOOR CONDITIONS. Outdoor ramps and their approaches shall be designed so that water will not accumulate on walking surfaces.

4.9 STAIRS.

4.9.1 MINIMUM NUMBER. Stairs required to be accessible by 4.1 shall comply with 4.9.

4.9.2 TREADS AND RISERS. On any given flight of stairs, all steps shall have uniform riser heights and uniform tread widths. Stair treads shall be no less than 11 in (280 mm) wide, measured from riser to riser (see **Fig. 18(a)**). Open risers are not permitted on accessible routes.

4.9.3 NOSINGS. The undersides of nosings shall not be abrupt. The radius of curvature at the leading edge of the tread shall be no greater than 1/2 in (13 mm). Risers shall be sloped or the underside of the nosing shall have an angle not less than 60 degrees from the horizontal. Nosings shall project no more than 1-1/2 in (38 mm) (see **Fig. 18**).

4.9.4 HANDRAILS. Stairways shall have handrails at both sides of all stairs. Handrails shall comply with 4.26 and shall have the following features:

(1) Handrails shall be continuous along both sides of stairs. The inside handrail on switchback or dogleg stairs shall always be continuous (see **Fig. 19(a)** and **(b)**).

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top riser and at least 12 in (305 mm) plus the width of one tread beyond the bottom riser. At the top, the extension

shall be parallel with the floor or ground surface. At the bottom, the handrail shall continue to slope for a distance of the width of one tread from the bottom riser; the remainder of the extension shall be horizontal (see **Fig. 19(c)** and **(d)**). Handrail extensions shall comply with 4.4.

(3) The clear space between handrails and wall shall be 1-1/2 in (38 mm).

(4) Gripping surfaces shall be uninterrupted by newel posts, other construction elements, or obstructions.

(5) Top of handrail gripping surface shall be mounted between 30 in and 34 in (760 mm and 865 mm) above stair nosings.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall, or post.

(7) Handrails shall not rotate within their fittings.

4.9.5 TACTILE WARNINGS AT STAIRS. (Removed and reserved).

4.9.6 OUTDOOR CONDITIONS. Outdoor stairs and their approaches shall be designed so that water will not accumulate on walking surfaces.

4.10 ELEVATORS.

4.10.1 GENERAL. Accessible elevators shall be on an accessible route and shall comply with 4.10 and with the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators, and Moving Walks, ANSI A17.1-1978 and A17.1a-1979. This standard does not preclude the use of residential or fully enclosed wheelchair lifts when appropriate and approved by administrative authorities. Freight elevators shall not be considered as meeting the requirements of this section, unless the only elevators provided are used as combination passenger and freight elevators for the public and employees.

4.10.2 AUTOMATIC OPERATION. Elevator operation shall be automatic. Each car shall be equipped with a self-leveling feature that will automatically bring the car to floor landings within a tolerance of 1/2 in (13 mm) under rated loading to zero loading conditions. This self-leveling feature shall be automatic and independent of the operating device and shall correct the over-travel or undertravel.

4.10.3 HALL CALL BUTTONS. Call buttons in elevator lobbies and halls shall be centered at 42 in (1065 mm) above the floor. Such call buttons shall have visual signals to indicate when each call is registered and when each call is answered. Call buttons shall be a minimum of 3/4 in (19 mm) in the smallest dimension. The button designating the up direction shall be on top (see **Fig. 20**). Buttons shall be raised or flush. Objects mounted beneath hall call buttons shall not project into the elevator lobby more than 4 in (100 mm).

4.10.4 HALL LANTERNS. A visible and audible signal shall be provided at each hoistway entrance to indicate which car is answering a call. Audible signals shall sound once for the up direction and twice for the down direction or shall have verbal annunciators that say "up" or "down." Visible signals shall have the following features:

(1) Hall lantern fixtures shall be mounted so that their centerline is at least 72 in (1830 mm) above the lobby floor.

(2) Visual elements shall be at least 2-1/2 in (64 mm) in the smallest dimension.

(3) Signals shall be visible from the vicinity of the hall call button. In-car lanterns located in cars,

visible from the vicinity of hall call buttons, and conforming to the above requirements, shall be acceptable (see **Fig. 20**).

4.10.5 RAISED CHARACTERS ON HOISTWAY ENTRANCES. All elevator hoistway entrances shall have raised floor designations provided on both jambs. The centerline of the characters shall be 60 in (1525 mm) from the floor. Such characters shall be 2 in (50 mm) high and shall comply with 4.30. Permanently applied plates are acceptable if they are permanently fixed to the jambs. (See **Fig. 20**).

4.10.6* DOOR PROTECTIVE AND REOPENING DEVICE. Elevator doors shall open and close automatically. They shall be provided with a reopening device that will stop and reopen a car door and hoistway door automatically if the door becomes obstructed by an object or person. The device shall be capable of completing these operations without requiring contact for an obstruction passing through the opening at heights of 5 in and 29 in (125 mm and 735 mm) from the floor (see **Fig. 20**). Door reopening devices shall remain effective for at least 20 seconds. After such an interval, doors may close in accordance with the requirements of ANSI A17.1-1978 and A17.1a-1979.

4.10.7* DOOR AND SIGNAL TIMING FOR HALL CALLS. The minimum acceptable time from notification that a car is answering a call until the doors of that car start to close shall be calculated from the following equation:

T = D or T = D

1.5 ft/s 445 mm/s

where T = total time in seconds and D = distance (in feet or millimeters) from a point in the lobby or corridor 60 in (1525 mm) directly in front of the farthest call button controlling that car to the centerline of its hoistway door (see **Fig. 21**). For cars with in-car lanterns, T begins when the lantern is visible from the vicinity of hall call buttons and an audible signal is sounded. The minimum acceptable notification time shall be 5 seconds.

4.10.8 DOOR DELAY FOR CAR CALLS. The minimum time for elevator doors to remain fully open in response to a car call shall be 3 seconds.

4.10.9 FLOOR PLAN OF ELEVATOR CARS. The floor area of elevator cars shall provide space for wheelchair users to enter the car, maneuver within reach of controls, and exit from the car. Acceptable door opening and inside dimensions shall be as shown in **Fig. 22**. The clearance between the car platform sill and the edge of any hoistway landing shall be no greater than 1-1/4 in (32 mm).

4.10.10 FLOOR SURFACES. Floor surfaces shall comply with 4.5.

4.10.11 ILLUMINATION LEVELS. The level of illumination at the car controls, platform, and car threshold and landing sill shall be at least 5 footcandles (53.8 lux).

4.10.12* CAR CONTROLS. Elevator control panels shall have the following features:

(1) Buttons. All control buttons shall be at least 3/4 in (19 mm) in their smallest dimension. They may be raised or flush.

(2) Tactile and Visual Control Indicators. All control buttons shall be designated by raised standard alphabet characters for letters, arabic characters for numerals, or standard symbols as shown in **Fig. 23(a)**, and as required in ANSI A17.1-1978 and A17.1a-1979. Raised characters and symbols shall comply with 4.30. The call button for the main entry floor shall be designated by a raised star at the left of the floor designation (see **Fig. 23(a)**). All raised designations for control buttons shall be placed immediately to the left of the button to which they apply. Applied plates, permanently attached, are an acceptable means to provide raised control designations. Floor buttons shall be

provided with visual indicators to show when each call is registered. The visual indicators shall be extinguished when each call is answered.

(3) Height. All floor buttons shall be no higher than 48 in (1220 mm), unless there is a substantial increase in cost, in which case the maximum mounting height may be increased to 54 in (1370 mm), above the floor. Emergency controls, including the emergency alarm and emergency stop, shall be grouped at the bottom of the panel and shall have their centerlines no less than 35 in (890 mm) above the floor (see **Fig. 23(a)** and **(b)**).

(4) Location. Controls shall be located on a front wall if cars have center opening doors, and at the side wall or at the front wall next to the door if cars have side opening doors (see **Fig. 23(c)** and **(d)**).

4.10.13* CAR POSITION INDICATORS. In elevator cars, a visual car position indicator shall be provided above the car control panel or over the door to show the position of the elevator in the hoistway. As the car passes or stops at a floor served by the elevators, the corresponding numerals shall illuminate, and an audible signal shall sound. Numerals shall be a minimum of 1/2 in (13 mm) high. The audible signal shall be no less than 20 decibels with a frequency no higher than 1500 Hz. An automatic verbal announcement of the floor number at which a car stops or which a car passes may be substituted for the audible signal.

4.10.14* EMERGENCY COMMUNICATIONS. If provided, emergency two-way communication systems between the elevator and a point outside the hoistway shall comply with ANSI A17.1-1978 and A17.1a-1979. The highest operable part of a two-way communication system shall be a maximum of 48 in (1220 mm) from the floor of the car. It shall be identified by a raised or recessed symbol and lettering complying with 4.30 and located adjacent to the device. If the system uses a handset, then the length of the cord from the panel to the handset shall be at least 29 in (735 mm). If the system is located in a closed compartment, the compartment door hardware shall conform to 4.27, Controls and Operating Mechanisms. The emergency intercommunication system shall not require voice communication.

4.11* PLATFORM LIFTS.

4.11.1 LOCATION. Platform lifts permitted by 4.1 shall comply with the requirements of 4.11.

4.11.2 OTHER REQUIREMENTS. If platform lifts are used, they shall comply with 4.2.4, 4.5, 4.27, and the applicable safety regulations of administrative authorities having jurisdiction.

4.11.3 ENTRANCE. If platform lifts are used, then they should facilitate unassisted entry and exit from the lift in compliance with 4.11.2.

4.12 WINDOWS. (Reserved).

4.13 DOORS.

4.13.1 GENERAL. Doors required to be accessible by 4.1 shall comply with the requirements of 4.13.

4.13.2 REVOLVING DOORS AND TURNSTILES. Revolving doors or turnstiles shall not be the only means of passage at an accessible entrance or along an accessible route. An accessible gate or door shall be provided adjacent to the turnstile or revolving door and shall be so designed as to facilitate the same use pattern.

4.13.3 GATES. Gates, including ticket gates, shall meet all applicable specifications of 4.13.

4.13.4 DOUBLE-LEAF DOORWAYS. If doorways have two independently operated door leaves, then

at least one leaf shall meet the specifications in 4.13.5 and 4.13.6. That leaf shall be an active leaf.

4.13.5 CLEAR WIDTH. Doorways shall have a minimum clear opening of 32 in (815 mm) with the door open 90 degrees, measured between the face of the door and the stop (see **Fig. 24(a)**, **(b)**, **(c)**, and **(d)**). Openings more than 24 in (610 mm) in depth shall comply with 4.2.1 and 4.3.3 (see **Fig. 24(e)**).

EXCEPTION: Doors not requiring full user passage, such as shallow closets, may have the clear opening reduced to 20 in (510 mm) minimum.

4.13.6 MANEUVERING CLEARANCES AT DOORS. Minimum maneuvering clearances at doors that are not automatic or power-assisted shall be as shown in **Fig. 25**. The floor or ground area within the required clearances shall be level and clear. Entry doors to acute care hospital bedrooms for in-patients shall be exempted from the requirement for space at the latch side of the door (see dimension "x" in **Fig. 25**) if the door is at least 44 in (1120 mm) wide.

4.13.7 TWO DOORS IN SERIES. The minimum space between two hinged or pivoted doors in series shall be 48 in (1220 mm) plus the width of any door swinging into the space. Doors in series shall swing either in the same direction or away from the space between the doors (see **Fig. 26**).

4.13.8* THRESHOLDS AT DOORWAYS. Thresholds at doorways shall not exceed 3/4 in (19 mm) in height for exterior sliding doors or 1/2 in (13 mm) for other types of doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2 (see 4.5.2).

4.13.9* DOOR HARDWARE. Handles, pulls, latches, locks, and other operating devices on accessible doors shall have a shape that is easy to grasp with one hand and does not require tight grasping, tight pinching, or twisting of the wrist to operate. Lever-operated mechanisms, push-type mechanisms, and U-shaped handles are acceptable designs. When sliding doors are fully open, operating hardware shall be exposed and usable from both sides. In dwelling units, only doors at accessible entrances to the unit itself shall comply with the requirements of this paragraph. Doors to hazardous areas shall have hardware complying with 4.29.3. Mount no hardware required for accessible door passage higher than 48 in (1220 mm) above finished floor.

4.13.10* DOOR CLOSERS. If a door has a closer, then the sweep period of the closer shall be adjusted so that from an open position of 70 degrees, the door will take at least 3 seconds to move to a point 3 in (75 mm) from the latch, measured to the leading edge of the door.

4.13.11* DOOR OPENING FORCE. The maximum force for pushing or pulling open a door shall be as follows:

(1) Fire doors shall have the minimum opening force allowable by the appropriate administrative authority.

(2) Other doors.

(a) exterior hinged doors: (Reserved).

(b) interior hinged doors: 5 lbf (22.2N)

(c) sliding or folding doors: 5 lbf (22.2N)

These forces do not apply to the force required to retract latch bolts or disengage other devices that may hold the door in a closed position.

4.13.12* AUTOMATIC DOORS AND POWER-ASSISTED DOORS. If an automatic door is used, then it shall comply with American National Standard for Power-Operated Doors, ANSI A156.10-1979. Slowly opening, low-powered, automatic doors shall be considered a type of custom design installation as described in paragraph 1.1.1 of ANSI A156.10-1979. Such doors shall not open to back check faster than 3 seconds and shall require no more than 15 lbf (66.6N) to stop door movement. If a power-assisted door is used, its door-opening force shall comply with 4.13.11 and its closing shall conform to the requirements in section 10 of ANSI A156.10-1979.

4.14 ENTRANCES.

4.14.1 MINIMUM NUMBER. Entrances required to be accessible by 4.1 shall be part of an accessible route and shall comply with 4.3. Such entrances shall be connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, and to public streets or sidewalks if available (see 4.3.2(1)). They shall also be connected by an accessible route to all accessible spaces or elements within the building or facility.

4.14.2 SERVICE ENTRANCES. A service entrance shall not be the sole accessible entrance unless it is the only entrance to a building or facility (for example, in a factory or garage).

4.15 DRINKING FOUNTAINS AND WATER COOLERS.

4.15.1 MINIMUM NUMBER. Drinking fountains or water coolers required to be accessible by 4.1 shall comply with 4.15.

4.15.2* SPOUT HEIGHT. Spouts shall be no higher than 36 in (915 mm), measured from the floor or ground surfaces to the spout outlet (see **Fig. 27(a)**).

4.15.3 SPOUT LOCATION. The spouts of drinking fountains and water coolers shall be at the front of the unit and shall direct the water flow in a trajectory that is parallel or nearly parallel to the front of the unit. The spout shall provide a flow of water at least 4 in (100 mm) high so as to allow the insertion of a cup or glass under the flow of water.

4.15.4 CONTROLS. Controls shall comply with 4.27.4. Unit controls shall be front mounted or side mounted near the front edge.

4.15.5 CLEARANCES.

(1) Wall- and post-mounted cantilevered units shall have a clear knee space between the bottom of the apron and the floor or ground at least 27 in (685 mm) high, 30 in (760 mm) wide, and 17 in to 19 in (430 mm to 485 mm) deep (see **Fig. 27(a)** and **(b)**). Such units shall also have a minimum clear floor space 30 in by 48 in (760 mm by 1220 mm) to allow a person in a wheelchair to approach the unit facing forward.

(2) Free standing or built-in units not having a clear space under them shall have a clear floor space at least 30 in by 48 in (760 mm by 1220 mm) that allows a person in a wheelchair to make a parallel approach to the unit (see **Fig. 27(c)** and **(d)**). This clear floor space shall comply with 4.2.4.

4.16 WATER CLOSETS.

4.16.1 GENERAL. Accessible water closets shall comply with 4.16. For water closets in accessible dwelling units, see 4.34.5.2.

4.16.2 CLEAR FLOOR SPACE. Clear floor space for water closets not in stalls shall comply with **Fig. 28**. Clear floor space may be arranged to allow either a left-handed or right-handed approach.

4.16.3* HEIGHT. The height of water closets shall be 17 in to 19 in (430 mm to 485 mm), measured to the top of the toilet seat (see **Fig. 29(b)**). Seats shall not be sprung to return to a lifted position.

4.16.4* GRAB BARS. Grab bars for water closets not located in stalls shall comply with **Fig. 29** and 4.26.

4.16.5* FLUSH CONTROLS. Flush controls shall be hand operated or automatic and shall comply with 4.27.4. Controls for flush valves shall be mounted on the wide side of toilet areas no more than 44 in (1120 mm) above the floor.

4.16.6 DISPENSERS. Toilet paper dispensers shall be installed within reach, as shown in **Fig. 29(b)**. Dispensers that control delivery, or that do not permit continuous paper flow, shall not be used.

4.17 TOILET STALLS.

4.17.1 LOCATION. Accessible toilet stalls shall be on an accessible route and shall meet the requirements of 4.17.

4.17.2 WATER CLOSETS. Water closets in accessible stalls shall comply with 4.16.

4.17.3 SIZE AND ARRANGEMENT. The size and arrangement of toilet stalls shall comply with **Fig. 30(a)**. Toilet stalls with a minimum depth of 56 in (1420 mm) (see **Fig. 30(a)**) shall have wall-mounted water closets. If the depth of toilet stalls is increased at least 3 in (75 mm), then a floor-mounted water closet may be used. Arrangements shown for stalls may be reversed to allow either a left- or right-hand approach.

EXCEPTION: In instances of alteration work where provision of a standard stall (**Fig. 30(a)**) is structurally impracticable or where plumbing code requirements prevent combining existing stalls to provide space, an alternate stall (**Fig. 30(b)**) may be provided in lieu of the standard stall.

4.17.4 TOE CLEARANCES. In standard stalls, the front partition and at least one side partition shall provide a toe clearance of at least 9 in (230 mm) above the floor. If the depth of the stall is greater than 60 in (1525 mm), then the toe clearance is not required.

4.17.5* DOORS. Toilet stall doors shall comply with 4.13. If toilet stall approach is from the latch side of the stall door, clearance between the door side of the stall and any obstruction may be reduced to a minimum of 42 in (1065 mm).

4.17.6 GRAB BARS. Grab bars complying with the length and positioning shown in **Fig. 30(a)**, **(b)**, **(c)**, and **(d)** shall be provided. Grab bars may be mounted with any desired method as long as they have a gripping surface at the locations shown and do not obstruct the required clear floor area. Grab bars shall comply with 4.26.

4.18 URINALS.

4.18.1 GENERAL. Accessible urinals shall comply with 4.18.

4.18.2 HEIGHT. Urinals shall be stall-type or wall-hung with an elongated rim at a maximum of 17 in (430 mm) above the floor.

4.18.3 CLEAR FLOOR SPACE. A clear floor space 30 in by 48 in (760 mm by 1220 mm) shall be provided in front of urinals to allow forward approach. This clear space shall adjoin or overlap an accessible route and shall comply with 4.2.4. Urinal shields that do not extend beyond the front edge of the urinal rim may be provided with 29 in (735 mm) clearance between them.

4.18.4 FLUSH CONTROLS. Flush controls shall be hand operated or automatic, and shall comply with 4.27.4, and shall be mounted no more than 44 in (1120 mm) above the floor.

4.19 LAVATORIES AND MIRRORS.

4.19.1 GENERAL. The requirements of 4.19 shall apply to lavatory fixtures, vanities, and built-in lavatories.

4.19.2 HEIGHT AND CLEARANCES. Lavatories shall be mounted with the rim or counter surface no higher than 34 in (865 mm) above the finished floor. Provide a clearance of at least 29 in (735 mm) from the floor to the bottom of the apron. Knee and toe clearance shall comply with **Fig. 31**.

4.19.3 CLEAR FLOOR SPACE. A clear floor space 30 in by 48 in (760 mm by 1220 mm) complying with 4.2.4 shall be provided in front of a lavatory to allow forward approach. Such clear floor space shall adjoin or overlap an accessible route and shall extend a maximum of 19 in (485 mm) underneath the lavatory (see **Fig. 32**).

4.19.4 EXPOSED PIPES AND SURFACES. Hot water and drain pipes under lavatories shall be insulated or otherwise covered. There shall be no sharp or abrasive surfaces under lavatories.

4.19.5 FAUCETS. Faucets shall comply with 4.27.4. Lever-operated, push-type, and electronically controlled mechanisms are examples of acceptable designs. Self-closing valves are allowed if the faucet remains open for at least 10 seconds.

4.19.6* MIRRORS. Mirrors shall be mounted with the bottom edge of the reflecting surface no higher than 40 in (1015 mm) from the floor (see **Fig. 31**).

4.20 BATHTUBS.

4.20.1 GENERAL. Accessible bathtubs shall comply with 4.20. For bathtubs in accessible dwelling units, see 4.34.5.4.

4.20.2 FLOOR SPACE. Clear floor space in front of bathtubs shall be as shown in **Fig. 33**.

4.20.3 SEAT. An in-tub seat or a seat at the head end of the tub shall be provided as shown in **Fig. 33** and **34**. The structural strength of seats and their attachments shall comply with 4.26.3. Seats shall be mounted securely and shall not slip during use.

4.20.4 GRAB BARS. Grab bars complying with 4.26 shall be provided as shown in **Fig. 33** and **34**.

4.20.5 CONTROLS. Faucets and other controls complying with 4.27.4 shall be located as shown in **Fig. 34**.

4.20.6 SHOWER UNIT. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used as a fixed shower head or as a hand-held shower shall be provided.

4.20.7 BATHTUB ENCLOSURES. If provided, enclosures for bathtubs shall not obstruct controls or transfer from wheelchairs onto bathtub seats or into tubs. Enclosures on bathtubs shall not have tracks mounted on their rims.

4.21 SHOWER STALLS.

4.21.1* GENERAL. Accessible shower stalls shall comply with 4.21. For shower stalls in accessible dwelling units, see 4.34.5.5.

4.21.2 SIZE AND CLEARANCES. Shower stall size and clear floor space shall comply with **Fig. 35 (a)** or **(b)**. The shower stall in **Fig. 35(a)** shall be 36 in by 36 in (915 mm by 915 mm). The shower stall in **Fig. 35(b)** will fit into the space required for a bathtub.

4.21.3 SEAT. A seat shall be provided in shower stalls 36 in by 36 in (915 mm by 915 mm) and shall be as shown in **Fig. 36**. The seat shall be mounted 17 in to 19 in (430 mm to 485 mm) from the bathroom floor and shall extend the full depth of the stall. The seat shall be on the wall opposite the controls. The structural strength of seats and their attachments shall comply with 4.26.3.

4.21.4 GRAB BARS. Grab bars complying with 4.26 shall be provided as shown in **Fig. 37**.

4.21.5 CONTROLS. Faucets and other controls complying with 4.27.4 shall be located as shown in **Fig. 37**. In shower stalls 36 in by 36 in (915 mm by 915 mm), all controls, faucets, and the shower unit shall be mounted on the side wall opposite the seat.

4.21.6 SHOWER UNIT. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used as a fixed shower head or as a hand-held shower shall be provided.

EXCEPTION: In unmonitored facilities where vandalism is a consideration, a fixed shower head mounted at 48 in (1220 mm) above the shower floor may be used in lieu of a hand-held shower head.

4.21.7 CURBS. If provided, curbs in shower stalls 36 in by 36 in (915 mm by 915 mm) shall be no higher than 1/2 in (13 mm). Shower stalls that are 30 in by 60 in (760 mm by 1525 mm) shall not have curbs.

4.21.8 SHOWER ENCLOSURES. If provided, enclosures for shower stalls shall not obstruct controls or obstruct transfer from wheelchairs onto shower seats.

4.22 TOILET ROOMS.

4.22.1 MINIMUM NUMBER. Toilet facilities required to be accessible by 4.1 shall comply with 4.22. Accessible toilet rooms shall be on an accessible route.

4.22.2 DOORS. All doors to accessible toilet rooms shall comply with 4.13. Doors shall not swing into the clear floor space required for any fixture.

4.22.3 CLEAR FLOOR SPACE. The accessible fixtures and controls required in 4.22.4, 4.22.5, 4.22.6, and 4.22.7 shall be on an accessible route. An unobstructed turning space complying with 4.2.3 shall be provided within an accessible toilet room. The clear floor space at fixtures and controls, the accessible route, and the turning space may overlap.

EXCEPTION: In toilet rooms with only one water closet and one lavatory, a clear floor space of 30 in by 60 in (815 mm by 1525 mm) may be used in lieu of the unobstructed turning space.

4.22.4 WATER CLOSETS. If toilet stalls are provided, then at least one shall comply with 4.17; its water closet shall comply with 4.16. If water closets are not in stalls, then at least one shall comply with 4.16.

4.22.5 URINALS. If urinals are provided, then at least one shall comply with 4.18.

4.22.6 LAVATORIES AND MIRRORS. If lavatories and mirrors are provided, then at least one of each shall comply with 4.19.

4.22.7 CONTROLS AND DISPENSERS. If controls, dispensers, receptacles, or other equipment is

provided, then at least one of each shall be on an accessible route and shall comply with 4.27.

4.23 BATHROOMS, BATHING FACILITIES, AND SHOWER ROOMS.

4.23.1 MINIMUM NUMBER. Bathrooms, bathing facilities, or shower rooms required to be accessible by 4.1 shall comply with 4.23 and shall be on an accessible route. For adaptable bathrooms in accessible dwelling units, see 4.34.5.

4.23.2 DOORS. Doors to accessible bathrooms shall comply with 4.13. Doors shall not swing into the floor space required for any fixture.

4.23.3 CLEAR FLOOR SPACE. The accessible fixtures and controls required in 4.23.4, 4.23.5, 4.23.6, 4.23.7, 4.23.8, and 4.23.9 shall be on an accessible route. An unobstructed turning space complying with 4.2.3 shall be provided within an accessible bathroom. The clear floor spaces at fixtures and controls, the accessible route, and the turning space may overlap.

EXCEPTION: In bathrooms with only one water closet, one lavatory, and one bathtub or shower, a clear floor space of 30 in by 60 in (760 mm by 1525 mm) may be used in lieu of the unobstructed turning space.

4.23.4 WATER CLOSETS. If toilet stalls are provided, then at least one shall comply with 4.17; its water closet shall comply with 4.16. If water closets are not in stalls, then at least one shall comply with 4.16.

4.23.5 URINALS. If urinals are provided, then at least one shall comply with 4.18.

4.23.6 LAVATORIES AND MIRRORS. If lavatories and mirrors are provided, then at least one of each shall comply with 4.19.

4.23.7 CONTROLS AND DISPENSERS. If controls, dispensers, receptacles, or other equipment is provided, then at least one of each shall be on an accessible route and shall comply with 4.27.

4.23.8 BATHING AND SHOWER FACILITIES. If tubs or showers are provided, then at least one accessible tub that complies with 4.20 or at least one accessible shower that complies with 4.21 shall be provided.

4.23.9* MEDICINE CABINETS. If medicine cabinets are provided, at least one shall be located with a usable shelf no higher than 44 in (1120 mm) above the floor space. The floor space shall comply with 4.2.4.

4.24 SINKS.

4.24.1 GENERAL. Sinks required to be accessible by 4.1 shall comply with 4.24. Sinks in kitchens of accessible dwelling units shall comply with 4.34.6.5.

4.24.2 HEIGHT. Sinks shall be mounted with the counter or rim no higher than 34 in (865 mm) from the floor.

4.24.3 KNEE CLEARANCE. Knee clearance that is at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep shall be provided underneath sinks.

4.24.4 DEPTH. Each sink shall be a maximum of 6-1/2 in (165 mm) deep.

4.24.5 CLEAR FLOOR SPACE. A clear floor space at least 30 in by 48 in (760 mm by 1220 mm)

complying with 4.2.4 shall be provided in front of a sink to allow forward approach. The clear floor space shall be on an accessible route and shall extend a maximum of 19 in (485 mm) underneath the sink (see **Fig. 32**).

4.24.6 EXPOSED PIPES AND SURFACES. Hot water and drain pipes exposed under sinks shall be insulated or otherwise covered. There shall be no sharp or abrasive surfaces under sinks.

4.24.7 FAUCETS. Faucets shall comply with 4.27.4. Lever-operated, push-type, touch-type, or electronically controlled mechanisms are acceptable designs.

4.25 STORAGE.

4.25.1 GENERAL. Fixed storage facilities such as cabinets, shelves, closets, and drawers required to be accessible by 4.1 shall comply with 4.25.

4.25.2 CLEAR FLOOR SPACE. A clear floor space at least 30 in by 48 in (760 mm by 1220 mm) complying with 4.2.4 that allows either a forward or parallel approach by a person using a wheelchair shall be provided at accessible storage facilities.

4.25.3 HEIGHT. Accessible storage spaces shall be within at least one of the reach ranges specified in 4.2.5 and 4.2.6. Clothes rods shall be a maximum of 54 in (1370 mm) from the floor (see **Fig. 38**).

4.25.4 HARDWARE. Hardware for accessible storage facilities shall comply with 4.27.4. Touch latches and U-shaped pulls are acceptable.

4.26 HANDRAILS, GRAB BARS, AND TUB AND SHOWER SEATS.

4.26.1* GENERAL. All handrails, grab bars, and tub and shower seats required to be accessible by 4.1, 4.8, or 4.9 shall comply with 4.26.

4.26.2* SIZE AND SPACING OF GRAB BARS AND HANDRAILS. The diameter or width of the gripping surfaces of a handrail or grab bar shall be 1-1/4 in to 1-1/2 in (32 mm to 38 mm), or the shape shall provide an equivalent gripping surface. If handrails or grab bars are mounted adjacent to a wall, the space between the wall and the grab bar shall be 1-1/2 in (38 mm) (see **Fig. 39(a)**, **(b)**, and **(c)**). Handrails may be located in a recess if the recess is a maximum of 3 in (75 mm) deep and extends at least 18 in (455 mm) above the top of the rail (see **Fig. 39(d)**).

4.26.3 STRUCTURAL STRENGTH. The structural strength of grab bars, tub and shower seats, fasteners, and mounting devices shall meet the following specification:

(1) Bending stress in a grab bar or seat induced by the maximum bending moment from the application of 250 lbf (1112N) shall be less than the allowable stress for the material of the grab bar or seat.

(2) Shear stress induced in a grab bar or seat by the application of 250 lbf (1112N) shall be less than the allowable shear stress for the material of the grab bar or seat. If the connection between the grab bar or seat and its mounting bracket or other support is considered to be fully restrained, then direct and torsional shear stresses shall be totaled for the combined shear stress, which shall not exceed the allowable shear stress.

(3) Shear force induced in a fastener or mounting device from the application of 250 lbf (1112N) shall be less than the allowable lateral load of either the fastener or mounting device or the supporting structure, whichever is the smaller allowable load.

(4) Tensile force induced in a fastener by a direct tension force of 250 lbf (1112N) plus the maximum moment from the application of 250 lbf (1112N) shall be less than the allowable withdrawal and the supporting structure.

(5) Grab bars shall not rotate within their fittings.

4.26.4 ELIMINATING HAZARDS. A handrail or grab bar and any wall or other surface adjacent to it shall be free of any sharp or abrasive elements. Edges shall have a minimum radius of 1/8 in (3.2 mm).

4.27 CONTROLS AND OPERATING MECHANISMS.

4.27.1 GENERAL. Controls and operating mechanisms required to be accessible by 4.1 shall comply with 4.27.

4.27.2 CLEAR FLOOR SPACE. Clear floor space complying with 4.2.4 that allows a forward or a parallel approach by a person using a wheelchair shall be provided at controls, dispensers, receptacles, and other operable equipment.

4.27.3* HEIGHT. The highest operable part of all controls, dispensers, receptacles, and other operable equipment shall be placed within at least one of the reach ranges specified in 4.2.5 and 4.2.6. Except where the use of special equipment dictates otherwise, electrical and communications system receptacles on walls shall be mounted no less than 15 in (380 mm) above the floor.

4.27.4 OPERATION. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).

4.28 ALARMS.

4.28.1 GENERAL. Alarm systems required to be accessible by 4.1 shall comply with 4.28.

4.28.2* AUDIBLE ALARMS. If provided, audible emergency alarms shall produce a sound that exceeds the prevailing equivalent sound level in the room or space by at least 15 decibels or exceeds any maximum sound level with a duration of 30 seconds by 5 decibels, whichever is louder. Sound levels for alarm signals shall not exceed 120 decibels.

4.28.3* VISUAL ALARMS. If provided, electrically powered internally illuminated emergency exit signs shall flash as a visual emergency alarm in conjunction with audible emergency alarms. The flashing frequency of visual alarm devices shall be less than 5 Hz. If such alarms use electricity from the building as a power source, then they shall be installed on the same system as the audible emergency alarms.

EXCEPTIONS:

(1) Visual alarm devices that are mounted adjacent to emergency exit signs may be used in lieu of flashing exit signs.

(2) Specialized systems utilizing advanced technology may be substituted for the visual systems specified above if equivalent protection is afforded handicapped users of the building or facility.

4.28.4* AUXILIARY ALARMS. Accessible sleeping accommodations shall have a visual alarm connected to the building emergency alarm system or shall have a standard 110-volt electrical receptacle into which such an alarm could be connected. Instructions for use of the auxiliary alarm or

connection shall be provided.

4.29 TACTILE WARNINGS.

4.29.1 GENERAL. Tactile warnings required to be accessible by 4.1 shall comply with 4.29.

4.29.2* TACTILE WARNINGS ON WALKING SURFACES. (Reserved).

4.29.3* TACTILE WARNINGS ON DOORS TO HAZARDOUS AREAS. Doors that lead to areas that might prove dangerous to a blind person (for example, doors to loading platforms, boiler rooms, stages, and the like) shall be made identifiable to the touch by a textured surface on the door handle, knob, pull or other operating hardware. This textured surface may be made by knurling or roughing or by a material applied to the contact surface. Such textured surfaces shall not be provided for emergency exit doors or any doors other than those to hazardous areas.

4.29.4 TACTILE WARNINGS AT STAIRS. (Reserved).

4.29.5* TACTILE WARNINGS AT HAZARDOUS VEHICULAR AREAS. (Reserved).

4.29.6* TACTILE WARNINGS AT REFLECTING POOLS. (Reserved).

4.29.7* STANDARDIZATION. Textured surfaces for tactile door warnings shall be standard within a building, facility, site, or complex of buildings.

4.30 SIGNAGE.

4.30.1* GENERAL. Signage required to be accessible by 4.1 shall comply with 4.30.

4.30.2* CHARACTER PROPORTION. Letters and numbers on signs shall have a width-to-height ratio between 3:5 and 1:1 and a stroke width-to-height ratio between 1:5 and 1:10.

4.30.3* COLOR CONTRAST. Characters and symbols shall contrast with their background - either light characters on a dark background or dark characters on a light background.

4.30.4* RAISED CHARACTERS OR SYMBOLS. Letters and numbers on signs shall be raised 1/32 in (0.8 mm) minimum and shall be sans serif characters. Raised characters or symbols shall be at least 5/8 in (16 mm) high, but no higher than 2 in (50 mm). Symbols or pictographs on signs shall be raised 1/32 in (0.8 mm) minimum.

4.30.5 SYMBOLS OF ACCESSIBILITY. Accessible facilities required to be identified by 4.1, shall use the international symbol of accessibility. The symbol shall be displayed as shown in Fig. 43.

4.30.6 MOUNTING LOCATION AND HEIGHT. Interior signage shall be located alongside the door on the latch side and shall be mounted at a height of between 54 in and 66 in (1370 mm and 1675 mm) above the finished floor.

4.31 TELEPHONES.

4.31.1 GENERAL. Public telephones required to be accessible by 4.1 shall comply with 4.31.

4.31.2 CLEAR FLOOR OR GROUND SPACE. A clear floor or ground space at least 30 in by 48 in (760 mm by 1220 mm) that allows either a forward or parallel approach by a person using a wheelchair shall be provided at telephones (see **Fig. 44**). The clear floor or ground space shall comply with 4.2.4. Bases, enclosures, and fixed seats shall not impede approaches to telephones by people

who use wheelchairs.

4.31.3* MOUNTING HEIGHT. The highest operable part of the telephone shall be within the reach ranges specified in 4.2.5 or 4.2.6.

4.31.4 PROTRUDING OBJECTS. Telephones shall comply with 4.4.

4.31.5* EQUIPMENT FOR HEARING IMPAIRED PEOPLE. Telephones shall be equipped with a receiver that generates a magnetic field in the area of the receiver cap. Volume controls shall be provided in accordance with 4.1.2.

4.31.6 CONTROLS. Telephones shall have pushbutton controls where service for such equipment is available.

4.31.7 TELEPHONE BOOKS. Telephone books, if provided, shall be located in a position that complies with the reach ranges specified in 4.2.5 and 4.2.6.

4.31.8 CORD LENGTH. The cord from the telephone to the handset shall be at least 29 in (735 mm) long.

4.32 SEATING, TABLES, AND WORK SURFACES.

4.32.1 MINIMUM NUMBER. Fixed or built-in seating, tables, or work surfaces required to be accessible by 4.1 shall comply with 4.32.

4.32.2 SEATING. If seating spaces for people in wheelchairs are provided at tables, counters, or work surfaces, clear floor space complying with 4.2.4 shall be provided. Such clear floor space shall not overlap knee space by more than 19 in (485 mm) (see **Fig. 45**).

4.32.3 KNEE CLEARANCES. If seating for people in wheelchairs is provided at tables, counters, and work surfaces, knee spaces at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep shall be provided (see **Fig. 45**).

4.32.4* HEIGHT OF WORK SURFACES. The tops of tables and work surfaces shall be from 28 in to 34 in (710 mm to 865 mm) from the floor or ground.

4.33 ASSEMBLY AREAS.

4.33.1 MINIMUM NUMBER. Assembly and associated areas required to be accessible by 4.1 shall comply with 4.33.

4.33.2* SIZE OF WHEELCHAIR LOCATIONS. Each wheelchair location shall provide minimum clear ground or floor spaces as shown in **Fig. 46**.

4.33.3* PLACEMENT OF WHEELCHAIR LOCATIONS. Wheelchair areas shall be an integral part of any fixed seating plan and shall be dispersed throughout the seating area. They shall adjoin an accessible route that also serves as a means of egress in case of emergency and shall be located to provide lines of sight comparable to those for all viewing areas.

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

4.33.4 SURFACES. The ground or floor at wheelchair locations shall be level and shall comply with

4.5.

4.33.5 ACCESS TO PERFORMING AREAS. An accessible route shall connect wheelchair seating locations with performing areas, including stages, arena floors, dressing rooms, locker rooms, and other spaces used by performers.

4.33.6* PLACEMENT OF LISTENING SYSTEMS. If the listening system provided serves individual fixed seats, then such seats shall be located within a 50 ft (15 m) viewing distance of the stage or playing area and shall have a complete view of the stage or playing area.

4.33.7* TYPES OF LISTENING SYSTEMS. Audio loops and radio frequency systems are two acceptable types of listening systems.

4.34 DWELLING UNITS.

4.34.1 GENERAL. The requirements of 4.34 apply to dwelling units required to be accessible by 4.1.

4.34.2* MINIMUM REQUIREMENTS. An accessible dwelling unit shall be on an accessible route. An accessible dwelling unit shall have the following accessible elements and spaces as a minimum:

(1) Common spaces and facilities serving individual accessible dwelling units (for example, entry walks, trash disposal facilities, and mail boxes) shall comply with 4.2 through 4.33.

(2) Accessible spaces shall have maneuvering space complying with 4.2.2 and 4.2.3 and surfaces complying with 4.5.

(3) At least one accessible route complying with 4.3 shall connect the accessible entrances with all accessible spaces and elements within the dwelling units.

(4) See 4.1.1(5)(d) — Parking.

(5) Removed and reserved.

(6) Doors to and in accessible spaces that are intended for passage shall comply with 4.13, except that the provisions of 4.13.9 apply only to the doors at accessible entrances to the unit itself.

(7) At least one accessible entrance to the dwelling unit shall comply with 4.14.

(8) Storage in accessible spaces in dwelling units, including cabinets, shelves, closets, and drawers, shall comply with 4.25.

(9) All controls in accessible spaces shall comply with 4.27. Those portions of heating, ventilating, and air conditioning equipment requiring regular, periodic maintenance and adjustment by the resident of a dwelling shall be accessible to people in wheelchairs. If air distribution registers must be placed in or close to ceilings for proper air circulation, this specification shall not apply to the registers.

(10) Emergency alarms as required by 4.1 and complying with 4.28.4 shall be provided in the dwelling unit.

(11) Removed and reserved.

(12) At least one full bathroom shall comply with 4.34.5. A full bathroom shall include a water closet, a lavatory, and a bathtub or a shower.

(13) The kitchen shall comply with 4.34.6.

(14) If laundry facilities are provided, they shall comply with 4.34.7.

(15) The following spaces shall be accessible and shall be on an accessible route:

(a) The living area.

(b) The dining area.

(c) The sleeping area, or the bedroom in one bedroom dwelling units, or at least two bedrooms or sleeping spaces in dwelling units with two or more bedrooms.

(d) Patios, terraces, balconies, carports, and garages, if provided with the dwelling unit.

4.34.3 ADAPTABILITY. The specifications for 4.34.5 and 4.34.6 include the concept of adaptability. Accessible dwelling units may be designed for either permanent accessibility or adaptability.

4.34.4 CONSUMER INFORMATION. To ensure that the existence of adaptable features will be known to the owner or occupant of a dwelling, the following consumer information shall be provided in each adaptable dwelling unit available for occupancy:

(1) Notification of the alternate heights available for the kitchen counter and sink, and the existence of removable cabinets and bases, if provided, under counters, sinks, and lavatories.

(2) Notification of the provisions for the installation of grab bars at toilets, bathtubs, and showers.

(3) Notification that the dwelling unit is equipped to have a visual emergency alarm installed.

(4) Identification of the location where information and instructions are available for changing the height of counters, removing cabinets and bases, installing a visual emergency alarm system, and installing grab bars.

(5) Notification that the dwelling unit has been designed in accordance with this Uniform Federal Accessibility Standards.

In addition, the parties who will be responsible for making adaptations shall be provided with the following information:

(1) Instructions for adjusting or replacing kitchen counter and sink heights and for removing cabinets.

(2) A scale drawing showing methods and locations for the installation of grab bars.

(3) A scale drawing showing the location of adjustable or replaceable counter areas and removable cabinets.

(4) Identification of the location of any equipment and parts required for adjusting or replacing counter tops, cabinets, and sinks.

(5) Instructions for installing a visual emergency alarm system, if the dwelling unit is equipped for such an installation.

4.34.5* BATHROOMS. Accessible or adaptable bathrooms shall be on an accessible route and shall

comply with the requirements of 4.34.5.

4.34.5.1 DOORS. Doors shall not swing into the clear floor space required for any fixture.

4.34.5.2 WATER CLOSETS.

(1) Clear floor space at the water closet shall be as shown in **Fig. 47(a)**. The water closet may be located with the clear area at either the right or left side of the toilet.

(2) The height of the water closet shall be at least 15 in (380 mm), and no more than 19 in (485 mm), measured to the top of the toilet seat.

(3) Structural reinforcement or other provisions that will allow installation of grab bars shall be provided in the locations shown in **Fig. 47(b)**. If provided, grab bars shall be installed as shown in **Fig. 29** and shall comply with 4.26.

(4) The toilet paper dispenser shall be installed within reach as shown in **Fig. 47(b)**.

4.34.5.3 LAVATORY, MIRRORS, AND MEDICINE CABINETS.

(1) The lavatory and mirrors shall comply with 4.22.6.

(2) If a cabinet is provided under the lavatory in adaptable bathrooms, then it shall be removable to provide the clearances specified in 4.22.6.

(3) If a medicine cabinet is provided above the lavatory, then the bottom of the medicine cabinet shall be located with a usable shelf no higher than 44 in (1120 mm) above the floor.

4.34.5.4 BATHTUBS. If a bathtub is provided, then it shall have the following features:

(1) Floor space. Clear floor space at bathtubs shall be as shown in **Fig. 33**.

(2) Seat. An in-tub seat or a seat at the head end of the tub shall be provided as shown in **Fig. 33** and **34**. The structural strength of seats and their attachments shall comply with 4.26.3. Seats shall be mounted securely and shall not slip during use.

(3) Grab bars. Structural reinforcement or other provisions that will allow installation of grab bars shall be provided in the locations shown in **Fig. 48**. If provided, grab bars shall be installed as shown in **Fig. 34** and shall comply with 4.26.

(4) Controls. Faucets and other controls shall be located as shown in **Fig. 34** and shall comply with 4.27.4.

(5) Shower unit. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used as a fixed shower head or as a hand-held shower shall be provided.

4.34.5.5 SHOWERS. If a shower is provided, it shall have the following features:

(1) Size and clearances. Shower stall size and clear floor space shall comply with either **Fig. 35(a)** or **(b)**. The shower stall in **Fig. 35(a)** shall be 36 in by 36 in (915 mm by 915 mm). The shower stall in **Fig. 35(b)** will fit into the same space as a standard 60 in (1525 mm) long bathtub.

(2) Seat. A seat shall be provided in the shower stall in **Fig. 35(a)** as shown in **Fig. 36**. The seat shall be 17 in to 19 in (430 mm to 485 mm) high measured from the bathroom floor and shall extend the

full depth of the stall. The seat shall be on the wall opposite the controls. The structural strength of seats and their attachments shall comply with 4.26.3. Seats shall be mounted securely and shall not slip during use.

(3) Grab bars. Structural reinforcement or other provisions that will allow installation of grab bars shall be provided in the locations shown in **Fig. 49**. If provided, grab bars shall be installed as shown in **Fig. 37** and shall comply with 4.26.

(4) Controls. Faucets and other controls shall be located as shown in **Fig. 37** and shall comply with 4.27.4. In the shower stall in **Fig. 35(a)**, all controls, faucets, and the shower unit shall be mounted on the side wall opposite the seat.

(5) Shower unit. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used as a fixed shower head at various heights or as a hand-held shower shall be provided.

4.34.5.6 BATHTUB AND SHOWER ENCLOSURES. Enclosures for bathtubs or shower stalls shall not obstruct controls or transfer from wheelchairs onto shower or bathtub seats. Enclosures on bathtubs shall not have tracks mounted on their rims.

4.34.5.7 CLEAR FLOOR SPACE. Clear floor space at fixtures may overlap.

4.34.6 KITCHENS. Accessible or adaptable kitchens and their components shall be on an accessible route and shall comply with the requirements of 4.34.6.

4.34.6.1* CLEARANCE. Clearances between all opposing base cabinets, counter tops, appliances, or walls shall be 40 in (1015 mm) minimum, except in U-shaped kitchens, where such clearance shall be 60 in (1525 mm) minimum.

4.34.6.2 CLEAR FLOOR SPACE. A clear floor space at least 30 in by 48 in (760 mm by 1220 mm) complying with 4.2.4 that allows either a forward or a parallel approach by a person in a wheelchair shall be provided at all appliances in the kitchen, including the range or cooktop, oven, refrigerator/freezer, dishwasher, and trash compactor. Laundry equipment located in the kitchen shall comply with 4.34.7.

4.34.6.3 CONTROLS. All controls in kitchens shall comply with 4.27.

4.34.6.4 WORK SURFACES. At least one 30 in (760 mm) section of counter shall provide a work surface that complies with the following requirements (see **Fig. 50**):

(1) The counter shall be mounted at a maximum height of 34 in (865 mm) above the floor, measured from the floor to the top of the counter surface, or shall be adjustable or replaceable as a unit to provide alternative heights of 28 in, 32 in, and 36 in (710 mm, 815 mm, and 915 mm), measured from the top of the counter surface.

(2) Base cabinets, if provided, shall be removable under the full 30 in (760 mm) minimum frontage of the counter. The finished floor shall extend under the counter to the wall.

(3) Counter thickness and supporting structure shall be 2 in (50 mm) maximum over the required clear area.

(4) A clear floor space 30 in by 48 in (760 mm by 1220 mm) shall allow a forward approach to the counter. Nineteen inches (485 mm) maximum of the clear floor space may extend underneath the counter. The knee space shall have a minimum clear width of 30 in (760 mm) and a minimum clear depth of 19 in (485 mm).

(5) There shall be no sharp or abrasive surfaces under such counters.

4.34.6.5* SINK. The sink and surrounding counter shall comply with the following requirements (see **Fig. 51**):

(1) The sink and surrounding counter shall be mounted at a maximum height of 34 in (865 mm) above the floor, measured from the floor to the top of the counter surface, or shall be adjustable or replaceable as a unit to provide alternative heights of 28 in, 32 in, and 36 in (710 mm, 815 mm, and 915 mm), measured from the floor to the top of the counter surface or sink rim. The total width of sink and counter area shall be 30 in (760 mm).

(2) Rough-in plumbing shall be located to accept connections of supply and drain pipes for sinks mounted at the height of 28 in (710 mm).

(3) The depth of a sink bowl shall be no greater than 6-1/2 in (165 mm). Only one bowl of double- or triple-bowl sinks needs to meet this requirement.

(4) Faucets shall comply with 4.27.4. Lever-operated or push-type mechanisms are two acceptable designs.

(5) Base cabinets, if provided, shall be removable under the full 30 in (760 mm) minimum frontage of the sink and surrounding counter. The finished flooring shall extend under the counter to the wall.

(6) Counter thickness and supporting structure shall be 2 in (50 mm) maximum over the required clear space.

(7) A clear floor space 30 in by 48 in (760 mm by 1220 mm) shall allow forward approach to the sink. Nineteen inches (485 mm) maximum of the clear floor space may extend underneath the sink. The knee space shall have a clear width of 30 in (760 mm) and a clear depth of 19 in (485 mm).

(8) There shall be no sharp or abrasive surfaces under sinks. Hot water and drain pipes under sinks shall be insulated or otherwise covered.

4.34.6.6* RANGES AND COOKTOPS. Ranges and cooktops shall comply with 4.34.6.2 and 4.34.6.3. If ovens or cooktops have knee spaces underneath, then they shall be insulated or otherwise protected on the exposed contact surfaces to prevent burns, abrasions, or electrical shock. The clear floor space may overlap the knee space, if provided, by 19 in (485 mm) maximum. The location of controls for ranges and cook-tops shall not require reaching across burners.

4.34.6.7* OVENS. Ovens shall comply with 4.34.6.2 and 4.34.6.3. Ovens shall be of the self-cleaning type or be located adjacent to an adjustable height counter with knee space below (see **Fig. 52**). For side-opening ovens, the door latch side shall be next to the open counter space, and there shall be a pull-out shelf under the oven extending the full width of the oven and pulling out not less than 10 in (255 mm) when fully extended. Ovens shall have controls on front panels; they may be located on either side of the door.

4.34.6.8* REFRIGERATOR/FREEZER. Refrigerator/freezers shall comply with 4.34.6.3. Provision shall be made for refrigerators which are:

(1) Of the vertical side-by-side refrigerator/freezer type; or

(2) Of the over-and-under type and meet the following requirements:

(a) Have at least 50 percent of the freezer space below 54 in (1370 mm) above the floor.

(b) Have 100 percent of the refrigerator space and controls below 54 in (1370 mm).

Freezers with less than 100 percent of the storage volume within the limits specified in 4.2.5 or 4.2.6 shall be the self-defrosting type.

4.34.6.9 DISHWASHERS. Dishwashers shall comply with 4.34.6.2 and 4.34.6.3. Dishwashers shall have all rack space accessible from the front of the machine for loading and unloading dishes.

4.34.6.10* KITCHEN STORAGE. Cabinets, drawers, and shelf areas shall comply with 4.25 and shall have the following features:

(1) Maximum height shall be 48 in (1220 mm) for at least one shelf of all cabinets and storage shelves mounted above work counters (see **Fig. 50**).

(2) Door pulls or handles for wall cabinets shall be mounted as close to the bottom of cabinet doors as possible. Door pulls or handles for base cabinets shall be mounted as close to the top of cabinet doors as possible.

4.34.7 LAUNDRY FACILITIES. If laundry equipment is provided within individual accessible dwelling units, or if separate laundry facilities serve one or more accessible dwelling units, then they shall meet the requirements of 4.34.7.1 through 4.34.7.3.

4.34.7.1 LOCATION. Laundry facilities and laundry equipment shall be on an accessible route.

4.34.7.2 WASHING MACHINES AND CLOTHES DRYERS. Washing machines and clothes dryers in common use laundry rooms shall be front loading.

4.34.7.3 CONTROLS. Laundry equipment shall comply with 4.27.

5. RESTAURANTS AND CAFETERIAS.

5.1 GENERAL. In addition to the requirements of 4.1 to 4.33, the design of at least 5 percent of all fixed seating or tables in a restaurant or cafeteria shall comply with 4.32. Access aisles between tables shall comply with 4.3. Where practical, accessible tables should be distributed throughout the space or facility. In restaurants or cafeterias where there are mezzanine levels, loggias, or raised platforms, accessibility to all such spaces is not required providing that the same services and decorative character are provided in spaces located on accessible routes.

5.2 FOOD SERVICE LINES. Food service lines shall have a minimum clear width of 36 in (915 mm), with a preferred clear width of 42 in (1065 mm) where passage of stopped wheelchairs by pedestrians is desired. Tray slides shall be mounted no higher than 34 in (865 mm) above the floor. If self-service shelves are provided, a reasonable portion must be within the ranges shown in **Fig. 53**.

5.3 TABLEWARE AREAS. Install tableware, dishware, condiment, food and beverage display shelves, and dispensing devices in compliance with 4.2 (see **Fig. 54**).

5.4 VENDING MACHINES. Install vending machines in compliance with 4.27.

6. HEALTH CARE.

6.1 GENERAL. In addition to the requirements of 4.1 to 4.33, Health Care buildings and facilities shall comply with 6.

6.2 ENTRANCES. At least one accessible entrance that complies with 4.14 shall be protected from

the weather by canopy or roof overhang. Such entrances shall incorporate a passenger loading zone that complies with 4.6.5 (see 4.13.6).

6.3 PATIENT BEDROOMS. Provide accessible patient bedrooms in compliance with 4. Accessible patient bedrooms shall comply with the following:

(1) Each bedroom shall have a turning space that complies with 4.2.3, and preferably that is located near the entrance.

(2) Each one-bed room shall have a minimum clear floor space of 36 in (915 mm) along each side of the bed, and 42 in (1065 mm) between the foot of the bed and the wall.

(3) Each two-bed room shall have a minimum clear floor space of 42 in (1065 mm), preferably 48 in (1220 mm), between the foot of the bed and the wall; 36 in (915 mm) between the side of the bed and the wall; and 48 in (1220 mm) between beds.

(4) Each four-bed room shall have a minimum clear floor space of 48 in (1220 mm) from the foot of the bed to the foot of the opposing bed; 36 in (915 mm) between the side of the bed and the wall; and 48 in (1220 mm) between beds.

(5) Each bedroom shall have a door that complies with 4.13.

6.4 PATIENT TOILET ROOMS. Provide each patient bedroom that is required to be accessible with an accessible toilet room that complies with 4.22 or 4.23.

7. MERCANTILE.

7.1 GENERAL. In addition to the requirements of 4.1 to 4.33, the design of all areas used for business transactions with the public shall comply with 7.

7.2 SERVICE COUNTERS. Where service counters exceeding 36 in (915 mm) in height are provided for standing sales or distribution of goods to the public, an auxiliary counter or a portion of the main counter shall be provided with a maximum height of between 28 in to 34 in (710 mm to 865 mm) above the floor in compliance with 4.32.4.

7.3 CHECK-OUT AISLES. At least one accessible check-out aisle shall be provided in buildings or facilities with check-out aisles. Clear aisle width shall comply with 4.2.1 and maximum adjoining counter height shall not exceed 36 in (915 mm) above the floor.

7.4 SECURITY BOLLARDS. Any device used to prevent the removal of shopping carts from store premises shall not prevent access or egress to those in wheelchairs. An alternate entry that is equally convenient to that provided for the ambulatory population is acceptable.

8. LIBRARIES.

8.1 GENERAL. In addition to the requirements of 4.1 to 4.33, the design of all public areas of a library shall comply with 8, including reading and study areas, stacks, reference rooms, reserve areas, and special facilities or collections. As provided, elements such as public toilet rooms, telephones, and parking shall be accessible.

8.2 READING AND STUDY AREAS. At least 5 percent or a minimum of one of each element of fixed seating, tables, or study carrels shall comply with 4.2 and 4.32. Clearances between fixed accessible tables and study carrels shall comply with 4.3.

8.3 CHECK-OUT AREAS. At least one lane at each check-out area shall comply with 4.32. Any traffic control or book security gates or turnstiles shall comply with 4.13.

8.4 CARD CATALOGS. Minimum clear aisle space at card catalogs, magazine displays, or reference stacks shall comply with **Fig. 55**. Maximum reach height shall comply with 4.2, with a height of 48 in (1370 mm) preferred, irrespective of reach allowed.

8.5 STACKS. Minimum clear aisle width between stacks shall comply with 4.3, with a minimum clear aisle width of 42 in (1065 mm) preferred where possible. Shelf height in stack areas is unrestricted (see **Fig. 56**).

9. POSTAL FACILITIES.

9.1 GENERAL. In addition to the requirements of 4.1 to 4.33, the design of U.S. postal facilities shall comply with the requirements of 9. In addition, employee toilet rooms, water fountains, lunchrooms, lounges, attendance-recording equipment, medical treatment rooms, emergency signals, and switches and controls shall be made accessible or adaptable in accordance with the requirements of these standards.

9.2* POST OFFICE LOBBIES. Where writing desks or tables are provided, a minimum of at least one writing desk or table that complies with 4.32 must be provided. Clear passageways in front of customer service counters shall be not less than 48 in (1220 mm) clear width to permit maneuvering of a wheelchair. Letter drops shall be mounted at heights that comply with 4.2.

(1) All fixed partitions must be installed to withstand a 250-pound force applied at any point and from any direction. Avoid designs that call for, or may necessitate, non-fixed partitions in circulation routes of handicapped people.

(2) Walls where handrails are provided for handicapped people must be capable of supporting handrails designed to support a 250-pound pull force in any direction.

9.3 SELF-SERVICE POSTAL CENTER. Parcel post depositories, stamp vending machines, multi-commodity vending machines, and currency-coin changing machines shall be installed so that the operating mechanisms of all machines comply with 4.2 and 4.27. All mechanisms must be installed to permit close parallel approach by a wheelchair user.

9.4 POST OFFICE BOXES. At least 5 percent of the post office boxes in a facility shall be accessible to wheelchair users. The total number of accessible post office boxes provided shall include a representative number of each of the standard USPS boxes currently being installed. Accessible post office boxes shall be located in the second or third set of modules from the floor, approximately 12 in to 36 in (305 mm to 915 mm) above the finished floor. Aisles between post office boxes shall be a minimum of 66 in (1675 mm) clear width.

9.5 LOCKER ROOMS. Lockers in easily accessible areas must be provided for use by handicapped people. When double-tier lockers are used, only the bottom row of lockers may be assigned for use by wheelchair users. When full length lockers are used all hooks, shelves, etc., intended for use by people in wheelchairs shall be located no higher than 48 in (1220 mm) above the finished floor. Lockers intended for use by handicapped people shall be equipped with latches and latch handles that comply with 4.27. Unobstructed aisle space in front of lockers used by handicapped people shall be a minimum of 42 in (1065 mm) clear width.

9.6 ATTENDANCE-RECORDING EQUIPMENT. Time clocks, card racks, log books, and other work assignment or attendance-recording equipment used by people in wheelchairs must be installed at a height no more than 48 in (1220 mm) above the finished floor. Counter space at check-in areas must be no more than 36 in (915 mm) above the finished floor.

APPENDIX

This appendix contains additional information that should help the designer to understand the minimum requirements of the standard or to design buildings or facilities for greater accessibility. The paragraph numbers correspond to the sections or paragraphs of the standard to which the material relates and are therefore not consecutive (for example, A4.2.1 contains additional information relevant to 4.2.1). Sections for which additional material appears in this appendix have been indicated by an asterisk.

A4.2 SPACE ALLOWANCES AND REACH RANGES.

A4.2.1 WHEELCHAIR PASSAGE WIDTH.

(1) Space Requirements for Wheelchairs. Most wheelchair users need a 30 in (760 mm) clear opening width for doorways, gates, and the like, when the latter are entered head-on. If the wheelchair user is unfamiliar with a building, if competing traffic is heavy, if sudden or frequent movements are needed, or if the wheelchair must be turned at an opening, then greater clear widths are needed. For most situations, the addition of an inch of leeway on either side is sufficient. Thus, a minimum clear width of 32 in (815 mm) will provide adequate clearance. However, when an opening or a restriction in a passageway is more than 24 in (610 mm) long, it is essentially a passageway and must be at least 36 in (915 mm) wide.

(2) Space Requirements for Use of Walking Aids. Although people who use walking aids can maneuver through clear width openings of 32 in (815 mm), they need 36 in (915 mm) wide passageways and walks for comfortable gaits. Crutch tips, often extending down at a wide angle, are a hazard in narrow passageways where they might not be seen by other pedestrians. Thus, the 36 in (915 mm) width provides a safety allowance both for the disabled person and for others.

(3) Space Requirements for Passing. Able-bodied people in winter clothing, walking straight ahead with arms swinging, need 32 in (815 mm) of width, which includes 2 in (50 mm) on either side for sway, and another 1 in (25 mm) tolerance on either side for clearing nearby objects or other pedestrians. Almost all wheelchair users and those who use walking aids can also manage within this 32 in (815 mm) width for short distances. Thus, two streams of traffic can pass in 64 in (1625 mm) in a comfortable flow. Sixty inches (1525 mm) provide a minimum width for a somewhat more restricted flow. If the clear width is less than 60 in (1525 mm), two wheelchair users will not be able to pass but will have to seek a wider place for passing. Forty-eight inches (1220 mm) is the minimum width needed for an ambulatory person to pass a nonambulatory or semiambulatory person. Within this 48 in (1220 mm) width, the ambulatory person will have to twist to pass a wheelchair user, a person with a seeing eye dog, or a semiambulatory person. There will be little leeway for swaying or missteps (see **Fig. A1**).

A4.2.3 WHEELCHAIR TURNING SPACE. This standard specifies a minimum space of 60 in (1525 mm) diameter for a pivoting 180-degree turn of a wheelchair. This space is usually satisfactory for turning around, but many people will not be able to turn without repeated tries and bumping into surrounding objects. The space shown in **Fig. A2** will allow most wheelchair users to complete U-turns without difficulty.

A4.2.4 CLEAR FLOOR OR GROUND SPACE FOR WHEELCHAIRS. The wheelchair and user shown in **Fig. A3**represent typical dimensions for a large adult male. The space requirements in this standard are based upon maneuvering clearances that will accommodate most larger wheelchairs. **Fig. A3**provides a uniform reference for design not covered by this standard.

A4.2.5 & A4.2.6 REACH. Reach ranges for persons seated in wheelchairs may be further clarified by

Fig. A3(a). These drawings approximate in the plan view information shown in **Fig. 4**, **5**, and **6**in other views.

A.4.3 ACCESSIBLE ROUTE.

A4.3.1 GENERAL.

(1) Travel Distances. Many disabled person can move at only very slow speeds; for many, traveling 200 ft (61 m) could take about 2 minutes. This assumes a rate of about 1.5 ft/s (455 mm/s) on level ground. It also assumes that the traveler would move continuously. However, on trips over 100 ft (30 m), disabled people are apt to rest frequently, which substantially increases their trip times. Resting periods of 2 minutes for every 100 ft (30 m) can be used to estimate travel times for people with severely limited stamina. In inclement weather, slow progress and resting can greatly increase a disabled person's exposure to the elements.

(2) Sites. Level, indirect routes or those with running slopes lower than 1:20 can sometimes provide more convenience than direct routes with maximum allowable slopes or with ramps.

A4.3.10 EGRESS. In buildings where physically handicapped people are regularly employed or are residents, an emergency management plan for their evacuation also plays an essential role in fire safety.

A4.4 PROTRUDING OBJECTS.

A4.4.1 GENERAL. Guide dogs are trained to recognize and avoid hazards. However, most people with severe impairments of vision use the long cane as an aid to mobility. The two principal cane techniques are the touch technique, where the cane arcs from side to side and touches points outside both shoulders; and the diagonal technique, where the cane is held in a stationary position diagonally across the body with the cane tip touching or just above the ground at a point outside one shoulder and the handle or grip extending to a point outside the other shoulder. The touch technique is used primarily in uncontrolled areas, while the diagonal technique is used primarily in certain limited, controlled, and familiar environments. Cane users are often trained to use both techniques.

Potential hazardous objects are noticed only if they fall within the detection range of canes (see **Fig. A4**). Visually impaired people walking toward an object can detect an overhang if its lowest surface is not higher than 27 in (685 mm). When walking alongside projecting objects, they cannot detect overhangs. Since proper cane and guide dog techniques keep people away from the edge of a path or from walks, a slight overhang of no more than 4 in (100 mm) is not hazardous.

A4.5 GROUND AND FLOOR SURFACES.

A4.5.1 GENERAL. Ambulant and semiambulant people who have difficulty maintaining balance and those with restricted gaits are particularly sensitive to slipping and tripping hazards. For such people, a stable and regular surface is necessary for safe walking, particularly on stairs. Wheelchairs can be propelled most easily on surfaces that are hard, stable, and regular. Soft, loose surfaces such as shag carpet, loose sand, and wet clay, and irregular surfaces, such as cobblestones, can significantly impede wheelchair movement.

Slip resistance is based on the frictional force necessary to keep a shoe heel or crutch tip from slipping on a walking surface under the conditions of use likely to be found on the surface. Although it is known that the static coefficient of friction is the basis of slip resistance, there is not as yet a generally accepted method to evaluate the slip resistance of walking surfaces.

Cross slopes on walks and ground or floor surfaces can cause considerable difficulty in propelling a wheelchair in a straight line.

A4.5.3 CARPET. Much more needs to be done in developing both quantitative and qualitative criteria for carpeting. However, certain functional characteristics are well established. When both carpet and padding are used, it is desirable to have minimum movement (preferably none) between the floor and the pad and the pad and the carpet, which would allow the carpet to hump or warp. In heavily trafficked areas, a thick soft (plush) pad or cushion, particularly in combination with long carpet pile, makes it difficult for individuals in wheelchairs and those with other ambulatory disabilities to get about. This should not preclude their use in specific areas where traffic is light. Firm carpeting can be achieved through proper selection and combination of pad and carpet, sometimes with the elimination of the pad or cushion, and with proper installation.

A4.6 PARKING AND PASSENGER LOADING ZONES.

A4.6.3 PARKING SPACES. High-top vans, which disabled people or transportation services often use, require higher clearances in parking garages than automobiles. When optional van spaces are provided within a garage, only the spaces themselves and a vehicle route to them require the specified clearances.

A4.6.4 SIGNAGE. Signs designating parking places for disabled people can be seen from a driver's seat if the signs are mounted high enough above the ground and located at the front of a parking space.

A4.8 RAMPS.

A4.8.1 GENERAL. Ramps are essential for wheelchair users if elevators or lifts are not available to connect different levels. However, some people who use walking aids have difficulty with ramps and prefer stairs.

A4.8.2 SLOPE AND RISE. The ability to manage an incline is related to both its slope and its length. Wheelchair users with disabilities affecting arms or with low stamina have serious difficulty using inclines. Most ambulatory people and most people who use wheelchairs can manage a slope of 1:16. Many people cannot manage a slope of 1:12 for 30 ft (9 m). Many people who have difficulty negotiating very long ramps at relatively shallow slopes can manage very short ramps at steeper slopes.

A4.8.5 HANDRAILS. The requirements for stair and ramp handrails in this standard are for adults. When children are principal users in a building or facility, a second set of handrails at an appropriate height can assist them and aid in preventing accidents.

A4.10 ELEVATORS.

A4.10.6 DOOR PROTECTIVE AND REOPENING DEVICE. The required door reopening device would hold the door open for 20 seconds if the doorway remains unobstructed. After 20 seconds, the door may begin to close. However, if designed in accordance with ANSI A17.1-1978, the door closing movement could still be stopped if a person or object exerts sufficient force at any point on the door edge.

A4.10.7 DOOR AND SIGNAL TIMING FOR HALL CALLS. This paragraph allows variation in the location of call buttons, advance time for warning signals, and the door-holding period used to meet the time requirement.

A4.10.12 CAR CONTROLS. Industry-wide standardization of elevator control panel design would make all elevators significantly more convenient for use by people with severe visual impairments.

In many cases, it will be possible to locate the highest control on elevator panels with 48 in (1220 mm) from the floor.

A4.10.13 CAR POSITION INDICATORS. A special button may be provided that would activate the audible signal within the given elevator only for the desired trip, rather than maintaining the audible signal in constant operation.

A4.10.14 EMERGENCY COMMUNICATIONS. A device that required no handset is easier to use by people who have difficulty reaching.

A4.11 PLATFORM LIFTS. Platform lifts include porch lifts and other devices used for short-distance, vertical transportation of people in wheelchairs. At the present time, generally recognized safety standards for such lifts have not been developed. Care should be taken in selecting and installing lifts to ensure that they are free from hazards to users or to other individuals who may be in the vicinity where they are being operated.

A4.13 DOORS.

A4.13.8 THRESHOLDS AT DOORWAYS. Thresholds and surface height changes in doorways are particularly inconvenient for wheelchair users who also have low stamina or restrictions in arm movement, because complex maneuvering is required to get over the level change while operating the door.

A4.13.9 DOOR HARDWARE. Some disabled persons must push against a door with their chair or walker to open it. Applied kickplates on doors with closers can reduce required maintenance by withstanding abuse from wheelchairs and canes. To be effective, they should cover the door width, less approximately 2 in (51 mm), up to a height of 16 in (405 mm) form its bottom edge and be centered across the top.

A4.13.10 DOOR CLOSERS. Closers with delayed action features give a person more time to maneuver through doorways. They are particularly useful on frequently used interior doors such as entrances to toilet rooms.

A4.13.11 DOOR OPENING FORCE. Although most people with disabilities can exert at least 5 lbf (22.2N), both pushing and pulling from a stationary position, a few people with severe disabilities cannot exert even 3 lbf (13.3N). Although some people cannot manage the allowable force in this standard and many others have difficulty, door closers must have certain minimum closing forces to close doors satisfactorily. Forces for pushing or pulling doors open are measured with a push-pull scale under the following conditions:

(1) Hinged doors: Forced applied perpendicular to the door at the door opener or 30 in (760 mm) from the hinged side, whichever is farther from the hinge.

(2) Sliding or folding doors: Force applied parallel to the door at the door pull or latch.

(3) Application of force: Apply force gradually so that the applied force does not exceed the resistance of the door.

In high-rise buildings, air-pressure differentials may require a modification of this specification in order to meet the functional intent.

A4.13.12 AUTOMATIC DOORS AND POWER-ASSISTED DOORS. Sliding automatic doors do not need guard rails and are more convenient for wheelchair users and visually impaired people to use. If slowly opening automatic doors can be reactuated before their closing cycle is completed, they will be more convenient in busy doorways.

A4.15 DRINKING FOUNTAINS AND WATER COOLERS.

A4.15.2 Drinking fountains with two spouts can assist both handicapped people and those people who find it difficult to bend over.

A4.16 WATER CLOSETS.

A4.16.3 HEIGHT. Preferences for toilet seat heights vary considerably among disabled people. Higher seat heights may be an advantage to some ambulatory disabled people but a disadvantage for wheelchair users and others. Toilet seats 18 in (455 mm) high seem to be a reasonable compromise. Thick seats and filler rings are available to adapt standard fixtures to these requirements.

A4.16.4 GRAB BARS. Fig. A5(a) and (b)show the diagonal and side approaches most commonly used to transfer from a wheelchair to a water closet. Some wheelchair users can transfer from the front of the toilet, while others use a 90-degree approach. Most people who use the two additional approaches can also use either the diagonal approach or the side approach.

A4.16.5 FLUSH CONTROLS. Flush valves and related plumbing can be located behind walls or to the side of the toilet, or a toilet seat lid can be provided if plumbing fittings are directly behind the toilet seat. Such designs reduce the chance of injury and imbalance caused by leaning back against the fittings. Flush controls for tank-type toilets have a standardized mounting location on the left side of the tank (facing the tank). Tanks can be obtained by special order with controls mounted on the right side. If administrative authorities require flush controls for flush valves to be located in a position that conflicts with the location of the rear grab bar, then that bar may be split or shifted toward the wide side of the toilet area.

A4.17 TOILET STALLS.

A4.17.5 DOORS. To make it easier for wheelchair users to close toilet stall doors, doors can be provided with closers, spring hinges, or a pull bar mounted on the inside surface of the door near the hinge side.

A4.19 LAVATORIES AND MIRRORS.

A4.19.6 MIRRORS. If mirrors are to be used by both ambulatory people and wheelchair users, then they must be at least 74 in (1880 mm) high at their topmost edge. A single full length mirror can accommodate all people, including children.

A4.21 SHOWER STALLS.

A4.21.1 GENERAL. Shower stalls that are 36 in by 36 in (915 mm by 915 mm) wide provide additional safety to people who have difficulty maintaining balance because all grab bars and walls are within easy reach. Seated people use the walls of 36 in by 36 in (915 mm by 915 mm) showers for back support. Shower stalls that are 60 in (1525 mm) wide and have no curb may increase usability of a bathroom by wheelchair users because the shower area provides additional maneuvering space.

A4.23 BATHROOMS, BATHING FACILITIES, AND SHOWER ROOMS.

A4.23.9 MEDICINE CABINETS. Other alternatives for storing medical and personal care items are very useful to disabled people. Shelves, drawers, and floor-mounted cabinets can be provided within the reach ranges of disabled people.

A4.26 HANDRAILS, GRAB BARS, AND TUB AND SHOWER SEATS.

A4.26.1 GENERAL. Many disabled people rely heavily upon grab bars and handrails to maintain balance and prevent serious falls. Many people brace their forearms between supports and walls to give them more leverage and stability in maintaining balance or for lifting. The maximum grab bar

clearance of 1-1/2 in (38 mm) required in this standard is a safety clearance to prevent injuries from arms slipping through the opening. It also provides adequate gripping room.

A4.26.2 SIZE AND SPACING OF GRAB BARS AND HANDRAILS. This specification allows for alternate shapes of handrails as long as they allow an opposing grips similar to that provided by a circular section of 1-1/4 in to 1-1/2 in (32 mm to 38 mm).

A4.27 CONTROLS AND OPERATING MECHANISMS.

A4.27.3 HEIGHT. Fig. A6 further illustrates mandatory and advisory control mounting height provision for typical equipment. Note distinction between built-in equipment (considered real property) and movable equipment (considered chattel, and not covered by the Architectural Barriers Act of 1968).

A4.28 ALARMS.

A4.28.2 AUDIBLE ALARMS. Audible emergency signals must have an intensity and frequency that can attract the attention of individuals who have partial hearing loss. People over 60 years of age generally have difficulty perceiving frequencies higher than 10,000 Hz.

A4.28.3 VISUAL ALARMS. The specifications in this section do not preclude the use of zoned or coded alarm systems. In zoned systems, the emergency exit lights in an area will flash whenever an audible signal rings in the area.

A4.28.4 AUXILIARY ALARMS. Locating visual emergency alarms in rooms where deaf individuals may work or reside alone can ensure that they will always be warned when an emergency alarm is activated. To be effective, such devices must be located and oriented so that they will spread signals and reflections throughout a space or raise the overall light level sharply. The amount and type of light necessary to wake a deaf person from a sound sleep in a dark room will vary depending on a number of factors, including the size and configuration of the room, the distance between the source and the person, whether or not the light flashes, and the cycle of flashing. A 150-watt flashing bulb can be effective under some conditions. Certain devices currently available are designed specifically as visual alarms for deaf people. Deaf people may not need accessibility features other than the emergency alarm connections and communications devices. Thus, rooms in addition to those accessible from wheelchair users also should be equipped with emergency visual alarms or connections.

A4.29 TACTILE WARNINGS.

A4.29.2 TACTILE WARNINGS ON WALKING SURFACES. (Reserved).

A4.29.3 TACTILE WARNINGS ON DOORS TO HAZARDOUS AREAS. Tactile signals for hand reception are useful if it is certain that the signals will be touched.

A4.29.5 TACTILE WARNINGS AT HAZARDOUS VEHICULAR AREAS. (Reserved).

A4.29.6 TACTILE WARNINGS AT REFLECTING POOLS. (Reserved)

A4.29.7 STANDARDIZATION. Too many tactile warnings or lack of standardization weakens their usefulness. Tactile signals can also be visual signals to guide dogs, since dogs can be trained to respond to a large variety of visual cues.

A.4.30 SIGNAGE.

A4.30.1 GENERAL. In building complexes where finding locations independently on a routine basis may be a necessity (for example, college campuses), tactile maps or prerecorded instructions can be very helpful to visually impaired people. Several maps and auditory instructions have been developed and tested for specific applications. The type of map or instructions used must be based on the information to be communicated, which depends highly on the type of buildings or users.

Landmarks that can easily be distinguished by visually impaired individuals are useful as orientation cues. Such cues include changes in illumination level, bright colors, unique patterns, wall murals, location of special equipment, or other architectural features (for example, an exterior view).

Many people with disabilities have limitations in movement of their head and reduced peripheral vision. Thus, signage positioned perpendicular to the path of travel is easiest for them to notice. People can generally distinguish signage within an angle of 30 degrees of either side of the centerline of their face without moving their head.

A4.30.2 CHARACTER PROPORTION. The legibility of printed characters is a function of the viewing distance, character height, the ratio of the stroke width to the height of the character, the contrast of color between character and background, and print font. The size of characters must be based upon the intended viewing distance. A severely nearsighted person may have to be much closer to see a character of a given size accurately than a person with normal visual acuity.

A4.30.3 COLOR CONTRAST. The greatest readability is usually achieved through the use of light-colored characters or symbols on a dark background.

A4.30.4 RAISED OR INDENTED CHARACTERS OR SYMBOLS. Signs with descriptive materials about public buildings, monuments, and objects of cultural interest can be raised or incised letters. However, a sighted guide or audio-tape device is often a more effective way to present such information. Raised characters are easier to feel at small sizes and are not susceptible to maintenance problems as are indented characters, which can fill with dirt, cleaning compounds, and the like.

Braille characters can be used in addition to standard alphabet characters and numbers. Placing braille characters to the left of standard characters makes them more convenient to read. Standard dot sizing and spacing as used in braille publications are acceptable. Raised borders around raised characters can make them confusing to read unless the border is set far away from the characters.

A4.31 TELEPHONES.

A4.31.3 MOUNTING HEIGHT. In localities where the dial-tone first system is in operation, calls can be placed at a coin telephone through the operator without inserting coins. The operator button is located at a height of 46 in (1170 mm) if the coin slot of the telephone is at 54 in (1370 mm).

A generally available public telephone with a coin slot mounted lower on the equipment would allow universal installation of telephones at a height of 48 in (1220 mm) or less to all operable parts

A4.31.5 EQUIPMENT FOR HEARING IMPAIRED PEOPLE. Other aids for people with hearing impairments are telephones, teleprinter, and other telephonic devices that can be used to transmit printed messages through telephone lines to a teletype printer or television monitor.

A4.32 SEATING, TABLES, AND WORK SURFACES.

A4.32.4 HEIGHT OF WORK SURFACES. Different types of work require different work surface heights for comfort and optimal performance. Light detailed work such as writing requires a work surface close to elbow height for a standing person. Heavy manual work such as rolling dough requires a work surface height about 10 in (255 mm) below elbow height for a standing person. The principle of a high work surface height for light detailed work and a low work surface for heavy manual

work also applies for seated persons; however, the limiting condition for seated manual work is clearance under the work surface.

Table A1 shows convenient work surface heights for seated persons. The great variety of heights for comfort and optimal performance indicates a need for alternatives or a compromise in height if people who stand and people who sit will be using the same counter area.

A4.33 ASSEMBLY AREAS.

A4.33.2 SIZE OF WHEELCHAIR LOCATIONS. Spaces large enough for two wheelchairs allow people who are coming to a performance together to sit together.

A4.33.3 PLACEMENT OF WHEELCHAIR LOCATIONS. The location of wheelchair areas can be planned so that a variety of positions within the seating area are provided. This will allow choice in viewing and price categories.

A4.33.6 PLACEMENT OF LISTENING SYSTEMS. A distance of 50 ft (15 m) allows a person to distinguish performers' facial expressions.

Table A1 -- Convenient Heights of Work Surfaces for Seated People*

Conditions of Use	Short Women		Tall Men	
	in	mm	in	mm
Seated in a wheelchair: Manual work:				
Desk or removable armrests	26	660	30	760
Fixed, full-size armrests**	32***	815	32***	815
Light, detailed work:				
Desk or removable armrests	29	735	34	865
Fixed, full-size armrests**	32***	815	34	865
Seated in a 16-in (405-mm)				
-high chair:	26	660	27	685
Manual work				
Light, detailed work	28	710	31	785

*** All dimensions are based on a work-surface thickness of 1-1/2 in (38 mm) and a clearance of 1-1/2 in (38 mm) between legs and the underside of a work surface.**

**** This type of wheelchair arm does not interfere with the positioning of a wheelchair under a work surface.**

***** This dimension is limited by the height of the armrests: a lower height would be preferable. Some people in this group prefer lower work surfaces, which require positioning the wheelchair back from the edge of the counter.**

A4.33.7 TYPES OF LISTENING SYSTEMS. A listening system that can be used from any seat in a seating area is the most flexible way to meet this specification. Earphone jacks with variable volume controls can benefit only people who have slight hearing losses and do not help people with hearing aids. At the present time, audio loops are the most feasible type of listening system for people who use hearing aids, but people without hearing aids or those with hearing aids not equipped with

inductive pickups cannot use them. Loops can be portable and moved to various locations within a room. Moreover, for little cost, they can serve a large area within a seating area. Radio frequency systems can be extremely effective and inexpensive. People without hearing aids can use them, but people with hearing aids need custom-designed equipment to use them as they are presently designed. If hearing aids had a jack to allow a by-pass of microphones, then radio frequency systems would be suitable for people with and without hearing aids. Some listening systems may be subject to interference from other equipment and feedback from hearing aids of people who are using the systems. Such interference can be controlled by careful engineering design that anticipates feedback and sources of interference in the surrounding area.

A4.34 DWELLING UNITS.

A4.34.2 MINIMUM REQUIREMENTS. Handicapped people who live in accessible dwelling units of multifamily buildings or housing projects will want to participate in all on-site social activities, including visiting neighbors in their dwelling units. Hence, any circulation paths among all dwelling units and among all on-site facilities should be as accessible as possible. An accessible second exit to dwelling units provides an extra margin of safety in a fire.

A4.34.5 BATHROOMS. Although not required by these specifications, it is important to install grab bars at toilets, bathtubs, and showers if it is known that a dwelling unit will be occupied by elderly or severely disabled people.

A4.34.6 KITCHENS.

A4.34.6.1 CLEARANCE. The minimum clearances provide satisfactory maneuvering spaces for wheelchairs only if cabinets are removed at the sink.

A4.34.6.5 SINK. Installing a sink with a drain at the rear so that plumbing is as close to the wall as possible can provide additional clear knee space for wheelchair users.

A4.34.6.6 RANGES AND COOKTOPS. Although not required for minimum accessibility, countertop range units in a counter with adjustable heights can be an added convenience for wheelchair users.

A4.34.6.7 OVENS. Countertop or wall-mounted ovens with side-opening doors are easier for people in wheelchairs to use. Clear spaces at least 30 in (760 mm) wide under counters at the side of ovens are an added convenience. The pullout board or fixed shelf under side-opening oven doors provides a resting place for heavy items being moved from the oven to a counter.

A4.34.6.8 REFRIGERATOR/FREEZERS. Side-by-side refrigerator/freezers provide the most usable freezer compartments. Locating refrigerators so that their doors can swing back 180 degrees is more convenient for wheelchair users.

A4.34.6.10 KITCHEN STORAGE. Full height cabinets or tall cabinets can be provided rather than cabinets mounted over work counters. Additional storage space located conveniently adjacent to kitchens can be provided to make up for space lost when cabinets under counters are removed.

A9. POSTAL FACILITIES.

A9.2 POST OFFICE LOBBIES. Furniture as chattel is not covered under the Architectural Barriers Act of 1968, but the requirements for lobby furniture and equipment are imposed by the United States Postal Service for greater accessibility in its customer lobbies.

Note: Unedited copies of the American National Standards Institute standard, A117.1-1980,

"Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped People," are available from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

THE ARCHITECTURAL BARRIERS ACT

(Public Law 90-480) of August 12, 1968

AS AMENDED THROUGH 1984

42 U.S.C. Section 4151 et seq.

An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, as used in this Act, the term "building" means any building or facility (other than (A) a privately owned residential structure not leased by the Government for subsidized housing programs and (B) any building or facility on a military installation designed and constructed primarily for use by able bodied military personnel) the intended use for which either will require that such building or facility be accessible to the public, or may result in employment or residence therein of physically handicapped persons, which building or facility is -

(1) to be constructed or altered by or on behalf of the United States;

(2) to be leased in whole or in part by the United States after August 12, 1968; [Note: A 1976 amendment, Public Law 94-541, deleted the following words from the end of section 2: "after construction or alteration in accordance with plans and specifications of the United States." Section 202 of Public Law 94-541states that the amendment applies to "every lease entered into on or after January 1, 1977, including any renewal of a lease entered into before such a date which renewal is on or after such date." Regulations at 43 Fed. Reg. 16478 (April 19, 1978) amending 41 C.F.R. Section 101-19.6.]

(3) to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan; or

(4) to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or title III of the Washington Metropolitan Area Transit Regulation Compact.

SEC. 2 The Administrator of General Services, in consultation with the Secretary of Health and Human Services, shall prescribe standards for the design, construction, and alteration of buildings (other than residential structures subject to this Act and buildings, structures, and facilities of the Department of Defense and of the United States Postal Service subject to this Act) to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

SEC. 3 The Secretary of Housing and Urban Development, in consultation with the Secretary of Health and Human Services, shall prescribe standards for the design, construction, and alteration of buildings which are residential structures subject to this Act to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

SEC. 4 The Secretary of Defense, in consultation with the Secretary of Health and Human Services, shall prescribe standards for the design, construction, and alteration of buildings, structures, and facilities of the Department of Defense subject to this Act to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

SEC. 4a The United States Postal Service, in consultation with the Secretary of Health and Human Services, shall prescribe such standards for the design, construction, and alteration of its buildings to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

SEC. 5 Every building designed, constructed, or altered after the effective date of a standard issued under this Act which is applicable to such building, shall be designed, constructed, or altered in accordance with such standard.

SEC. 6 The Administrator of General Services, with respect to standards issued under section 2 of this Act, and the Secretary of Housing and Urban Development, with respect to standards issued under section 3 of this Act, and the Secretary of Defense, with respect to standards issued under section 4 of this Act, and the United States Postal Service, with respect to standards issued under section 4a of this Act —

(1) is authorized to modify or waive any such standard, on a case-by-case basis, upon application made by the head of the department, agency, or instrumentality of the United States concerned, and upon a determination by the Administrator or Secretary, as the case may be, that such modification or waiver is clearly necessary, and

(2) shall establish a system of continuing surveys and investigations to insure compliance with such standards.

SEC. 7(a) The Administrator of General Services shall report to Congress during the first week of January of each year on his activities and those of other departments, agencies, and instrumentalities of the Federal Government under this Act during the preceding fiscal year including, but not limited to, standards issued, revised, amended, or repealed under this Act and all case-by-case modifications, and waivers of such standards during such year.

(b) The Architectural and Transportation Barriers Compliance Board established by section 502 of the Rehabilitation Act of 1973 (Public Law 93-112) shall report to the Public Works and Transportation Committee of the House of Representatives and the Public Works Committee of the Senate during the first week of January of each year on its activities and actions to insure compliance with the standards prescribed under this Act.

ADA Accessibility Guidelines for Buildings and Facilities (ADAAG)

PDF version ADAAG Homepage

Download a zipped copy to your computer. Then, unzip files and install them in a single folder and open "adaag.htm."

As amended through September 2002 About this Edition

TABLE OF CONTENTS

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1. PURPOSE.

This document contains scoping and technical requirements for accessibility to buildings and facilities by individuals with disabilities under the Americans with Disabilities Act (ADA) of 1990. These scoping and technical requirements are to be applied during the design, construction, and alteration of buildings and facilities covered by titles II and III of the ADA to the extent required by regulations issued by Federal agencies, including the Department of Justice and the Department of Transportation, under the ADA.

The illustrations and text of ANSI A117.1-1980 are reproduced with permission from the American National Standards Institute.

Paragraphs marked with an asterisk have related, nonmandatory material in the **Appendix**. In the Appendix, the corresponding paragraph numbers are preceded by an A.

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2. GENERAL.

2.1 Provisions for Adults and Children. The specifications in these guidelines are based upon adult dimensions and anthropometrics. These guidelines also contain alternate specifications based on children's dimensions and anthropometrics for drinking fountains, water closets, toilet stalls, lavatories, sinks, and fixed or built-in seating and tables.

2.2* Equivalent Facilitation. Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility. **Appendix Note**

2.3 Incorporation by Reference.

2.3.1 General. The publications listed in 2.3.2 are incorporated by reference in this document. The Director of the Federal Register has approved these materials for incorporation by reference in accordance with 5U.S.C. 552(a) and 1 C.F.R. part 51. Copies of the referenced publications may be inspected at the Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., Suite 1000, Washington, DC; at the Department of Justice, Civil Rights Division, Disability Rights Section, 1425 New York Avenue, NW., Washington, DC; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

2.3.2 Referenced Publications. The specific edition of the publications listed below are referenced in this document. Where differences occur between this document and the referenced publications, this document applies.

2.3.2.1 American Society for Testing and Materials (ASTM) Standards. Copies of the referenced publications may be obtained from the American Society for Testing and Materials, 100 Bar Harbor Drive, West Conshohocken, Pennsylvania 19428 (**http://www.astm.org**).

ASTM F 1292-99 Standard Specification for Impact Attenuation of Surface Systems Under and Around Playground Equipment (see 15.6.7.2 Ground Surfaces, Use Zones).

ASTM F 1487-98 Standard Consumer Safety Performance Specification for Playground Equipment for Public Use (see 3.5 Definitions, Use Zone).

ASTM F 1951-99 Standard Specification for Determination of Accessibility of Surface Systems Under and Around Playground Equipment (see 15.6.7.1 Ground Surfaces, Accessibility).

2.3.2.2 International Code Council (ICC) Codes. Copies of the referenced publications may be obtained from the International Code Council, 5203 Leesburg Pike, Suite 600, Falls Church, VA 2204-3401 (**http://www.intlcode.org**).

International Building Code 2000 (see 15.3.3.2 Height).

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3. MISCELLANEOUS INSTRUCTIONS AND DEFINITIONS.

3.1 Graphic Conventions. Graphic conventions are shown in **Table 1**. Dimensions that are not marked minimum or maximum are absolute, unless otherwise indicated in the text or captions.

3.2 Dimensional Tolerances. All dimensions are subject to conventional building industry tolerances for field conditions.

3.3 Notes. The text of these guidelines does not contain notes or footnotes. Additional information, explanations, and advisory materials are located in the **Appendix**.

3.4 General Terminology.

comply with. Meet one or more specifications of these guidelines.

if, if ... then. Denotes a specification that applies only when the conditions described are present.

may. Denotes an option or alternative.

shall. Denotes a mandatory specification or requirement.

should. Denotes an advisory specification or recommendation.

3.5 Definitions.

Access Aisle.

An accessible pedestrian space between elements, such as parking spaces, seating, and desks, that provides clearances appropriate for use of the elements.

Accessible.

Describes a site, building, facility, or portion thereof that complies with these guidelines.

Accessible Element.

An element specified by these guidelines (for example, telephone, controls, and the like).

Accessible Route.

A continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts.

Accessible Space.

Space that complies with these guidelines.

Adaptability.

The ability of certain building spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered so as to accommodate the needs of individuals with or without disabilities or to accommodate the needs of persons with different types or degrees of disability.

Addition.

An expansion, extension, or increase in the gross floor area of a building or facility.

Administrative Authority.

A governmental agency that adopts or enforces regulations and guidelines for the design, construction, or alteration of buildings and facilities.

Alteration.

An alteration is a change to a building or facility that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

Amusement Attraction.

Any facility, or portion of a facility, located within an amusement park or theme park which provides amusement without the use of an amusement device. Examples include, but are not limited to, fun houses, barrels, and other attractions without seats.

Amusement Ride.

A system that moves persons through a fixed course within a defined area for the purpose of amusement.

Amusement Ride Seat.

A seat that is built-in or mechanically fastened to an amusement ride intended to be occupied by one or more passengers.

Area of Rescue Assistance.

An area, which has direct access to an exit, where people who are unable to use stairs may remain temporarily in safety to await further instructions or assistance during emergency evacuation.

Area of Sport Activity.

That portion of a room or space where the play or practice of a sport occurs.

Assembly Area.

A room or space accommodating a group of individuals for recreational, educational, political, social, civic, or amusement purposes, or for the consumption of food and drink.

Automatic Door.

A door equipped with a power-operated mechanism and controls that open and close the door automatically upon receipt of a momentary actuating signal. The switch that begins the automatic cycle may be a photoelectric device, floor mat, or manual switch (see **power-assisted door**).

Boarding Pier.

A portion of a pier where a boat is temporarily secured for the purpose of embarking or disembarking.

Boat Launch Ramp.

A sloped surface designed for launching and retrieving trailered boats and other water craft to and from a body of water.

Boat Slip.

That portion of a pier, main pier, finger pier, or float where a boat is moored for the purpose of berthing, embarking, or disembarking.

Building.

Any structure used and intended for supporting or sheltering any use or occupancy.

Catch Pool.

A pool or designated section of a pool used as a terminus for water slide flumes.

Circulation Path.

An exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings.

Clear.

Unobstructed.

Clear Floor Space.

The minimum unobstructed floor or ground space required to accommodate a single, stationary wheelchair and occupant.

Closed Circuit Telephone.

A telephone with dedicated line(s) such as a house phone, courtesy phone or phone that must be used to gain entrance to a facility.

Common Use.

Refers to those interior and exterior rooms, spaces, or elements that are made available for the use of a restricted group of people (for example, occupants of a homeless shelter, the occupants of an office building, or the guests of such occupants).

Cross Slope.

The slope that is perpendicular to the direction of travel (see **running slope**).

Curb Ramp.

A short ramp cutting through a curb or built up to it.

Detectable Warning.

A standardized surface feature built in or applied to walking surfaces or other elements to warn visually impaired people of hazards on a circulation path.

Dwelling Unit.

A single unit which provides a kitchen or food preparation area, in addition to rooms and spaces for living, bathing, sleeping, and the like. Dwelling units include a single family home or a townhouse used as a transient group home; an apartment building used as a shelter; guestrooms in a hotel that provide sleeping accommodations and food preparation areas; and other similar facilities used on a transient basis. For purposes of these guidelines, use of the term "Dwelling Unit" does not imply the unit is used as a residence.

Egress, Means of.

A continuous and unobstructed way of exit travel from any point in a building or facility to a public way. A means of egress comprises vertical and horizontal travel and may include intervening room spaces, doorways, hallways, corridors, passageways, balconies, ramps, stairs, enclosures, lobbies, horizontal exits, courts and yards. An accessible means of egress is one that complies with these guidelines and does not include stairs, steps, or escalators. Areas of rescue assistance or evacuation elevators may be included as part of accessible means of egress.

Element.

An architectural or mechanical component of a building, facility, space, or site, e.g., telephone, curb ramp, door, drinking fountain, seating, or water closet.

Elevated Play Component.

A play component that is approached above or below grade and that is part of a composite play structure consisting of two or more play components attached or functionally linked to create an integrated unit providing more than one play activity.

Entrance.

Any access point to a building or portion of a building or facility used for the purpose of entering. An entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s).

Facility.

All or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site.

Gangway.

A variable-sloped pedestrian walkway that links a fixed structure or land with a floating structure. Gangways which connect to vessels are not included.

Golf Car Passage.

A continuous passage on which a motorized golf car can operate.

Ground Floor.

Any occupiable floor less than one story above or below grade with direct access to grade. A building or facility always has at least one ground floor and may have more than one ground floor as where a split level entrance has been provided or where a building is built into a hillside.

Ground Level Play Component.

A play component that is approached and exited at the ground level.

Mezzanine or Mezzanine Floor.

That portion of a story which is an intermediate floor level placed within the story and having occupiable space above and below its floor.

Marked Crossing.

A crosswalk or other identified path intended for pedestrian use in crossing a vehicular way.

Multifamily Dwelling.

Any building containing more than two dwelling units.

Occupiable.

A room or enclosed space designed for human occupancy in which individuals congregate for amusement, educational or similar purposes, or in which occupants are engaged at labor, and which is equipped with means of egress, light, and ventilation.

Operable Part.

A part of a piece of equipment or appliance used to insert or withdraw objects, or to activate, deactivate, or adjust the equipment or appliance (for example, coin slot, pushbutton, handle).

Path of Travel.

(Reserved).

Play Area.

A portion of a site containing play components designed and constructed for children.

Play Component.

An element intended to generate specific opportunities for play, socialization, or learning. Play components may be manufactured or natural, and may be stand alone or part of a composite play structure.

Power-assisted Door.

A door used for human passage with a mechanism that helps to open the door, or relieves the opening resistance of a door, upon the activation of a switch or a continued force applied to the door itself.

Private Facility.

A place of public accommodation or a commercial facility subject to title III of the ADA and 28 C.F.R. part 36 or a transportation facility subject to title III of the ADA and 49 C.F.R. 37.45.

Public Facility.

A facility or portion of a facility constructed by, on behalf of, or for the use of a public entity subject to title II of the ADA and 28 C.F.R. part 35 or to title II of the ADA and 49 C.F.R. 37.41 or 37.43.

Public Use.

Describes interior or exterior rooms or spaces that are made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned.

Ramp.

A walking surface which has a running slope greater than 1:20.

Running Slope.

The slope that is parallel to the direction of travel (see **cross slope**).

Service Entrance.

An entrance intended primarily for delivery of goods or services.

Signage.

Displayed verbal, symbolic, tactile, and pictorial information.

Site.

A parcel of land bounded by a property line or a designated portion of a public right-of-way.

Site Improvement.

Landscaping, paving for pedestrian and vehicular ways, outdoor lighting, recreational facilities, and the like, added to a site.

Sleeping Accommodations.

Rooms in which people sleep; for example, dormitory and hotel or motel guest rooms or suites.

Soft Contained Play Structure.

A play structure made up of one or more components where the user enters a fully enclosed play environment that utilizes pliable materials (e.g., plastic, netting, fabric).

Space.

A definable area, e.g., room, toilet room, hall, assembly area, entrance, storage room, alcove, courtyard, or lobby.

Story.

That portion of a building included between the upper surface of a floor and upper surface of the floor or roof next above. If such portion of a building does not include occupiable space, it is not considered a story for

purposes of these guidelines. There may be more than one floor level within a story as in the case of a mezzanine or mezzanines.

Structural Frame.

The structural frame shall be considered to be the columns and the girders, beams, trusses and spandrels having direct connections to the columns and all other members which are essential to the stability of the building as a whole.

TDD (Telecommunication Devices for the Deaf).

See **text telephone**.

TTY (Tele-Typewriter).

See **text telephone**.

Tactile.

Describes an object that can be perceived using the sense of touch.

Technically Infeasible.

See **4.1.6(1)(j)** EXCEPTION.

Teeing Ground.

In golf, the starting place for the hole to be played.

***Text Telephone** (TTY).*

Machinery or equipment that employs interactive text based communications through the transmission of coded signals across the standard telephone network. Text telephones can include, for example, devices known as TDDs (telecommunication display devices or telecommunication devices for deaf persons) or computers with special modems. Text telephones are also called TTYs, an abbreviation for tele-typewriter.

Transfer Device.

Equipment designed to facilitate the transfer of a person from a wheelchair or other mobility device to and from an amusement ride seat.

*Transient Lodging.**

A building, facility, or portion thereof, excluding inpatient medical care facilities and residential facilities, that contains sleeping accommodations. Transient lodging may include, but is not limited to, resorts, group homes, hotels, motels, and dormitories. **Appendix Note**

Transition Plate.

A sloping pedestrian walking surface located at the end(s) of a gangway.

Use Zone.

The ground level area beneath and immediately adjacent to a play structure or equipment that is designated by **ASTM F 1487 Standard Consumer Safety Performance Specification for Playground Equipment for Public Use** (incorporated by reference, see **2.3.2**) for unrestricted circulation around the equipment and on whose surface it is predicted that a user would land when falling from or exiting the equipment.

Vehicular Way.

A route intended for vehicular traffic, such as a street, driveway, or parking lot.

Walk.

An exterior pathway with a prepared surface intended for pedestrian use, including general pedestrian areas such as plazas and courts.

4. ACCESSIBLE ELEMENTS AND SPACES: SCOPE AND TECHNICAL REQUIREMENTS.

4.1 Minimum Requirements

4.1.1* Application.

(1) General. All areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities shall comply with section 4, unless otherwise provided in this section or as modified in a special application section.

(2) Application Based on Building Use. Special application sections provide additional requirements based on building use. When a building or facility contains more than one use covered by a special application section, each portion shall comply with the requirements for that use.

(3)* Areas Used Only by Employees as Work Areas. Areas that are used only as work areas shall be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. These guidelines do not require that any areas used only as work areas be constructed to permit maneuvering within the work area or be constructed or equipped (i.e., with racks or shelves) to be accessible. **Appendix Note**

(4) Temporary Structures. These guidelines cover temporary buildings or facilities as well as permanent facilities. Temporary buildings and facilities are not of permanent construction but are extensively used or are essential for public use for a period of time. Examples of temporary buildings or facilities covered by these guidelines include, but are not limited to: reviewing stands, temporary classrooms, bleacher areas, exhibit areas, temporary banking facilities, temporary health screening services, or temporary safe pedestrian passageways around a construction site. Structures, sites and equipment directly associated with the actual processes of construction, such as scaffolding, bridging, materials hoists, or construction trailers are not included.

(5) General Exceptions.

(a) In new construction, a person or entity is not required to meet fully the requirements of these guidelines where that person or entity can demonstrate that it is structurally impracticable to do so. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. If full compliance with the requirements of these guidelines is structurally impracticable, a person or entity shall comply with the requirements to the extent it is not structurally impracticable. Any portion of the building or facility which can be made accessible shall comply to the extent that it is not structurally impracticable.

(b) Accessibility is not required to or in:

(i) raised areas used primarily for purposes of security or life or fire safety, including, but not limited to, observation or lookout galleries, prison guard towers, fire towers, or fixed life guard stands;

(ii) non-occupiable spaces accessed only by ladders, catwalks, crawl spaces, very narrow passageways, tunnels, or freight (non-passenger) elevators, and frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment; such spaces may include, but are not limited to, elevator pits, elevator penthouses, piping or equipment catwalks, water or sewage treatment pump rooms and stations, electric substations and

transformer vaults, and highway and tunnel utility facilities;

(iii) single occupant structures accessed only by a passageway that is below grade or that is elevated above standard curb height, including, but not limited to, toll booths accessed from underground tunnels;

(iv) raised structures used solely for refereeing, judging, or scoring a sport;

(v) water slides;

(vi) animal containment areas that are not for public use; or

(vii) raised boxing or wrestling rings.

4.1.2 Accessible Sites and Exterior Facilities: New Construction. An accessible site shall meet the following minimum requirements:

(1) At least one accessible route complying with **4.3** shall be provided within the boundary of the site from public transportation stops, accessible parking spaces, passenger loading zones if provided, and public streets or sidewalks, to an accessible building entrance.

(2) (a) At least one accessible route complying with **4.3** shall connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site.

(b)* Court Sports: An accessible route complying with **4.3** shall directly connect both sides of the court in court sports. **Advisory Note**

(3) All objects that protrude from surfaces or posts into circulation paths shall comply with **4.4**.

EXCEPTION: The requirements of **4.4** shall not apply within an area of sport activity.

(4) Ground surfaces along accessible routes and in accessible spaces shall comply with **4.5**.

EXCEPTION 1*: The requirements of **4.5** shall not apply within an area of sport activity. **Appendix Note**

EXCEPTION 2*: Animal containment areas designed and constructed for public use shall not be required to provide stable, firm, and slip resistant ground and floor surfaces and shall not be required to comply with **4.5.2**. **Appendix Note**

(5) **(a)** If parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces complying with **4.6** shall be provided in each such parking area in conformance with the table below. Spaces required by the table need not be provided in the particular lot. They may be provided in a different location if equivalent or greater accessibility, in terms of distance from an accessible entrance, cost and convenience is ensured.

Total Parking in Lot	Required Minimum Number of Accessible Spaces
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	2 percent of total
1001 and over	20 plus 1 for each 100 over 1000

Except as provided in (b), access aisles adjacent to accessible spaces shall be 60 in (1525 mm) wide

minimum.

(b) One in every eight accessible spaces, but not less than one, shall be served by an access aisle 96 in (2440 mm) wide minimum and shall be designated "van accessible" as required by **4.6.4**. The vertical clearance at such spaces shall comply with **4.6.5**. All such spaces may be grouped on one level of a parking structure.

EXCEPTION: Provision of all required parking spaces in conformance with "Universal Parking Design" (see appendix **A4.6.3**) is permitted.

(c) If passenger loading zones are provided, then at least one passenger loading zone shall comply with **4.6.6**.

(d) At facilities providing medical care and other services for persons with mobility impairments, parking spaces complying with 4.6 shall be provided in accordance with **4.1.2 (5)(a)** except as follows:

(i) Outpatient units and facilities: 10 percent of the total number of parking spaces provided serving each such outpatient unit or facility;

(ii) Units and facilities that specialize in treatment or services for persons with mobility impairments: 20 percent of the total number of parking spaces provided serving each such unit or facility.

(e)* Valet parking: Valet parking facilities shall provide a passenger loading zone complying with **4.6.6** located on an accessible route to the entrance of the facility. Paragraphs 5(a), 5(b), and 5(d) of this section do not apply to valet parking facilities. **Appendix Note**

(6) If toilet facilities are provided on a site, then each such public or common use toilet facility shall comply with **4.22**. If bathing facilities are provided on a site, then each such public or common use bathing facility shall comply with **4.23**. For single user portable toilet or bathing units clustered at a single location, at least five percent but no less than one toilet unit or bathing unit complying with 4.22 or 4.23 shall be installed at each cluster whenever typical inaccessible units are provided. Accessible units shall be identified by the International Symbol of Accessibility.

EXCEPTION: Portable toilet units at construction sites used exclusively by construction personnel are not required to comply with 4.1.2(6).

(7) Building Signage. Signs which designate permanent rooms and spaces shall comply with **4.30.1**, **4.30.4**, **4.30.5** and **4.30.6**. Other signs which provide direction to, or information about, functional spaces of the building shall comply with **4.30.1**, **4.30.2**, **4.30.3**, and **4.30.5**. Elements and spaces of accessible facilities which shall be identified by the International Symbol of Accessibility and which shall comply with **4.30.7** are:

(a) Parking spaces designated as reserved for individuals with disabilities;

(b) Accessible passenger loading zones;

(c) Accessible entrances when not all are accessible (inaccessible entrances shall have directional signage to indicate the route to the nearest accessible entrance);

(d) Accessible toilet and bathing facilities when not all are accessible.

4.1.3 Accessible Buildings: New Construction. Accessible buildings and facilities shall meet the following minimum requirements:

(1)(a) At least one accessible route complying with **4.3** shall connect accessible building or facility entrances with all accessible spaces and elements within the building or facility.

(b)* Court Sports. An accessible route complying with **4.3** shall directly connect both sides of the court in court sports. **Appendix Note**

(2) All objects that overhang or protrude into circulation paths shall comply with **4.4**.

EXCEPTION: The requirements of **4.4** shall not apply within an area of sport activity.

(3) Ground and floor surfaces along accessible routes and in accessible rooms and spaces shall comply with **4.5**.

EXCEPTION 1*: The requirements of **4.5** shall not apply within an area of sport activity. **Appendix Note**

EXCEPTION 2*: Animal containment areas designed and constructed for public use shall not be required to provide stable, firm, and slip resistant ground and floor surfaces and shall not be required to comply with **4.5.2**. **Appendix Note**

(4) Interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access shall comply with **4.9**.

(5)* One passenger elevator complying with **4.10** shall serve each level, including mezzanines, in all multi-story buildings and facilities unless exempted below. If more than one elevator is provided, each passenger elevator shall comply with **4.10**. **Appendix Note**

EXCEPTION 1: Elevators are not required in:

(a) private facilities that are less than three stories or that have less than 3000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider, or another type of facility as determined by the Attorney General; or

(b) public facilities that are less than three stories and that are not open to the general public if the story above or below the accessible ground floor houses no more than five persons and is less than 500 square feet. Examples may include, but are not limited to, drawbridge towers and boat traffic towers, lock and dam control stations, and train dispatching towers.

The elevator exemptions set forth in paragraphs (a) and (b) do not obviate or limit in any way the obligation to comply with the other accessibility requirements established in section **4.1.3**. For example, floors above or below the accessible ground floor must meet the requirements of this section except for elevator service. If toilet or bathing facilities are provided on a level not served by an elevator, then toilet or bathing facilities must be provided on the accessible ground floor. In new construction, if a building or facility is eligible for exemption but a passenger elevator is nonetheless planned, that elevator shall meet the requirements of **4.10** and shall serve each level in the building. A passenger elevator that provides service from a garage to only one level of a building or facility is not required to serve other levels.

EXCEPTION 2: Elevator pits, elevator penthouses, mechanical rooms, piping or equipment catwalks are exempted from this requirement.

EXCEPTION 3: Accessible ramps complying with **4.8** may be used in lieu of an elevator.

EXCEPTION 4: Platform lifts (wheelchair lifts) complying with **4.11** of this guideline and applicable State or local codes may be used in lieu of an elevator only under the following conditions:

(a) To provide an accessible route to a performing area in an assembly occupancy.

(b) To comply with the wheelchair viewing position line-of- sight and dispersion requirements of **4.33.3**.

(c) To provide access to incidental occupiable spaces and rooms which are not

open to the general public and which house no more than five persons, including but not limited to equipment control rooms and projection booths.

(d) To provide access where existing site constraints or other constraints make use of a ramp or an elevator infeasible.

(e) To provide access to raised judges' benches, clerks' stations, speakers' platforms, jury boxes and witness stands or to depressed areas such as the well of a court.

(f)* To provide access to player seating areas serving an area of sport activity. **Appendix Note**

EXCEPTION 5: Elevators located in air traffic control towers are not required to serve the cab and the floor immediately below the cab.

(6) Windows: (Reserved).

(7) Doors:

(a) At each accessible entrance to a building or facility, at least one door shall comply with **4.13**.

(b) Within a building or facility, at least one door at each accessible space shall comply with **4.13**.

(c) Each door that is an element of an accessible route shall comply with **4.13**.

(d) Each door required by **4.3.10**, Egress, shall comply with **4.13**.

(8) The requirements in (a) and (b) below shall be satisfied independently:

(a)(i) At least 50 percent of all public entrances (excluding those in (b) below) shall comply with **4.14**. At least one must be a ground floor entrance. Public entrances are any entrances that are not loading or service entrances.

(ii) Accessible public entrances must be provided in a number at least equivalent to the number of exits required by the applicable building or fire codes. (This paragraph does not require an increase in the total number of public entrances planned for a facility.)

(iii) An accessible public entrance must be provided to each tenancy in a facility (for example, individual stores in a strip shopping center).

(iv) In detention and correctional facilities subject to section 12, public entrances that are secured shall be accessible as required by **12.2.1**.

One entrance may be considered as meeting more than one of the requirements in (a). Where feasible, accessible public entrances shall be the entrances used by the majority of people visiting or working in the building.

(b)(i) In addition, if direct access is provided for pedestrians from an enclosed parking garage to the building, at least one direct entrance from the garage to the building must be accessible.

(ii) If access is provided for pedestrians from a pedestrian tunnel or elevated walkway, one entrance to the building from each tunnel or walkway must be accessible.

(iii) In judicial, legislative, and regulatory facilities subject to section 11, restricted and secured entrances shall be accessible in the number required by **11.1.1**.

One entrance may be considered as meeting more than one of the requirements in (b).

Because entrances also serve as emergency exits whose proximity to all parts of buildings and facilities is essential, it is preferable that all entrances be accessible.

(c) If the only entrance to a building, or tenancy in a facility, is a service entrance, that entrance shall be accessible.

(d) Entrances which are not accessible shall have directional signage complying with **4.30.1**, **4.30.2**, **4.30.3**, and **4.30.5**, which indicates the location of the nearest accessible entrance.

(9)* In buildings or facilities, or portions of buildings or facilities, required to be accessible, accessible means of egress shall be provided in the same number as required for exits by local building/life safety regulations. Where a required exit from an occupiable level above or below a level of accessible exit discharge is not accessible, an area of rescue assistance shall be provided on each such level (in a number equal to that of inaccessible required exits). Areas of rescue assistance shall comply with **4.3.11**. A horizontal exit, meeting the requirements of local building/life safety regulations, shall satisfy the requirement for an area of rescue assistance. **Appendix Note**

EXCEPTION: Areas of rescue assistance are not required in buildings or facilities having a supervised automatic sprinkler system.

(10)* Drinking Fountains:

(a) Where only one drinking fountain is provided on a floor there shall be a drinking fountain which is accessible to individuals who use wheelchairs in accordance with **4.15** and one accessible to those who have difficulty bending or stooping. (This can be accommodated by the use of a "hi-lo" fountain; by providing one fountain accessible to those who use wheelchairs and one fountain at a standard height convenient for those who have difficulty bending; by providing a fountain accessible under 4.15 and a water cooler; or by such other means as would achieve the required accessibility for each group on each floor.)

(b) Where more than one drinking fountain or water cooler is provided on a floor, 50% of those provided shall comply with **4.15** and shall be on an accessible route. **Appendix Note**

(11) Toilet Facilities: If toilet rooms are provided, then each public and common use toilet room shall comply with **4.22**. Other toilet rooms provided for the use of occupants of specific spaces (i.e., a private toilet room for the occupant of a private office) shall be adaptable. If bathing rooms are provided, then each public and common use bathroom shall comply with **4.23**. Accessible toilet rooms and bathing facilities shall be on an accessible route.

(12) Storage, Shelving and Display Units:

(a) If fixed or built-in storage facilities such as cabinets, shelves, closets, and drawers are provided in accessible spaces, at least one of each type provided shall contain storage space complying with **4.25**. Additional storage may be provided outside of the dimensions required by 4.25.

(b) Shelves or display units allowing self-service by customers in mercantile occupancies shall be located on an accessible route complying with **4.3**. Requirements for accessible reach range do not apply.

(c)* Where lockers are provided in accessible spaces, at least 5 percent, but not less than one, of each type of locker shall comply with **4.25**. **Appendix Note**

(13) Controls and operating mechanisms in accessible spaces, along accessible routes, or as parts of accessible elements (for example, light switches and dispenser controls) shall comply with **4.27**.

EXCEPTION: The requirements of **4.27** shall not apply to exercise machines.

(14) If emergency warning systems are provided, then they shall include both audible alarms and visual alarms complying with **4.28**. Sleeping accommodations required to comply with **9.3** shall have an alarm system complying with **4.28**. Emergency warning systems in medical care facilities may be

modified to suit standard health care alarm design practice.

(15) Detectable warnings shall be provided at locations as specified in **4.29**.

(16) Building Signage:

(a) Signs which designate permanent rooms and spaces shall comply with **4.30.1**, **4.30.4**, **4.30.5** and **4.30.6**.

(b) Other signs which provide direction to or information about functional spaces of the building shall comply with **4.30.1**, **4.30.2**, **4.30.3**, and **4.30.5**.

EXCEPTION: Building directories, menus, and all other signs which are temporary are not required to comply.

(17) Public telephones:

(a) If public pay telephones, public closed circuit telephones, or other public telephones are provided, then they shall comply with **4.31.2** through **4.31.8** to the extent required by the following table:

(**text version**)

Number of each type of telephone provided on each floor	Number of telephones required to comply with 4.31.2 through 4.31.8[1]
1 or more single unit	1 per floor
1 bank[2]	1 per floor
2 or more banks[2]	1 per bank. Accessible unit may be installed as a single unit in proximity (either visible or with signage) to the bank. At least one public telephone per floor shall meet the requirements for a forward reach telephone[3]

[1] Additional public telephones may be installed at any height. Unless otherwise specified, accessible telephones may be either forward or side reach telephones.

[2] A bank consists of two or more adjacent public telephones, often installed as a unit.

[3] EXCEPTION: For exterior installations only, if dial tone first service is available, then a side reach telephone may be installed instead of the required forward reach telephone.

(b)* All telephones required to be accessible and complying with **4.31.2** through **4.31.8** shall be equipped with a volume control. In addition, 25 percent, but never less than one, of all other public telephones provided shall be equipped with a volume control and shall be dispersed among all types of public telephones, including closed circuit telephones, throughout the building or facility. Signage complying with applicable provisions of **4.30.7** shall be provided. **Appendix Note**

(c) The following shall be provided in accordance with **4.31.9**:

(i) If four or more public pay telephones (including both interior and exterior telephones) are provided at a site of a private facility, and at least one is in an interior location, then at least one interior public text telephone (TTY) shall be provided. If an interior public pay telephone is provided in a public use area in a building of a public facility, at least one interior public text telephone (TTY) shall be provided in the building in a public use area.

(ii) If an interior public pay telephone is provided in a private facility that is a stadium or arena, a convention center, a hotel with a convention center, or a covered mall, at least one interior public text telephone (TTY) shall be provided

in the facility. In stadiums, arenas and convention centers which are public facilities, at least one public text telephone (TTY) shall be provided on each floor level having at least one interior public pay telephone.

(iii) If a public pay telephone is located in or adjacent to a hospital emergency room, hospital recovery room, or hospital waiting room, one public text telephone (TTY) shall be provided at each such location.

(iv) If an interior public pay telephone is provided in the secured area of a detention or correctional facility subject to section 12, then at least one public text telephone (TTY) shall also be provided in at least one secured area. Secured areas are those areas used only by detainees or inmates and security personnel.

(d) Where a bank of telephones in the interior of a building consists of three or more public pay telephones, at least one public pay telephone in each such bank shall be equipped with a shelf and outlet in compliance with **4.31.9(2)**.

EXCEPTION: This requirement does not apply to the secured areas of detention or correctional facilities where shelves and outlets are prohibited for purposes of security or safety.

(18) If fixed or built-in seating or tables (including, but not limited to, study carrels and student laboratory stations), are provided in accessible public or common use areas, at least five percent (5%), but not less than one, of the fixed or built-in seating areas or tables shall comply with **4.32**. An accessible route shall lead to and through such fixed or built-in seating areas, or tables.

(19)* Assembly Areas:

(a) In places of assembly with fixed seating accessible wheelchair locations shall comply with **4.33.2**, **4.33.3**, and **4.33.4** and shall be provided consistent with the following table:

Capacity of Seating in Assembly Area	Number of Required Wheelchair Locations
4 to 25	1
26 to 50	2
51 to 300	4
301 to 500	6
over 500	6 plus 1 additional space for each total seating capacity increase of 100

In addition, one percent, but not less than one, of all fixed seats shall be aisle seats with no armrests on the aisle side, or removable or folding armrests on the aisle side. Each such seat shall be identified by a sign or marker. Signage notifying patrons of the availability of such seats shall be posted at the ticket office. Aisle seats are not required to comply with **4.33.4**. **Appendix Note**

(b) This paragraph applies to assembly areas where audible communications are integral to the use of the space (e.g., concert and lecture halls, playhouses and movie theaters, meeting rooms, etc.). Such assembly areas, if (1) they accommodate at least 50 persons, or if they have audio-amplification systems, and (2) they have fixed seating, shall have a permanently installed assistive listening system complying with **4.33**. For other assembly areas, a permanently installed assistive listening system, or an adequate number of electrical outlets or other supplementary wiring necessary to support a portable assistive listening system shall be provided. The minimum number of receivers to be provided shall be equal to 4 percent of the total number of seats, but in no case less than two. Signage complying with applicable provisions of **4.30** shall be installed to notify patrons of the availability of a listening system.

(c) Where a team or player seating area contains fixed seats and serves an area of sport activity, the seating area shall contain the number of wheelchair spaces required by 4.1.3 (19)(a), but not less than one wheelchair space. Wheelchair spaces shall comply with **4.33.2**, **4.33.3**, **4.33.4**, and **4.33.5**.

EXCEPTION 1: Wheelchair spaces in team or player seating areas shall not be required to provide a choice of admission price or lines of sight comparable to those for members of the general public.

EXCEPTION 2: This provision shall not apply to team or player seating areas serving bowling lanes not required to be accessible by **15.7.3**.

(20) Where automated teller machines (ATMs) are provided, each ATM shall comply with the requirements of **4.34** except where two or more are provided at a location, then only one must comply.

EXCEPTION: Drive-up-only automated teller machines are not required to comply with **4.27.2**, **4.27.3** and **4.34.3**.

(21) Where dressing, fitting, or locker rooms are provided, the rooms shall comply with **4.35**.

EXCEPTION: Where dressing, fitting, or locker rooms are provided in a cluster, at least 5 percent, but not less than one, of the rooms for each type of use in each cluster shall comply with **4.35**.

(22) Where saunas or steam rooms are provided, the rooms shall comply with **4.36**.

EXCEPTION: Where saunas or steam rooms are provided in a cluster, at least 5 percent, but not less than one, of the rooms for each type of use in each cluster shall comply with **4.36**.

4.1.4 (Reserved).

4.1.5 Accessible Buildings: Additions. Each addition to an existing building or facility shall be regarded as an alteration. Each space or element added to the existing building or facility shall comply with the applicable provisions of **4.1.1** to **4.1.3**, Minimum Requirements (for New Construction) and the applicable technical specifications of section 4 and the special application sections. Each addition that affects or could affect the usability of an area containing a primary function shall comply with **4.1.6(2)**.

4.1.6 Accessible Buildings: Alterations.

(1) General. Alterations to existing buildings and facilities shall comply with the following:

(a) No alteration shall be undertaken which decreases or has the effect of decreasing accessibility or usability of a building or facility below the requirements for new construction at the time of alteration.

(b) If existing elements, spaces, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of **4.1.1** to **4.1.3** Minimum Requirements (for New Construction). If the applicable provision for new construction requires that an element, space, or common area be on an accessible route, the altered element, space, or common area is not required to be on an accessible route except as provided in **4.1.6(2)** (Alterations to an Area Containing a Primary Function.)

(c) If alterations of single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible.

(d) No alteration of an existing element, space, or area of a building or facility shall impose a requirement for greater accessibility than that which would be required for new construction. For example, if the elevators and stairs in a building are being altered and the elevators are, in turn, being made accessible, then no accessibility modifications are required to the stairs connecting levels connected by the elevator. If stair modifications to correct unsafe conditions are required by other codes, the modifications shall be done in compliance with these guidelines unless technically infeasible.

(e) At least one interior public text telephone (TTY) complying with **4.31.9** shall be provided if:

(i) alterations to existing buildings or facilities with less than four exterior or

interior public pay telephones would increase the total number to four or more telephones with at least one in an interior location; or

(ii) alterations to one or more exterior or interior public pay telephones occur in an existing building or facility with four or more public telephones with at least one in an interior location.

(f) If an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary for such installation, then a means of accessible vertical access shall be provided that complies with the applicable provisions of **4.7**, **4.8**, **4.10**, or **4.11**.

(g) In alterations, the requirements of **4.1.3(9)**, **4.3.10** and **4.3.11** do not apply.

(h)* Entrances: If a planned alteration entails alterations to an entrance, and the building has an accessible entrance, the entrance being altered is not required to comply with **4.1.3 (8)**, except to the extent required by **4.1.6(2)**. If a particular entrance is not made accessible, appropriate accessible signage indicating the location of the nearest accessible entrance(s) shall be installed at or near the inaccessible entrance, such that a person with disabilities will not be required to retrace the approach route from the inaccessible entrance. **Appendix Note**

(i) If the alteration work is limited solely to the electrical, mechanical, or plumbing system, or to hazardous material abatement, or automatic sprinkler retrofitting, and does not involve the alteration of any elements or spaces required to be accessible under these guidelines, then **4.1.6(2)** does not apply.

(j) EXCEPTION: In alteration work, if compliance with **4.1.6** is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration.

Technically Infeasible. Means, with respect to an alteration of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.

(k) EXCEPTION:

(i) These guidelines do not require the installation of an elevator in an altered facility that is exempt from the requirement for an elevator under **4.1.3(5)**.

(ii) The exemption provided in paragraph (i) does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in these guidelines. For example, alterations to floors above or below the ground floor must be accessible regardless of whether the altered facility has an elevator. If a facility subject to the elevator exemption set forth in paragraph (i) nonetheless has a passenger elevator, that elevator shall meet, to the maximum extent feasible, the accessibility requirements of these guidelines.

(2) Alterations to an Area Containing a Primary Function: In addition to the requirements of **4.1.6(1)**, an alteration that affects or could affect the usability of or access to an area containing a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, unless such alterations are disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(3) Special Technical Provisions for Alterations to Existing Buildings and Facilities:

(a) Ramps: Curb ramps and interior or exterior ramps to be constructed on sites or in existing buildings or facilities where space limitations prohibit the use of a 1:12 slope or less may have slopes and rises as follows:

(i) A slope between 1:10 and 1:12 is allowed for a maximum rise of 6 inches (150 mm).

(ii) A slope between 1:8 and 1:10 is allowed for a maximum rise of 3 inches (75 mm). A slope steeper than 1:8 is not allowed.

(b) Stairs: Full extension of handrails at stairs shall not be required in alterations where such extensions would be hazardous or impossible due to plan configuration.

(c) Elevators:

(i) If safety door edges are provided in existing automatic elevators, automatic door reopening devices may be omitted (see **4.10.6**).

(ii) Where existing shaft configuration or technical infeasibility prohibits strict compliance with **4.10.9**, the minimum car plan dimensions may be reduced by the minimum amount necessary, but in no case shall the inside car area be smaller than 48 in (1220 mm) by 48 in (1220 mm).

(iii) Equivalent facilitation may be provided with an elevator car of different dimensions when usability can be demonstrated and when all other elements required to be accessible comply with the applicable provisions of **4.10**. For example, an elevator of 47 in by 69 in (1195 mm by 1755 mm) with a door opening on the narrow dimension, could accommodate the standard wheelchair clearances shown in **Figure 4**.

(d) Doors:

(i) Where it is technically infeasible to comply with clear opening width requirements of **4.13.5**, a projection of 5/8 in (16 mm) maximum will be permitted for the latch side stop.

(ii) If existing thresholds are 3/4 in (19 mm) high or less, and have (or are modified to have) a beveled edge on each side, they may remain.

(e) Toilet Rooms:

(i) Where it is technically infeasible to comply with **4.22** or **4.23**, the installation of at least one unisex toilet/bathroom per floor, located in the same area as existing toilet facilities, will be permitted in lieu of modifying existing toilet facilities to be accessible. Each unisex toilet room shall contain one water closet complying with **4.16** and one lavatory complying with **4.19**, and the door shall have a privacy latch.

(ii) Where it is technically infeasible to install a required standard stall (**Fig. 30 (a)**), or where other codes prohibit reduction of the fixture count (i.e., removal of a water closet in order to create a double-wide stall), either alternate stall (**Fig.30(b)**) may be provided in lieu of the standard stall.

(iii) When existing toilet or bathing facilities are being altered and are not made accessible, signage complying with **4.30.1**, **4.30.2**, **4.30.3**, **4.30.5**, and **4.30.7** shall be provided indicating the location of the nearest accessible toilet or bathing facility within the facility.

(f) Assembly Areas:

(i) Where it is technically infeasible to disperse accessible seating throughout an altered assembly area, accessible seating areas may be clustered. Each

accessible seating area shall have provisions for companion seating and shall be located on an accessible route that also serves as a means of emergency egress.

(ii) Where it is technically infeasible to alter all performing areas to be on an accessible route, at least one of each type of performing area shall be made accessible.

(g) Platform Lifts (Wheelchair Lifts): In alterations, platform lifts (wheelchair lifts) complying with **4.11** and applicable state or local codes may be used as part of an accessible route. The use of lifts is not limited to the conditions in **exception 4 of 4.1.3(5)**

(h) Dressing Rooms: In alterations where technical infeasibility can be demonstrated, one dressing room for each sex on each level shall be made accessible. Where only unisex dressing rooms are provided, accessible unisex dressing rooms may be used to fulfill this requirement.

4.1.7 Accessible Buildings: Historic Preservation.

(1)* Applicability:

(a) General Rule. Alterations to a qualified historic building or facility shall comply with **4.1.6** (Accessible Buildings: Alterations), the applicable technical specifications of section 4 and the applicable special application sections unless it is determined in accordance with the procedures in **4.1.7(2)** that compliance with the requirements for accessible routes (exterior and interior), ramps, entrances, or toilets would threaten or destroy the historic significance of the building or facility in which case the alternative requirements in **4.1.7(3)** may be used for the feature. **Appendix Note**

EXCEPTION: (Reserved).

(b) Definition. A qualified historic building or facility is a building or facility that is:

(i) Listed in or eligible for listing in the National Register of Historic Places; or

(ii) Designated as historic under an appropriate State or local law.

(2) Procedures:

(a) Alterations to Qualified Historic Buildings and Facilities Subject to Section 106 of the National Historic Preservation Act:

(i) Section 106 Process. Section 106 of the National Historic Preservation Act (16 U.S.C. 470 f) requires that a Federal agency with jurisdiction over a Federal, federally assisted, or federally licensed undertaking consider the effects of the agency's undertaking on buildings and facilities listed in or eligible for listing in the National Register of Historic Places and give the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking prior to approval of the undertaking.

(ii) ADA Application. Where alterations are undertaken to a qualified historic building or facility that is subject to section 106 of the National Historic Preservation Act, the Federal agency with jurisdiction over the undertaking shall follow the section 106 process. If the State Historic Preservation Officer or Advisory Council on Historic Preservation agrees that compliance with the requirements for accessible routes (exterior and interior), ramps, entrances, or toilets would threaten or destroy the historic significance of the building or facility, the alternative requirements in **4.1.7(3)** may be used for the feature.

(b) Alterations to Qualified Historic Buildings and Facilities Not Subject to Section 106 of the National Historic Preservation Act. Where alterations are undertaken to a qualified historic building or facility that is not subject to section 106 of the National Historic Preservation Act, if the entity undertaking the alterations believes that compliance with the requirements

for accessible routes (exterior and interior), ramps, entrances, or toilets would threaten or destroy the historic significance of the building or facility and that the alternative requirements in **4.1.7(3)** should be used for the feature, the entity should consult with the State Historic Preservation Officer. If the State Historic Preservation Officer agrees that compliance with the accessibility requirements for accessible routes (exterior and interior), ramps, entrances or toilets would threaten or destroy the historical significance of the building or facility, the alternative requirements in **4.1.7(3)** may be used.

(c) Consultation With Interested Persons. Interested persons should be invited to participate in the consultation process, including State or local accessibility officials, individuals with disabilities, and organizations representing individuals with disabilities.

(d) Certified Local Government Historic Preservation Programs. Where the State Historic Preservation Officer has delegated the consultation responsibility for purposes of this section to a local government historic preservation program that has been certified in accordance with section 101(c) of the National Historic Preservation Act of 1966 (16 U.S.C. 470a (c)) and implementing regulations (36 C.F.R. 61.5), the responsibility may be carried out by the appropriate local government body or official.

(3) Historic Preservation: Minimum Requirements:

(a) At least one accessible route complying with **4.3** from a site access point to an accessible entrance shall be provided.

EXCEPTION: A ramp with a slope no greater than 1:6 for a run not to exceed 2 ft (610 mm) may be used as part of an accessible route to an entrance.

(b) At least one accessible entrance complying with **4.14** which is used by the public shall be provided.

EXCEPTION: If it is determined that no entrance used by the public can comply with **4.14**, then access at any entrance not used by the general public but open (unlocked) with directional signage at the primary entrance may be used. The accessible entrance shall alsohave a notification system. Where security is a problem, remote monitoring may be used.

(c) If toilets are provided, then at least one toilet facility complying with **4.22** and **4.1.6** shall be provided along an accessible route that complies with **4.3**. Such toilet facility may be unisex in design.

(d) Accessible routes from an accessible entrance to all publicly used spaces on at least the level of the accessible entrance shall be provided. Access shall be provided to all levels of a building or facility in compliance with **4.1** whenever practical.

(e) Displays and written information, documents, etc., should be located where they can be seen by a seated person. Exhibits and signage displayed horizontally (e.g., open books), should be no higher than 44 in (1120 mm) above the floor surface.

4.2 Space Allowance and Reach Ranges.

4.2.1* Wheelchair Passage Width. The minimum clear width for single wheelchair passage shall be 32 in (815 mm) at a point and 36 in (915 mm) continuously (see **Fig. 1** and **24(e)**). **Appendix Note**

4.2.2 Width for Wheelchair Passing. The minimum width for two wheelchairs to pass is 60 in (1525 mm) (see **Fig. 2**).

4.2.3* Wheelchair Turning Space. The space required for a wheelchair to make a 180-degree turn is a clear space of 60 in (1525 mm) diameter (see **Fig. 3(a)**) or a T-shaped space (see **Fig. 3(b)**). **Appendix Note**

4.2.4* Clear Floor or Ground Space for Wheelchairs.

4.2.4.1 Size and Approach. The minimum clear floor or ground space required to accommodate a single, stationary wheelchair and occupant is 30 in by 48 in (760 mm by 1220 mm) (see **Fig. 4(a)**).

The minimum clear floor or ground space for wheelchairs may be positioned for forward or parallel approach to an object (see **Fig. 4(b)** and **(c)**). Clear floor or ground space for wheelchairs may be part of the knee space required under some objects.

4.2.4.2 Relationship of Maneuvering Clearance to Wheelchair Spaces. One full unobstructed side of the clear floor or ground space for a wheelchair shall adjoin or overlap an accessible route or adjoin another wheelchair clear floor space. If a clear floor space is located in an alcove or otherwise confined on all or part of three sides, additional maneuvering clearances shall be provided as shown in **Fig. 4(d)** and **(e)**.

4.2.4.3 Surfaces for Wheelchair Spaces. Clear floor or ground spaces for wheelchairs shall comply with **4.5**. **Appendix Note**

4.2.5* Forward Reach. If the clear floor space only allows forward approach to an object, the maximum high forward reach allowed shall be 48 in (1220 mm) (see **Fig. 5(a)**). The minimum low forward reach is 15 in (380 mm). If the high forward reach is over an obstruction, reach and clearances shall be as shown in **Fig. 5(b)**. **Appendix Note**

4.2.6* Side Reach. If the clear floor space allows parallel approach by a person in a wheelchair, the maximum high side reach allowed shall be 54 in (1370 mm) and the low side reach shall be no less than 9 in (230 mm) above the floor (**Fig. 6(a)** and **(b)**). If the side reach is over an obstruction, the reach and clearances shall be as shown in **Fig 6(c)**. **Appendix Note**

4.3 Accessible Route.

4.3.1* General. All walks, halls, corridors, aisles, skywalks, tunnels, and other spaces that are part of an accessible route shall comply with **4.3**. **Appendix Note**

4.3.2 Location.

(1) At least one accessible route within the boundary of the site shall be provided from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve. The accessible route shall, to the maximum extent feasible, coincide with the route for the general public.

(2) At least one accessible route shall connect accessible buildings, facilities, elements, and spaces that are on the same site.

(3) At least one accessible route shall connect accessible building or facility entrances with all accessible spaces and elements and with all accessible dwelling units within the building or facility.

(4) An accessible route shall connect at least one accessible entrance of each accessible dwelling unit with those exterior and interior spaces and facilities that serve the accessible dwelling unit.

4.3.3 Width. The minimum clear width of an accessible route shall be 36 in (915 mm) except at doors (see **4.13.5** and **4.13.6**). If a person in a wheelchair must make a turn around an obstruction, the minimum clear width of the accessible route shall be as shown in **Fig. 7(a)** and **(b)**.

4.3.4 Passing Space. If an accessible route has less than 60 in (1525 mm) clear width, then passing spaces at least 60 in by 60 in (1525 mm by 1525 mm) shall be located at reasonable intervals not to exceed 200 ft (61 m). A T-intersection of two corridors or walks is an acceptable passing place.

4.3.5 Head Room. Accessible routes shall comply with **4.4.2**.

4.3.6 Surface Textures. The surface of an accessible route shall comply with **4.5**.

4.3.7 Slope. An accessible route with a running slope greater than 1:20 is a ramp and shall comply with **4.8**. Nowhere shall the cross slope of an accessible route exceed 1:50.

4.3.8 Changes in Levels. Changes in levels along an accessible route shall comply with **4.5.2**. If an accessible route has changes in level greater than 1/2 in (13 mm), then a curb ramp, ramp, elevator, or platform lift (as permitted in **4.1.3** and **4.1.6**) shall be provided that complies with **4.7**, **4.8**, **4.10**, or **4.11**, respectively. An

accessible route does not include stairs, steps, or escalators. See definition of "egress, means of" in **3.5**.

4.3.9 Doors. Doors along an accessible route shall comply with **4.13**.

4.3.10* Egress. Accessible routes serving any accessible space or element shall also serve as a means of egress for emergencies or connect to an accessible area of rescue assistance. **Appendix Note**

4.3.11 Areas of Rescue Assistance.

4.3.11.1 Location and Construction. An area of rescue assistance shall be one of the following:

(1) A portion of a stairway landing within a smokeproof enclosure (complying with local requirements).

(2) A portion of an exterior exit balcony located immediately adjacent to an exit stairway when the balcony complies with local requirements for exterior exit balconies. Openings to the interior of the building located within 20 feet (6 m) of the area of rescue assistance shall be protected with fire assemblies having a three- fourths hour fire protection rating.

(3) A portion of a one-hour fire-resistive corridor (complying with local requirements for fire-resistive construction and for openings) located immediately adjacent to an exit enclosure.

(4) A vestibule located immediately adjacent to an exit enclosure and constructed to the same fire-resistive standards as required for corridors and openings.

(5) A portion of a stairway landing within an exit enclosure which is vented to the exterior and is separated from the interior of the building with not less than one-hour fire-resistive doors.

(6) When approved by the appropriate local authority, an area or a room which is separated from other portions of the building by a smoke barrier. Smoke barriers shall have a fire-resistive rating of not less than one hour and shall completely enclose the area or room. Doors in the smoke barrier shall be tight-fitting smoke- and draft-control assemblies having a fire-protection rating of not less than 20 minutes and shall be self-closing or automatic closing. The area or room shall be provided with an exit directly to an exit enclosure. Where the room or area exits into an exit enclosure which is required to be of more than one-hour fire- resistive construction, the room or area shall have the same fire- resistive construction, including the same opening protection, as required for the adjacent exit enclosure.

(7) An elevator lobby when elevator shafts and adjacent lobbies are pressurized as required for smokeproof enclosures by local regulations and when complying with requirements herein for size, communication, and signage. Such pressurization system shall be activated by smoke detectors on each floor located in a manner approved by the appropriate local authority. Pressurization equipment and its duct work within the building shall be separated from other portions of the building by a minimum two-hour fire- resistive construction.

4.3.11.2 Size. Each area of rescue assistance shall provide at least two accessible areas each being not less than 30 inches by 48 inches (760 mm by 1220 mm). The area of rescue assistance shall not encroach on any required exit width. The total number of such 30-inch by 48-inch (760 mm by 1220 mm) areas per story shall be not less than one for every 200 persons of calculated occupant load served by the area of rescue assistance.

EXCEPTION: The appropriate local authority may reduce the minimum number of 30-inch by 48-inch (760 mm by 1220 mm) areas to one for each area of rescue assistance on floors where the occupant load is less than 200.

4.3.11.3* Stairway Width. Each stairway adjacent to an area of rescue assistance shall have a minimum clear width of 48 inches between handrails. **Appendix Note**

4.3.11.4* Two-way Communication. A method of two-way communication, with both visible and

audible signals, shall be provided between each area of rescue assistance and the primary entry. The fire department or appropriate local authority may approve a location other than the primary entry. **Appendix Note**

4.3.11.5 Identification. Each area of rescue assistance shall be identified by a sign which states "AREA OF RESCUE ASSISTANCE" and displays the international symbol of accessibility. The sign shall be illuminated when exit sign illumination is required. Signage shall also be installed at all inaccessible exits and where otherwise necessary to clearly indicate the direction to areas of rescue assistance. In each area of rescue assistance, instructions on the use of the area under emergency conditions shall be posted adjoining the two-way communication system.

4.4 Protruding Objects.

4.4.1* General. Objects projecting from walls (for example, telephones) with their leading edges between 27 in and 80 in (685 mm and 2030 mm) above the finished floor shall protrude no more than 4 in (100 mm) into walks, halls, corridors, passageways, or aisles (see **Fig. 8(a)**). Objects mounted with their leading edges at or below 27 in (685 mm) above the finished floor may protrude any amount (see **Fig. 8(a)** and **(b)**). Free-standing objects mounted on posts or pylons may overhang 12 in (305 mm) maximum from 27 in to 80 in (685 mm to 2030 mm) above the ground or finished floor (see **Fig. 8(c)** and **(d)**). Protruding objects shall not reduce the clear width of an accessible route or maneuvering space (see **Fig. 8(e)**). **Appendix Note**

4.4.2 Head Room. Walks, halls, corridors, passageways, aisles, or other circulation spaces shall have 80 in (2030 mm) minimum clear head room (see **Fig. 8(a)**). If vertical clearance of an area adjoining an accessible route is reduced to less than 80 in (nominal dimension), a barrier to warn blind or visually-impaired persons shall be provided (see **Fig. 8(c-1)**).

4.5 Ground and Floor Surfaces.

4.5.1* General. Ground and floor surfaces along accessible routes and in accessible rooms and spaces including floors, walks, ramps, stairs, and curb ramps, shall be stable, firm, slip-resistant, and shall comply with 4.5. **Appendix Note**

4.5.2 Changes in Level. Changes in level up to 1/4 in (6 mm) may be vertical and without edge treatment (see **Fig. 7(c)**). Changes in level between 1/4 in and 1/2 in (6 mm and 13 mm) shall be beveled with a slope no greater than 1:2 (see **Fig. 7(d)**). Changes in level greater than 1/2 in (13 mm) shall be accomplished by means of a ramp that complies with **4.7** or **4.8**.

4.5.3* Carpet. If carpet or carpet tile is used on a ground or floor surface, then it shall be securely attached; have a firm cushion, pad, or backing, or no cushion or pad; and have a level loop, textured loop, level cut pile, or level cut/uncut pile texture. The maximum pile thickness shall be 1/2 in (13 mm) (see **Fig. 8(f)**). Exposed edges of carpet shall be fastened to floor surfaces and have trim along the entire length of the exposed edge. Carpet edge trim shall comply with **4.5.2**. **Appendix Note**

4.5.4 Gratings. If gratings are located in walking surfaces, then they shall have spaces no greater than 1/2 in (13 mm) wide in one direction (see **Fig. 8(g)**). If gratings have elongated openings, then they shall be placed so that the long dimension is perpendicular to the dominant direction of travel(see **Fig. 8(h)**).

4.6 Parking and Passenger Loading Zones.

4.6.1 Minimum Number. Parking spaces required to be accessible by **4.1** shall comply with 4.6.2 through 4.6.5. Passenger loading zones required to be accessible by **4.1** shall comply with **4.6.5** and **4.6.6**.

4.6.2 Location. Accessible parking spaces serving a particular building shall be located on the shortest accessible route of travel from adjacent parking to an accessible entrance. In parking facilities that do not serve a particular building, accessible parking shall be located on the shortest accessible route of travel to an accessible pedestrian entrance of the parking facility. In buildings with multiple accessible entrances with adjacent parking, accessible parking spaces shall be dispersed and located closest to the accessible entrances.

4.6.3* Parking Spaces. Accessible parking spaces shall be at least 96 in (2440 mm) wide. Parking access aisles shall be part of an accessible route to the building or facility entrance and shall comply with **4.3**. Two accessible parking spaces may share a common access aisle (see **Fig. 9**). Parked vehicle overhangs shall not reduce the clear width of an accessible route. Parking spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions. **Appendix Note**

4.6.4* Signage. Accessible parking spaces shall be designated as reserved by a sign showing the symbol of accessibility (see 4.30.7). Spaces complying with **4.1.2(5)(b)** shall have an additional sign "Van-Accessible" mounted below the symbol of accessibility. Such signs shall be located so they cannot be obscured by a vehicle parked in the space. **Appendix Note**

4.6.5* Vertical Clearance. Provide minimum vertical clearance of 114 in (2895 mm) at accessible passenger loading zones and along at least one vehicle access route to such areas from site entrance(s) and exit(s). At parking spaces complying with **4.1.2(5)(b)**, provide minimum vertical clearance of 98 in (2490 mm) at the parking space and along at least one vehicle access route to such spaces from site entrance(s) and exit(s). **Appendix Note**

4.6.6 Passenger Loading Zones. Passenger loading zones shall provide an access aisle at least 60 in (1525 mm) wide and 20 ft (240 in)(6100 mm) long adjacent and parallel to the vehicle pull-up space (see **Fig. 10**). If there are curbs between the access aisle and the vehicle pull-up space, then a curb ramp complying with **4.7** shall be provided. Vehicle standing spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions.

4.7 Curb Ramps.

4.7.1 Location. Curb ramps complying with 4.7 shall be provided wherever an accessible route crosses a curb.

4.7.2 Slope. Slopes of curb ramps shall comply with **4.8.2**. The slope shall be measured as shown in **Fig. 11**. Transitions from ramps to walks, gutters, or streets shall be flush and free of abrupt changes. Maximum slopes of adjoining gutters, road surface immediately adjacent to the curb ramp, or accessible route shall not exceed 1:20.

4.7.3 Width. The minimum width of a curb ramp shall be 36 in (915 mm), exclusive of flared sides.

4.7.4 Surface. Surfaces of curb ramps shall comply with **4.5**.

4.7.5 Sides of Curb Ramps. If a curb ramp is located where pedestrians must walk across the ramp, or where it is not protected by handrails or guardrails, it shall have flared sides; the maximum slope of the flare shall be 1:10 (see **Fig. 12(a)**). Curb ramps with returned curbs may be used where pedestrians would not normally walk across the ramp (see **Fig. 12(b)**).

4.7.6 Built-up Curb Ramps. Built-up curb ramps shall be located so that they do not project into vehicular traffic lanes (see **Fig. 13**).

4.7.7 Detectable Warnings. A curb ramp shall have a detectable warning complying with **4.29.2**. The detectable warning shall extend the full width and depth of the curb ramp.

4.7.8 Obstructions. Curb ramps shall be located or protected to prevent their obstruction by parked vehicles.

4.7.9 Location at Marked Crossings. Curb ramps at marked crossings shall be wholly contained within the markings, excluding any flared sides (see **Fig. 15**).

4.7.10 Diagonal Curb Ramps. If diagonal (or corner type) curb ramps have returned curbs or other well-defined edges, such edges shall be parallel to the direction of pedestrian flow. The bottom of diagonal curb ramps shall have 48 in (1220 mm) minimum clear space as shown in **Fig. 15(c)** and **(d)**. If diagonal curb ramps are provided at marked crossings, the 48 in (1220 mm) clear space shall be within the markings (see **Fig. 15(c)** and **(d)**). If diagonal curb ramps have flared sides, they shall also have at least a 24 in (610 mm) long segment of straight curb located on each side of the curb ramp and within the marked crossing (see **Fig. 15(c)**).

4.7.11 Islands. Any raised islands in crossings shall be cut through level with the street or have curb ramps at both sides and a level area at least 48 in (1220 mm) long between the curb ramps in the part of the island intersected by the crossings (see **Fig. 15(a)** and **(b)**).

4.8 Ramps.

4.8.1* General. Any part of an accessible route with a slope greater than 1:20 shall be considered a ramp and shall comply with 4.8. **Appendix Note**

4.8.2* Slope and Rise. The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be 1:12. The maximum rise for any run shall be 30 in (760 mm) (see **Fig. 16**). Curb ramps and

ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises as allowed in **4.1.6(3)(a)** if space limitations prohibit the use of a 1:12 slope or less. **Appendix Note**

4.8.3 Clear Width. The minimum clear width of a ramp shall be 36 in (915 mm).

4.8.4* Landings. Ramps shall have level landings at bottom and top of each ramp and each ramp run. Landings shall have the following features:

(1) The landing shall be at least as wide as the ramp run leading to it.

(2) The landing length shall be a minimum of 60 in (1525 mm) clear.

(3) If ramps change direction at landings, the minimum landing size shall be 60 in by 60 in (1525 mm by 1525 mm).

(4) If a doorway is located at a landing, then the area in front of the doorway shall comply with **4.13.6**. **Appendix Note**

4.8.5* Handrails. If a ramp run has a rise greater than 6 in (150 mm) or a horizontal projection greater than 72 in (1830 mm), then it shall have handrails on both sides. Handrails are not required on curb ramps or adjacent to seating in assembly areas. Handrails shall comply with **4.26** and shall have the following features:

(1) Handrails shall be provided along both sides of ramp segments. The inside handrail on switchback or dogleg ramps shall always be continuous.

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top and bottom of the ramp segment and shall be parallel with the floor or ground surface (see **Fig. 17)**.

(3) The clear space between the handrail and the wall shall be 1 - 1/2 in (38 mm).

(4) Gripping surfaces shall be continuous.

(5) Top of handrail gripping surfaces shall be mounted between 34 in and 38 in (865 mm and 965 mm) above ramp surfaces.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall, or post.

(7) Handrails shall not rotate within their fittings. **Appendix Note**

4.8.6 Cross Slope and Surfaces. The cross slope of ramp surfaces shall be no greater than 1:50. Ramp surfaces shall comply with **4.5**.

4.8.7 Edge Protection. Ramps and landings with drop-offs shall have curbs, walls, railings, or projecting surfaces that prevent people from slipping off the ramp. Curbs shall be a minimum of 2 in (50 mm) high (see **Fig. 17)**.

4.8.8 Outdoor Conditions. Outdoor ramps and their approaches shall be designed so that water will not accumulate on walking surfaces.

4.9 Stairs.

4.9.1* Minimum Number. Stairs required to be accessible by **4.1** shall comply with 4.9. **Appendix Note**

4.9.2 Treads and Risers. On any given flight of stairs, all steps shall have uniform riser heights and uniform tread widths. Stair treads shall be no less than 11 in (280 mm) wide, measured from riser to riser (see **Fig. 18(a)**). Open risers are not permitted.

4.9.3 Nosings. The undersides of nosings shall not be abrupt. The radius of curvature at the leading edge of the tread shall be no greater than 1/2 in (13 mm). Risers shall be sloped or the underside of the nosing shall have an angle not less than 60 degrees from the horizontal. Nosings shall project no more than 1-1/2 in (38 mm) (see **Fig. 18**).

4.9.4* Handrails. Stairways shall have handrails at both sides of all stairs. Handrails shall comply with **4.26** and shall have the following features:

(1) Handrails shall be continuous along both sides of stairs. The inside handrail on switchback or dogleg stairs shall always be continuous (see **Fig. 19(a)** and **(b)**).

(2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top riser and at least 12 in (305 mm) plus the width of one tread beyond the bottom riser. At the top, the extension shall be parallel with the floor or ground surface. At the bottom, the handrail shall continue to slope for a distance of the width of one tread from the bottom riser; the remainder of the extension shall be horizontal (see **Fig. 19(c)** and **(d)**). Handrail extensions shall comply with **4.4**.

(3) The clear space between handrails and wall shall be 1-1/2 in (38 mm).

(4) Gripping surfaces shall be uninterrupted by newel posts, other construction elements, or obstructions.

(5) Top of handrail gripping surface shall be mounted between 34 in and 38 in (865 mm and 965 mm) above stair nosings.

(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall or post.

(7) Handrails shall not rotate within their fittings. **Appendix Note**

4.9.5 Detectable Warnings at Stairs. (Reserved).

4.9.6 Outdoor Conditions. Outdoor stairs and their approaches shall be designed so that water will not accumulate on walking surfaces.

4.10 Elevators.

4.10.1 General. Accessible elevators shall be on an accessible route and shall comply with 4.10 and with the **ASME A17.1-1990, Safety Code for Elevators and Escalators**. Freight elevators shall not be considered as meeting the requirements of this section unless the only elevators provided are used as combination passenger and freight elevators for the public and employees.

4.10.2 Automatic Operation. Elevator operation shall be automatic. Each car shall be equipped with a self-leveling feature that will automatically bring the car to floor landings within a tolerance of 1/2 in (13 mm) under rated loading to zero loading conditions. This self-leveling feature shall be automatic and independent of the operating device and shall correct the overtravel or undertravel.

4.10.3 Hall Call Buttons. Call buttons in elevator lobbies and halls shall be centered at 42 in (1065 mm) above the floor. Such call buttons shall have visual signals to indicate when each call is registered and when each call is answered. Call buttons shall be a minimum of 3/4 in (19 mm) in the smallest dimension. The button designating the up direction shall be on top. (See **Fig. 20**.) Buttons shall be raised or flush. Objects mounted beneath hall call buttons shall not project into the elevator lobby more than 4 in (100 mm).

4.10.4 Hall Lanterns. A visible and audible signal shall be provided at each hoistway entrance to indicate which car is answering a call. Audible signals shall sound once for the up direction and twice for the down direction or shall have verbal annunciators that say "up" or "down." Visible signals shall have the following features:

(1) Hall lantern fixtures shall be mounted so that their centerline is at least 72 in (1830 mm) above the lobby floor. (See **Fig. 20**.)

(2) Visual elements shall be at least 2-1/2 in (64 mm) in the smallest dimension.

(3) Signals shall be visible from the vicinity of the hall call button (see **Fig. 20**). In-car lanterns located in cars, visible from the vicinity of hall call buttons, and conforming to the above requirements, shall be acceptable.

4.10.5 Raised and Braille Characters on Hoistway Entrances. All elevator hoistway entrances shall have raised and Braille floor designations provided on both jambs. The centerline of the characters shall be 60 in (1525 mm)

above finish floor. Such characters shall be 2 in (50 mm) high and shall comply with **4.30.4**. Permanently applied plates are acceptable if they are permanently fixed to the jambs. (See **Fig. 20**).

4.10.6* Door Protective and Reopening Device. Elevator doors shall open and close automatically. They shall be provided with a reopening device that will stop and reopen a car door and hoistway door automatically if the door becomes obstructed by an object or person. The device shall be capable of completing these operations without requiring contact for an obstruction passing through the opening at heights of 5 in and 29 in (125 mm and 735 mm) above finish floor (see **Fig. 20**). Door reopening devices shall remain effective for at least 20 seconds. After such an interval, doors may close in accordance with the requirements of **ASME A17.1-1990**. **Appendix Note**

4.10.7* Door and Signal Timing for Hall Calls. The minimum acceptable time from notification that a car is answering a call until the doors of that car start to close shall be calculated from the following equation:

$$T = D/(1.5\ ft/s) \text{ or } T = D/(445\ mm/s)$$

where T total time in seconds and D distance (in feet or millimeters) from a point in the lobby or corridor 60 in (1525 mm) directly in front of the farthest call button controlling that car to the centerline of its hoistway door (see **Fig. 21**). For cars with in-car lanterns, T begins when the lantern is visible from the vicinity of hall call buttons and an audible signal is sounded. The minimum acceptable notification time shall be 5 seconds. **Appendix Note**

4.10.8 Door Delay for Car Calls. The minimum time for elevator doors to remain fully open in response to a car call shall be 3 seconds.

4.10.9 Floor Plan of Elevator Cars. The floor area of elevator cars shall provide space for wheelchair users to enter the car, maneuver within reach of controls, and exit from the car. Acceptable door opening and inside dimensions shall be as shown in **Fig. 22**. The clearance between the car platform sill and the edge of any hoistway landing shall be no greater than 1-1/4 in (32 mm).

4.10.10 Floor Surfaces. Floor surfaces shall comply with **4.5**.

4.10.11 Illumination Levels. The level of illumination at the car controls, platform, and car threshold and landing sill shall be at least 5 footcandles (53.8 lux).

4.10.12* Car Controls. Elevator control panels shall have the following features:

(1) Buttons. All control buttons shall be at least 3/4 in (19 mm) in their smallest dimension. They shall be raised or flush.

(2) Tactile, Braille, and Visual Control Indicators. All control buttons shall be designated by Braille and by raised standard alphabet characters for letters, arabic characters for numerals, or standard symbols as shown in **Fig. 23(a)**, and as required in **ASME A17.1-1990**. Raised and Braille characters and symbols shall comply with **4.30**. The call button for the main entry floor shall be designated by a raised star at the left of the floor designation (see **Fig. 23(a)**). All raised designations for control buttons shall be placed immediately to the left of the button to which they apply. Applied plates, permanently attached, are an acceptable means to provide raised control designations. Floor buttons shall be provided with visual indicators to show when each call is registered. The visual indicators shall be extinguished when each call is answered.

(3) Height. All floor buttons shall be no higher than 54 in (1370 mm) above the finish floor for side approach and 48 in (1220 mm) for front approach. Emergency controls, including the emergency alarm and emergency stop, shall be grouped at the bottom of the panel and shall have their centerlines no less than 35 in (890 mm) above the finish floor (see **Fig. 23(a)** and **(b)**).

(4) Location. Controls shall be located on a front wall if cars have center opening doors, and at the side wall or at the front wall next to the door if cars have side opening doors (see **Fig. 23(c)** and **(d)**). **Appendix Note**

4.10.13* Car Position Indicators. In elevator cars, a visual car position indicator shall be provided above the car control panel or over the door to show the position of the elevator in the hoistway. As the car passes or stops at a floor served by the elevators, the corresponding numerals shall illuminate, and an audible signal shall sound. Numerals shall be a minimum of 1/2 in (13 mm) high. The audible signal shall be no less than 20 decibels with a frequency no higher than 1500 Hz. An automatic verbal announcement of the floor number at which a car stops or

which a car passes may be substituted for the audible signal. **Appendix Note**

4.10.14* Emergency Communications. If provided, emergency two-way communication systems between the elevator and a point outside the hoistway shall comply with **ASME A17.1-1990**. The highest operable part of a two-way communication system shall be a maximum of 48 in (1220 mm) from the floor of the car. It shall be identified by a raised symbol and lettering complying with **4.30** and located adjacent to the device. If the system uses a handset then the length of the cord from the panel to the handset shall be at least 29 in (735 mm). If the system is located in a closed compartment the compartment door hardware shall conform to **4.27**, Controls and Operating Mechanisms. The emergency intercommunication system shall not require voice communication. **Appendix Note**

4.11 Platform Lifts (Wheelchair Lifts).

4.11.1 Location. Platform lifts (wheelchair lifts) permitted by 4.1 shall comply with the requirements of 4.11.

4.11.2* Other Requirements. If platform lifts (wheelchair lifts) are used, they shall comply with **4.2.4**, **4.5**, **4.27**, and **ASME A17.1 Safety Code for Elevators and Escalators, Section XX, 1990**. **Appendix Note**

4.11.3 Entrance. If platform lifts are used then they shall facilitate unassisted entry, operation, and exit from the lift in compliance with **4.11.2**.

4.12 Windows.

4.12.1* General. (Reserved). **Appendix Note**

4.12.2* Window Hardware. (Reserved). **Appendix Note**

4.13 Doors.

4.13.1 General. Doors required to be accessible by **4.1** shall comply with the requirements of 4.13.

4.13.2 Revolving Doors and Turnstiles. Revolving doors or turnstiles shall not be the only means of passage at an accessible entrance or along an accessible route. An accessible gate or door shall be provided adjacent to the turnstile or revolving door and shall be so designed as to facilitate the same use pattern.

4.13.3 Gates. Gates, including ticket gates, shall meet all applicable specifications of 4.13.

4.13.4 Double-Leaf Doorways. If doorways have two independently operated door leaves, then at least one leaf shall meet the specifications in **4.13.5** and **4.13.6**. That leaf shall be an active leaf.

4.13.5 Clear Width. Doorways shall have a minimum clear opening of 32 in (815 mm) with the door open 90 degrees, measured between the face of the door and the opposite stop (see **Fig. 24(a)**, **(b)**, **(c)**, and **(d)**). Openings more than 24 in (610 mm) in depth shall comply with **4.2.1** and **4.3.3** (see **Fig. 24(e)**).

> EXCEPTION: Doors not requiring full user passage, such as shallow closets, may have the clear opening reduced to 20 in (510 mm) minimum.

4.13.6 Maneuvering Clearances at Doors. Minimum maneuvering clearances at doors that are not automatic or power-assisted shall be as shown in **Fig. 25**. The floor or ground area within the required clearances shall be level and clear.

> EXCEPTION: Entry doors to acute care hospital bedrooms for in-patients shall be exempted from the requirement for space at the latch side of the door (see dimension "x" in **Fig. 25**) if the door is at least 44 in (1120 mm) wide.

4.13.7 Two Doors in Series. The minimum space between two hinged or pivoted doors in series shall be 48 in (1220 mm) plus the width of any door swinging into the space. Doors in series shall swing either in the same direction or away from the space between the doors (see **Fig. 26**).

4.13.8* Thresholds at Doorways. Thresholds at doorways shall not exceed 3/4 in (19 mm) in height for exterior sliding doors or 1/2 in (13 mm) for other types of doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2 (see **4.5.2**). **Appendix Note**

4.13.9* Door Hardware. Handles, pulls, latches, locks, and other operating devices on accessible doors shall have a shape that is easy to grasp with one hand and does not require tight grasping, tight pinching, or twisting of the wrist to operate. Lever-operated mechanisms, push-type mechanisms, and U-shaped handles are acceptable designs. When sliding doors are fully open, operating hardware shall be exposed and usable from both sides. Hardware required for accessible door passage shall be mounted no higher than 48 in (1220 mm) above finished floor. **Appendix Note**

4.13.10* Door Closers. If a door has a closer, then the sweep period of the closer shall be adjusted so that from an open position of 70 degrees, the door will take at least 3 seconds to move to a point 3 in (75 mm) from the latch, measured to the leading edge of the door. **Appendix Note**

4.13.11* Door Opening Force. The maximum force for pushing or pulling open a door shall be as follows:

(1) Fire doors shall have the minimum opening force allowable by the appropriate administrative authority.

(2) Other doors.

(a) exterior hinged doors: (Reserved).
(b) interior hinged doors: 5 lbf (22.2N)
(c) sliding or folding doors: 5 lbf (22.2N)

These forces do not apply to the force required to retract latch bolts or disengage other devices that may hold the door in a closed position. **Appendix Note**

4.13.12* Automatic Doors and Power-Assisted Doors. If an automatic door is used, then it shall comply with **ANSI/BHMA A156.10-1985**. Slowly opening, low-powered, automatic doors shall comply with **ANSI A156.19-1984**. Such doors shall not open to back check faster than 3 seconds and shall require no more than 15 lbf (66.6N) to stop door movement. If a power-assisted door is used, its door-opening force shall comply with **4.13.11** and its closing shall conform to the requirements in **ANSI A156.19-1984**. **Appendix Note**

4.14 Entrances.

4.14.1 Minimum Number. Entrances required to be accessible by **4.1** shall be part of an accessible route complying with **4.3**. Such entrances shall be connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, and to public streets or sidewalks if available (see **4.3.2(1)**). They shall also be connected by an accessible route to all accessible spaces or elements within the building or facility.

4.14.2 Service Entrances. A service entrance shall not be the sole accessible entrance unless it is the only entrance to a building or facility (for example, in a factory or garage).

4.15 Drinking Fountains and Water Coolers.

4.15.1Minimum Number. Drinking fountains or water coolers required to be accessible by **4.1** shall comply with 4.15.

4.15.2* Spout Height. Spouts shall be no higher than 36 in (915 mm), measured from the floor or ground surfaces to the spout outlet (see **Fig. 27(a)**). **Appendix Note**

4.15.3 Spout Location. The spouts of drinking fountains and water coolers shall be at the front of the unit and shall direct the water flow in a trajectory that is parallel or nearly parallel to the front of the unit. The spout shall provide a flow of water at least 4 in (100 mm) high so as to allow the insertion of a cup or glass under the flow of water. On an accessible drinking fountain with a round or oval bowl, the spout must be positioned so the flow of water is within 3 in (75 mm) of the front edge of the fountain.

4.15.4 Controls. Controls shall comply with **4.27.4**. Unit controls shall be front mounted or side mounted near the front edge.

4.15.5 Clearances.

(1) Wall- and post-mounted cantilevered units shall have a clear knee space between the bottom of the apron and the floor or ground at least 27 in (685 mm) high, 30 in (760 mm) wide, and 17 in to 19 in

(430 mm to 485 mm) deep (see **Fig. 27(a)** and **(b)**). Such units shall also have a minimum clear floor space 30 in by 48 in (760 mm by 1220 mm) to allow a person in a wheelchair to approach the unit facing forward.

EXCEPTION: These clearances shall not be required at units used primarily by children ages 12 and younger where clear floor space for a parallel approach complying with **4.2.4** is provided and where the spout is no higher than 30 in (760 mm), measured from the floor or ground surface to the spout outlet.

(2) Free-standing or built-in units not having a clear space under them shall have a clear floor space at least 30 in by 48 in (760 mm by 1220 mm) that allows a person in a wheelchair to make a parallel approach to the unit (see **Fig. 27(c)** and **(d)**). This clear floor space shall comply with **4.2.4**.

4.16 Water Closets.

4.16.1 General. Accessible water closets shall comply with 4.16.2 through 4.16.6.

EXCEPTION: Water closets used primarily by children ages 12 and younger shall be permitted to comply with **4.16.7**.

4.16.2 Clear Floor Space. Clear floor space for water closets not in stalls shall comply with **Fig. 28**. Clear floor space may be arranged to allow either a left-handed or right-handed approach.

4.16.3* Height. The height of water closets shall be 17 in to 19 in (430 mm to 485 mm), measured to the top of the toilet seat (see **Fig. 29(b)**). Seats shall not be sprung to return to a lifted position. **Appendix Note**

4.16.4* Grab Bars. Grab bars for water closets not located in stalls shall comply with **4.26** and **Fig. 29**. The grab bar behind the water closet shall be 36 in (915 mm) minimum. **Appendix Note**

4.16.5* Flush Controls. Flush controls shall be hand operated or automatic and shall comply with **4.27.4**. Controls for flush valves shall be mounted on the wide side of toilet areas no more than 44 in (1120 mm) above the floor. **Appendix Note**

4.16.6 Dispensers. Toilet paper dispensers shall be installed within reach, as shown in **Fig. 29(b)**. Dispensers that control delivery, or that do not permit continuous paper flow, shall not be used.

4.16.7* Water Closets for Children. Water closets used primarily by children ages 12 and younger shall comply with 4.16.7 as permitted by 4.16.1. **Appendix Note**

(1) Clear Floor Space. Clear floor space for water closets not in stalls shall comply with **Fig. 28** except that the centerline of water closets shall be 12 in minimum to 18 in maximum (305 mm to 455 mm) from the side wall or partition. Clear floor space may be arranged to allow either a left- or right-hand approach.

(2) Height. The height of water closets shall be 11 in minimum to 17 in maximum (280 mm to 430 mm), measured to the top of the toilet seat. Seats shall not be sprung to return to a lifted position.

(3) Grab Bars. Grab bars for water closets not located in stalls shall comply with **4.26** and **Fig. 29** except that grab bars shall be mounted 18 in minimum to 27 in maximum (455 mm to 685 mm) above the finish floor measured to the grab bar centerline. The grab bar behind the water closet shall be 36 in (915 mm) minimum.

EXCEPTION: If administrative authorities require flush controls for flush valves to be located in a position that conflicts with the location of the rear grab bar, then that grab bar may be split or, at water closets with a centerline placement below 15 in (380 mm), a rear grab bar 24 in (610 mm) minimum on the open side of the toilet area shall be permitted.

(4) Flush Controls. Flush controls shall be hand operated or automatic and shall comply with **4.27.4**. Controls for flush valves shall be mounted on the wide side of the toilet area no more than 36 in (915 mm) above the floor.

(5) Dispensers. Toilet paper dispensers shall be installed 14 in minimum to 19 in maximum (355 mm to 485 mm) above the finish floor measured to the dispenser centerline. Dispensers that control delivery,

or that do not permit continuous paper flow, shall not be used.

4.17 Toilet Stalls.

4.17.1 Location. Accessible toilet stalls shall be on an accessible route and shall meet the requirements of 4.17.2 through 4.17.6.

EXCEPTION: Toilet stalls used primarily by children ages 12 and younger shall be permitted to comply with **4.17.7**.

4.17.2 Water Closets. Water closets in accessible stalls shall comply with **4.16**.

4.17.3* Size and Arrangement. The size and arrangement of the standard toilet stall shall comply with **Fig. 30 (a)**, Standard Stall. Standard toilet stalls with a minimum depth of 56 in (1420 mm) (see **Fig. 30(a)**) shall have wall-mounted water closets. If the depth of a standard toilet stall is increased at least 3 in (75 mm), then a floor-mounted water closet may be used. Arrangements shown for standard toilet stalls may be reversed to allow either a left- or right-hand approach. Additional stalls shall be provided in conformance with **4.22.4**. **Appendix Note**

EXCEPTION: In instances of alteration work where provision of a standard stall (**Fig. 30(a)**) is technically infeasible or where plumbing code requirements prevent combining existing stalls to provide space, either alternate stall (**Fig. 30(b)**) may be provided in lieu of the standard stall.

4.17.4 Toe Clearances. In standard stalls, the front partition and at least one side partition shall provide a toe clearance of at least 9 in (230 mm) above the floor. If the depth of the stall is greater than 60 in (1525 mm), then the toe clearance is not required.

4.17.5* Doors. Toilet stall doors, including door hardware, shall comply with **4.13**. If toilet stall approach is from the latch side of the stall door, clearance between the door side of the stall and any obstruction may be reduced to a minimum of 42 in (1065 mm) **(Fig. 30)**. **Appendix Note**

4.17.6 Grab Bars. Grab bars complying with the length and positioning shown in **Fig. 30(a)**, **(b)**, **(c)**, and **(d)** shall be provided. Grab bars may be mounted with any desired method as long as they have a gripping surface at the locations shown and do not obstruct the required clear floor area. Grab bars shall comply with **4.26**.

4.17.7* Toilet Stalls for Children. Toilet stalls used primarily by children ages 12 and younger shall comply with 4.17.7 as permitted by 4.17.1. **Appendix Note**

(1) Water Closets. Water closets in accessible stalls shall comply with **4.16.7**.

(2) Size and Arrangement. The size and arrangement of the standard toilet stall shall comply with **4.17.3** and **Fig. 30(a)**, Standard Stall, except that the centerline of water closets shall be 12 in minimum to 18 in maximum (305 mm to 455 mm) from the side wall or partition and the minimum depth for stalls with wall-mounted water closets shall be 59 in (1500 mm). Alternate stalls complying with **Fig. 30(b)** may be provided where permitted by **4.17.3** except that the stall shall have a minimum depth of 69 in (1745 mm) where wall-mounted water closets are provided.

(3) Toe Clearances. In standard stalls, the front partition and at least one side partition shall provide a toe clearance of at least 12 in (305 mm) above the finish floor.

(4) Doors. Toilet stall doors shall comply with **4.17.5**.

(5) Grab Bars. Grab bars shall comply with **4.17.6** and the length and positioning shown in **Fig. 30(a)**, **(b)**, **(c)**, and **(d)** except that grab bars shall be mounted 18 in minimum to 27 in maximum (455 mm to 685 mm) above the finish floor measured to the grab bar centerline.

EXCEPTION: If administrative authorities require flush controls for flush valves to be located in a position that conflicts with the location of the rear grab bar, then that grab bar may be split or, at water closets with a centerline placement below 15 in (380 mm), a rear grab bar 24 in (610 mm) minimum on the open side of the toilet area shall be permitted.

4.18 Urinals.

4.18.1 General. Accessible urinals shall comply with 4.18.

4.18.2 Height. Urinals shall be stall-type or wall-hung with an elongated rim at a maximum of 17 in (430 mm) above the finish floor.

4.18.3 Clear Floor Space. A clear floor space 30 in by 48 in (760 mm by 1220 mm) shall be provided in front of urinals to allow forward approach. This clear space shall adjoin or overlap an accessible route and shall comply with 4.2.4. Urinal shields that do not extend beyond the front edge of the urinal rim may be provided with 29 in (735 mm) clearance between them.

4.18.4 Flush Controls. Flush controls shall be hand operated or automatic, and shall comply with 4.27.4, and shall be mounted no more than 44 in (1120 mm) above the finish floor.

4.19 Lavatories and Mirrors.

4.19.1 General. The requirements of 4.19 shall apply to lavatory fixtures, vanities, and built-in lavatories.

4.19.2 Height and Clearances. Lavatories shall be mounted with the rim or counter surface no higher than 34 in (865 mm) above the finish floor. Provide a clearance of at least 29 in (735 mm) above the finish floor to the bottom of the apron. Knee and toe clearance shall comply with Fig. 31.

> EXCEPTION 1: Lavatories used primarily by children ages 6 through 12 shall be permitted to have an apron clearance and a knee clearance 24 in (610 mm) high minimum provided that the rim or counter surface is no higher than 31 in (760 mm).
>
> EXCEPTION 2: Lavatories used primarily by children ages 5 and younger shall not be required to meet these clearances if clear floor space for a parallel approach complying with 4.2.4 is provided.

4.19.3 Clear Floor Space. A clear floor space 30 in by 48 in (760 mm by 1220 mm) complying with 4.2.4 shall be provided in front of a lavatory to allow forward approach. Such clear floor space shall adjoin or overlap an accessible route and shall extend a maximum of 19 in (485 mm) underneath the lavatory (see Fig. 32).

4.19.4 Exposed Pipes and Surfaces. Hot water and drain pipes under lavatories shall be insulated or otherwise configured to protect against contact. There shall be no sharp or abrasive surfaces under lavatories.

4.19.5 Faucets. Faucets shall comply with 4.27.4. Lever-operated, push-type, and electronically controlled mechanisms are examples of acceptable designs. If self-closing valves are used the faucet shall remain open for at least 10 seconds.

4.19.6* Mirrors. Mirrors shall be mounted with the bottom edge of the reflecting surface no higher than 40 in (1015 mm) above the finish floor (see Fig. 31). Appendix Note

4.20 Bathtubs.

4.20.1 General. Accessible bathtubs shall comply with 4.20.

4.20.2 Floor Space. Clear floor space in front of bathtubs shall be as shown in Fig. 33.

4.20.3 Seat. An in-tub seat or a seat at the head end of the tub shall be provided as shown in Fig. 33 and 34. The structural strength of seats and their attachments shall comply with 4.26.3. Seats shall be mounted securely and shall not slip during use.

4.20.4 Grab Bars. Grab bars complying with 4.26 shall be provided as shown in Fig. 33 and 34.

4.20.5 Controls. Faucets and other controls complying with 4.27.4 shall be located as shown in Fig. 34.

4.20.6 Shower Unit. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used both as a fixed shower head and as a hand-held shower shall be provided.

4.20.7 Bathtub Enclosures. If provided, enclosures for bathtubs shall not obstruct controls or transfer from wheelchairs onto bathtub seats or into tubs. Enclosures on bathtubs shall not have tracks mounted on their rims.

4.21 Shower Stalls.

4.21.1* General. Accessible shower stalls shall comply with 4.21. **Appendix Note**

4.21.2 Size and Clearances. Except as specified in **9.1.2**, shower stall size and clear floor space shall comply with **Fig. 35(a)** or **(b)**. The shower stall in **Fig. 35(a)** shall be 36 in by 36 in (915 mm by 915 mm). Shower stalls required by **9.1.2** shall comply with **Fig. 57(a)** or **(b)**. The shower stall in Fig. 35(b) will fit into the space required for a bathtub.

4.21.3 Seat. A seat shall be provided in shower stalls 36 in by 36 in (915 mm by 915 mm) and shall be as shown in **Fig. 36**. The seat shall be mounted 17 in to 19 in (430 mm to 485 mm) from the bathroom floor and shall extend the full depth of the stall. In a 36 in by 36 in (915 mm by 915 mm) shower stall, the seat shall be on the wall opposite the controls. Where a fixed seat is provided in a 30 in by 60 in minimum (760 mm by 1525 mm) shower stall, it shall be a folding type and shall be mounted on the wall adjacent to the controls as shown in **Fig. 57.** The structural strength of seats and their attachments shall comply with **4.26.3**.

4.21.4 Grab Bars. Grab bars complying with **4.26** shall be provided as shown in **Fig. 37**.

4.21.5 Controls. Faucets and other controls complying with **4.27.4** shall be located as shown in **Fig. 37**. In shower stalls 36 in by 36 in (915 mm by 915 mm), all controls, faucets, and the shower unit shall be mounted on the side wall opposite the seat.

4.21.6 Shower Unit. A shower spray unit with a hose at least 60 in (1525 mm) long that can be used both as a fixed shower head and as a hand-held shower shall be provided.

> EXCEPTION: In unmonitored facilities where vandalism is a consideration, a fixed shower head mounted at 48 in (1220 mm) above the shower floor may be used in lieu of a hand-held shower head.

4.21.7 Curbs. If provided, curbs in shower stalls 36 in by 36 in (915 mm by 915 mm) shall be no higher than 1/2 in (13 mm). Shower stalls that are 30 in by 60 in (760 mm by 1525 mm) minimum shall not have curbs.

4.21.8 Shower Enclosures. If provided, enclosures for shower stalls shall not obstruct controls or obstruct transfer from wheelchairs onto shower seats.

4.22 Toilet Rooms.

4.22.1 Minimum Number. Toilet facilities required to be accessible by 4.1 shall comply with 4.22. Accessible toilet rooms shall be on an accessible route.

4.22.2 Doors. All doors to accessible toilet rooms shall comply with **4.13**. Doors shall not swing into the clear floor space required for any fixture.

4.22.3* Clear Floor Space. The accessible fixtures and controls required in **4.22.4**, **4.22.5**, **4.22.6**, and **4.22.7** shall be on an accessible route. An unobstructed turning space complying with **4.2.3** shall be provided within an accessible toilet room. The clear floor space at fixtures and controls, the accessible route, and the turning space may overlap. **Appendix Note**

4.22.4 Water Closets. If toilet stalls are provided, then at least one shall be a standard toilet stall complying with **4.17**; where 6 or more stalls are provided, in addition to the stall complying with **4.17.3**, at least one stall 36 in (915 mm) wide with an outward swinging, self-closing door and parallel grab bars complying with **Fig. 30(d)** and **4.26** shall be provided. Water closets in such stalls shall comply with **4.16**. If water closets are not in stalls, then at least one shall comply with **4.16**.

4.22.5 Urinals. If urinals are provided, then at least one shall comply with **4.18**.

4.22.6 Lavatories and Mirrors. If lavatories and mirrors are provided, then at least one of each shall comply with **4.19**.

4.22.7 Controls and Dispensers. If controls, dispensers, receptacles, or other equipment are provided, then at least one of each shall be on an accessible route and shall comply with **4.27**.

4.23 Bathrooms, Bathing Facilities, and Shower Rooms.

4.23.1 Minimum Number. Bathrooms, bathing facilities, or shower rooms required to be accessible by 4.1 shall

comply with 4.23 and shall be on an accessible route.

4.23.2 Doors. Doors to accessible bathrooms shall comply with **4.13**. Doors shall not swing into the floor space required for any fixture.

4.23.3* Clear Floor Space. The accessible fixtures and controls required in **4.23.4**, **4.23.5**, **4.23.6**, **4.23.7**, **4.23.8**, and **4.23.9** shall be on an accessible route. An unobstructed turning space complying with **4.2.3** shall be provided within an accessible bathroom. The clear floor spaces at fixtures and controls, the accessible route, and the turning space may overlap. **Appendix Note**

4.23.4 Water Closets. If toilet stalls are provided, then at least one shall be a standard toilet stall complying with **4.17**; where 6 or more stalls are provided, in addition to the stall complying with **4.17.3**, at least one stall 36 in (915 mm) wide with an outward swinging, self-closing door and parallel grab bars complying with **Fig. 30(d)** and 4.26 shall be provided. Water closets in such stalls shall comply with **4.16**. If water closets are not in stalls, then at least one shall comply with **4.16**.

4.23.5 Urinals. If urinals are provided, then at least one shall comply with **4.18**.

4.23.6 Lavatories and Mirrors. If lavatories and mirrors are provided, then at least one of each shall comply with **4.19**.

4.23.7 Controls and Dispensers. If controls, dispensers, receptacles, or other equipment are provided, then at least one of each shall be on an accessible route and shall comply with **4.27**.

4.23.8 Bathing and Shower Facilities. If tubs or showers are provided, then at least one accessible tub that complies with **4.20** or at least one accessible shower that complies with **4.21** shall be provided.

4.23.9* Medicine Cabinets. If medicine cabinets are provided, at least one shall be located with a usable shelf no higher than 44 in (1120 mm) above the floor space. The floor space shall comply with **4.2.4**. **Appendix Note**

4.24 Sinks.

4.24.1 General. Sinks required to be accessible by 4.1 shall comply with 4.24.

4.24.2 Height. Sinks shall be mounted with the counter or rim no higher than 34 in (865 mm) above the finish floor.

4.24.3 Knee Clearance. Knee clearance that is at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep shall be provided underneath sinks.

EXCEPTION 1: Sinks used primarily by children ages 6 through 12 shall be permitted to have a knee clearance 24 in (610 mm) high minimum provided that the rim or counter surface is no higher than 31 in (760 mm).

EXCEPTION 2: Sinks used primarily by children ages 5 and younger shall not be required to provide knee clearance if clear floor space for a parallel approach complying with **4.2.4** is provided

4.24.4 Depth. Each sink shall be a maximum of 6-1/2 in (165 mm) deep.

4.24.5 Clear Floor Space. A clear floor space at least 30 in by 48 in (760 mm by 1220 mm) complying with 4.2.4 shall be provided in front of a sink to allow forward approach. The clear floor space shall be on an accessible route and shall extend a maximum of 19 in (485 mm) underneath the sink (see **Fig. 32**).

4.24.6 Exposed Pipes and Surfaces. Hot water and drain pipes exposed under sinks shall be insulated or otherwise configured so as to protect against contact. There shall be no sharp or abrasive surfaces under sinks.

4.24.7 Faucets. Faucets shall comply with 4.27.4. Lever-operated, push-type, touch-type, or electronically controlled mechanisms are acceptable designs.

4.25 Storage.

4.25.1 General. Fixed storage facilities such as cabinets, shelves, closets, and drawers required to be accessible by **4.1** shall comply with 4.25.

4.25.2 Clear Floor Space. A clear floor space at least 30 in by 48 in (760 mm by 1220 mm) complying with **4.2.4** that allows either a forward or parallel approach by a person using a wheelchair shall be provided at accessible storage facilities.

4.25.3* Height. Accessible storage spaces shall be within at least one of the reach ranges specified in **4.2.5** and **4.2.6** (see **Fig. 5** and **Fig. 6**). Clothes rods or shelves shall be a maximum of 54 in (1370 mm) above the finish floor for a side approach. Where the distance from the wheelchair to the clothes rod or shelf exceeds 10 in (255 mm) (as in closets without accessible doors) the height and depth to the rod or shelf shall comply with **Fig. 38(a)** and **Fig. 38(b)**. **Appendix Note**

4.25.4 Hardware. Hardware for accessible storage facilities shall comply with **4.27.4**. Touch latches and U-shaped pulls are acceptable.

4.26 Handrails, Grab Bars, and Tub and Shower Seats.

4.26.1* General. All handrails, grab bars, and tub and shower seats required to be accessible by **4.1**, **4.8**, **4.9**, **4.16**, **4.17**, **4.20** or **4.21** shall comply with 4.26. **Appendix Note**

4.26.2* Size and Spacing of Grab Bars and Handrails. The diameter or width of the gripping surfaces of a handrail or grab bar shall be 1-1/4 in to 1-1/2 in (32 mm to 38 mm), or the shape shall provide an equivalent gripping surface. If handrails or grab bars are mounted adjacent to a wall, the space between the wall and the grab bar shall be 1-1/2 in (38 mm) (see **Fig. 39(a)**, **(b)**, **(c)**, and **(e)**). Handrails may be located in a recess if the recess is a maximum of 3 in (75 mm) deep and extends at least 18 in (455 mm) above the top of the rail (see **Fig. 39(d)**). **Appendix Note**

4.26.3 Structural Strength. The structural strength of grab bars, tub and shower seats, fasteners, and mounting devices shall meet the following specification:

(1) Bending stress in a grab bar or seat induced by the maximum bending moment from the application of 250 lbf (1112N) shall be less than the allowable stress for the material of the grab bar or seat.

(2) Shear stress induced in a grab bar or seat by the application of 250 lbf (1112N) shall be less than the allowable shear stress for the material of the grab bar or seat. If the connection between the grab bar or seat and its mounting bracket or other support is considered to be fully restrained, then direct and torsional shear stresses shall be totaled for the combined shear stress, which shall not exceed the allowable shear stress.

(3) Shear force induced in a fastener or mounting device from the application of 250 lbf (1112N) shall be less than the allowable lateral load of either the fastener or mounting device or the supporting structure, whichever is the smaller allowable load.

(4) Tensile force induced in a fastener by a direct tension force of 250 lbf (1112N) plus the maximum moment from the application of 250 lbf (1112N) shall be less than the allowable withdrawal load between the fastener and the supporting structure.

(5) Grab bars shall not rotate within their fittings.

4.26.4 Eliminating Hazards. A handrail or grab bar and any wall or other surface adjacent to it shall be free of any sharp or abrasive elements. Edges shall have a minimum radius of 1/8 in (3.2 mm).

4.27 Controls and Operating Mechanisms.

4.27.1 General. Controls and operating mechanisms required to be accessible by **4.1** shall comply with 4.27.

4.27.2 Clear Floor Space. Clear floor space complying with **4.2.4** that allows a forward or a parallel approach by a person using a wheelchair shall be provided at controls, dispensers, receptacles, and other operable equipment.

4.27.3* Height. The highest operable part of controls, dispensers, receptacles, and other operable equipment shall be placed within at least one of the reach ranges specified in **4.2.5** and **4.2.6**. Electrical and communications system receptacles on walls shall be mounted no less than 15 in (380 mm) above the floor. **Appendix Note**

EXCEPTION: These requirements do not apply where the use of special equipment dictates otherwise or where

electrical and communications systems receptacles are not normally intended for use by building occupants.

4.27.4 Operation. Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbf (22.2 N).

4.28 Alarms.

4.28.1 General. Alarm systems required to be accessible by **4.1** shall comply with 4.28. At a minimum, visual signal appliances shall be provided in buildings and facilities in each of the following areas: restrooms and any other general usage areas (e.g., meeting rooms), hallways, lobbies, and any other area for common use.

4.28.2* Audible Alarms. If provided, audible emergency alarms shall produce a sound that exceeds the prevailing equivalent sound level in the room or space by at least 15 dbA or exceeds any maximum sound level with a duration of 60 seconds by 5 dbA, whichever is louder. Sound levels for alarm signals shall not exceed 120 dbA. **Appendix Note**

4.28.3* Visual Alarms. Visual alarm signal appliances shall be integrated into the building or facility alarm system. If single station audible alarms are provided then single station visual alarm signals shall be provided. Visual alarm signals shall have the following minimum photometric and location features:

(1) The lamp shall be a xenon strobe type or equivalent.

(2) The color shall be clear or nominal white (i.e., unfiltered or clear filtered white light).

(3) The maximum pulse duration shall be two-tenths of one second (0.2 sec) with a maximum duty cycle of 40 percent. The pulse duration is defined as the time interval between initial and final points of 10 percent of maximum signal.

(4) The intensity shall be a minimum of 75 candela.

(5) The flash rate shall be a minimum of 1 Hz and a maximum of 3 Hz.

(6) The appliance shall be placed 80 in (2030 mm) above the highest floor level within the space or 6 in (152 mm) below the ceiling, whichever is lower.

(7) In general, no place in any room or space required to have a visual signal appliance shall be more than 50 ft (15 m) from the signal (in the horizontal plane). In large rooms and spaces exceeding 100 ft (30 m) across, without obstructions 6 ft (2 m) above the finish floor, such as auditoriums, devices may be placed around the perimeter, spaced a maximum 100 ft (30 m) apart, in lieu of suspending appliances from the ceiling.

(8) No place in common corridors or hallways in which visual alarm signalling appliances are required shall be more than 50 ft (15 m) from the signal. **Appendix Note**

4.28.4* Auxiliary Alarms. Units and sleeping accommodations shall have a visual alarm connected to the building emergency alarm system or shall have a standard 110-volt electrical receptacle into which such an alarm can be connected and a means by which a signal from the building emergency alarm system can trigger such an auxiliary alarm. When visual alarms are in place the signal shall be visible in all areas of the unit or room. Instructions for use of the auxiliary alarm or receptacle shall be provided. **Appendix Note**

4.29 Detectable Warnings.

4.29.1 General. Detectable warnings required by **4.1** and **4.7** shall comply with 4.29.

4.29.2* Detectable Warnings on Walking Surfaces. Detectable warnings shall consist of raised truncated domes with a diameter of nominal 0.9 in (23 mm), a height of nominal 0.2 in (5 mm) and a center-to-center spacing of nominal 2.35 in (60 mm) and shall contrast visually with adjoining surfaces, either light-on-dark, or dark-on-light. **Appendix Note**

The material used to provide contrast shall be an integral part of the walking surface. Detectable warnings used on interior surfaces shall differ from adjoining walking surfaces in resiliency or sound-on-cane contact.

4.29.3 Detectable Warnings on Doors To Hazardous Areas. (Reserved).

4.29.4 Detectable Warnings at Stairs. (Reserved).

4.29.5 Detectable Warnings at Hazardous Vehicular Areas. If a walk crosses or adjoins a vehicular way, and the walking surfaces are not separated by curbs, railings, or other elements between the pedestrian areas and vehicular areas, the boundary between the areas shall be defined by a continuous detectable warning which is 36 in (915 mm) wide, complying with **4.29.2**.

4.29.6 Detectable Warnings at Reflecting Pools. The edges of reflecting pools shall be protected by railings, walls, curbs, or detectable warnings complying with **4.29.2**.

4.29.7 Standardization. (Reserved).

4.30 Signage.

4.30.1* General. Signage required to be accessible by **4.1** shall comply with the applicable provisions of 4.30. **Appendix Note**

4.30.2* Character Proportion. Letters and numbers on signs shall have a width-to-height ratio between 3:5 and 1:1 and a stroke-width-to-height ratio between 1:5 and 1:10. **Appendix Note**

4.30.3 Character Height. Characters and numbers on signs shall be sized according to the viewing distance from which they are to be read. The minimum height is measured using an upper case X. Lower case characters are permitted.

Height Above Finished Floor	Minimum Character Height
Suspended or Projected Overhead in compliance with 4.4.2	3 in (75 mm) minimum

4.30.4* Raised and Brailled Characters and Pictorial Symbol Signs (Pictograms). Letters and numerals shall be raised 1/32 in (0.8 mm) minimum, upper case, sans serif or simple serif type and shall be accompanied with Grade 2 Braille. Raised characters shall be at least 5/8 in (16 mm) high, but no higher than 2 in (50 mm). Pictograms shall be accompanied by the equivalent verbal description placed directly below the pictogram. The border dimension of the pictogram shall be 6 in (152 mm) minimum in height. **Appendix Note**

4.30.5* Finish and Contrast. The characters and background of signs shall be eggshell, matte, or other non-glare finish. Characters and symbols shall contrast with their background -- either light characters on a dark background or dark characters on a light background. **Appendix Note**

4.30.6 Mounting Location and Height. Where permanent identification is provided for rooms and spaces, signs shall be installed on the wall adjacent to the latch side of the door. Where there is no wall space to the latch side of the door, including at double leaf doors, signs shall be placed on the nearest adjacent wall. Mounting height shall be 60 in (1525 mm) above the finish floor to the centerline of the sign. Mounting location for such signage shall be so that a person may approach within 3 in (76 mm) of signage without encountering protruding objects or standing within the swing of a door.

4.30.7* Symbols of Accessibility.

(1) Facilities and elements required to be identified as accessible by **4.1** shall use the international symbol of accessibility. The symbol shall be displayed as shown in **Fig. 43(a)** and **(b)**.

(2) Volume Control Telephones. Telephones required to have a volume control by **4.1.3(17)(b)** shall be identified by a sign containing a depiction of a telephone handset with radiating sound waves.

(3) Text Telephones (TTYs). Text telephones (TTYs) required by **4.1.3(17)(c)** shall be identified by the international TTY symbol (**Fig 43(c)**). In addition, if a facility has a public text telephone (TTY), directional signage indicating the location of the nearest text telephone (TTY) shall be placed adjacent to all banks of telephones which do not contain a text telephone (TTY). Such directional signage shall include the international TTY symbol. If a facility has no banks of telephones, the directional signage shall be provided at the entrance (e.g., in a building directory).

(4) Assistive Listening Systems. In assembly areas where permanently installed assistive listening systems are required by **4.1.3(19)(b)** the availability of such systems shall be identified with signage that includes the international symbol of access for hearing loss (**Fig 43(d)**). **Appendix Note**

4.30.8* Illumination Levels. (Reserved). **Appendix Note**

4.31 Telephones.

4.31.1 General. Public telephones required to be accessible by **4.1** shall comply with 4.31.

4.31.2 Clear Floor or Ground Space. A clear floor or ground space at least 30 in by 48 in (760 mm by 1220 mm) that allows either a forward or parallel approach by a person using a wheelchair shall be provided at telephones (see **Fig. 44**). The clear floor or ground space shall comply with **4.2.4**. Bases, enclosures, and fixed seats shall not impede approaches to telephones by people who use wheelchairs.

4.31.3* Mounting Height. The highest operable part of the telephone shall be within the reach ranges specified in **4.2.5** or **4.2.6**. **Appendix Note**

4.31.4 Protruding Objects. Telephones shall comply with **4.4**.

4.31.5 Hearing Aid Compatible and Volume Control Telephones Required by 4.1.

(1) Telephones shall be hearing aid compatible.

(2) Volume controls, capable of a minimum of 12 dbA and a maximum of 18 dbA above normal, shall be provided in accordance with **4.1.3**. If an automatic reset is provided then 18 dbA may be exceeded.

4.31.6 Controls. Telephones shall have pushbutton controls where service for such equipment is available.

4.31.7 Telephone Books. Telephone books, if provided, shall be located in a position that complies with the reach ranges specified in **4.2.5** and **4.2.6**.

4.31.8 Cord Length. The cord from the telephone to the handset shall be at least 29 in (735 mm) long.

4.31.9* Text Telephones (TTYs) Required by 4.1.

(1) Text telephones (TTYs) used with a pay telephone shall be permanently affixed within, or adjacent to, the telephone enclosure. If an acoustic coupler is used, the telephone cord shall be sufficiently long to allow connection of the text telephone (TTY) and the telephone receiver. **Appendix Note**

(2) Pay telephones designed to accommodate a portable text telephone (TTY) shall be equipped with a shelf and an electrical outlet within or adjacent to the telephone enclosure. The telephone handset shall be capable of being placed flush on the surface of the shelf. The shelf shall be capable of accommodating a text telephone (TTY) and shall have 6 in (152 mm) minimum vertical clearance in the area where the text telephone (TTY) is to be placed.

(3) Equivalent facilitation may be provided. For example, a portable text telephone (TTY) may be made available in a hotel at the registration desk if it is available on a 24-hour basis for use with nearby public pay telephones. In this instance, at least one pay telephone shall comply with paragraph 2 of this section. In addition, if an acoustic coupler is used, the telephone handset cord shall be sufficiently long so as to allow connection of the text telephone (TTY) and the telephone receiver. Directional signage shall be provided and shall comply with **4.30.7**. **Appendix Note**

4.32 Fixed or Built-in Seating and Tables.

4.32.1 Minimum Number. Fixed or built-in seating or tables required to be accessible by **4.1** shall comply with 4.32.2 through 4.32.4.

EXCEPTION: Fixed or built-in seating or tables used primarily by children ages 12 and younger shall be permitted to comply with 4.32.5.

4.32.2 Seating. If seating spaces for people in wheelchairs are provided at fixed tables or counters, clear floor

space complying with **4.2.4** shall be provided. Such clear floor space shall not overlap knee space by more than 19 in (485 mm) (see **Fig. 45**).

4.32.3 Knee Clearances. If seating for people in wheelchairs is provided at tables or counters, knee spaces at least 27 in (685 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep shall be provided (see **Fig. 45**).

4.32.4* Height of Tables or Counters. The tops of accessible tables and counters shall be from 28 in to 34 in (710 mm to 865 mm) above the finish floor or ground. **Appendix Note**

4.32.5 Children's Fixed or Built-in Seating and Tables. Fixed or built-in seating or tables used primarily by children ages 12 and younger shall comply with 4.32.5 as permitted by 4.32.1.

EXCEPTION: Fixed or built-in seating or tables used primarily by children ages 5 and younger shall not be required to comply with 4.32.5 if clear floor space complying with **4.2.4** parallel to fixed tables or counters is provided.

(1) Seating. If seating spaces for people in wheelchairs are provided at fixed tables or counters, clear floor space complying with **4.2.4** shall be provided. Such clear floor space shall not overlap knee space by more than 19 in (485 mm) (see **Fig. 45**).

(2) Knee Clearances. If seating for people in wheelchairs is provided at tables or counters, knee spaces at least 24 in (610 mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep shall be provided (see **Fig. 45**).

(3) Height of Tables or Counters. The tops of accessible tables and counters shall be from 26 in to 30 in (660 mm to 760 mm) above the finish floor or ground.

4.33 Assembly Areas.

4.33.1 Minimum Number. Assembly and associated areas required to be accessible by **4.1** shall comply with 4.33.

4.33.2* Size of Wheelchair Locations. Each wheelchair location shall provide minimum clear ground or floor spaces as shown in **Fig. 46**. **Appendix Note**

4.33.3* Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users. **Appendix Note**

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

4.33.4 Surfaces. The ground or floor at wheelchair locations shall be level and shall comply with **4.5**.

4.33.5 Access to Performing Areas. An accessible route shall connect wheelchair seating locations with performing areas, including stages, arena floors, dressing rooms, locker rooms, and other spaces used by performers.

4.33.6* Placement of Listening Systems. If the listening system provided serves individual fixed seats, then such seats shall be located within a 50 ft (15 m) viewing distance of the stage or playing area and shall have a complete view of the stage or playing area. **Appendix Note**

4.33.7* Types of Listening Systems. Assistive listening systems (ALS) are intended to augment standard public address and audio systems by providing signals which can be received directly by persons with special receivers or their own hearing aids and which eliminate or filter background noise. The type of assistive listening system appropriate for a particular application depends on the characteristics of the setting, the nature of the program, and the intended audience. Magnetic induction loops, infra-red and radio frequency systems are types of listening systems which are appropriate for various applications. **Appendix Note**

4.34 Automated Teller Machines.

4.34.1 General. Each automated teller machine required to be accessible by 4.1.3 shall be on an accessible route and shall comply with 4.34.

4.34.2 Clear Floor Space. The automated teller machine shall be located so that clear floor space complying with 4.2.4 is provided to allow a person using a wheelchair to make a forward approach, a parallel approach, or both, to the machine.

4.34.3 Reach Ranges.

(1) Forward Approach Only. If only a forward approach is possible, operable parts of all controls shall be placed within the forward reach range specified in 4.2.5.

(2) Parallel Approach Only. If only a parallel approach is possible, operable parts of controls shall be placed as follows:

(a) Reach Depth Not More Than 10 in (255 mm). Where the reach depth to the operable parts of all controls as measured from the vertical plane perpendicular to the edge of the unobstructed clear floor space at the farthest protrusion of the automated teller machine or surround is not more than 10 in (255 mm), the maximum height above the finished floor or grade shall be 54 in (1370 mm).

(b) Reach Depth More Than 10 in (255 mm). Where the reach depth to the operable parts of any control as measured from the vertical plane perpendicular to the edge of the unobstructed clear floor space at the farthest protrusion of the automated teller machine or surround is more than 10 in (255 mm), the maximum height above the finished floor or grade shall be as follows:

Reach Depth		**Maximum Height**	
inches	*millimeters*	*inches*	*millimeters*
10	255	54	1370
11	280	53 1/2	1360
12	305	53	1345
13	330	52 1/2	1335
14	355	51 1/2	1310
15	380	51	1295
16	405	50 1/2	1285
17	430	50	1270
18	455	49 1/2	1255
19	485	49	1245
20	510	48 1/2	1230
21	535	47 1/2	1205
22	560	47	1195
23	585	46 1/2	180
24	610	46	1170

(3) Forward and Parallel Approach. If both a forward and parallel approach are possible, operable parts of controls shall be placed within at least one of the reach ranges in paragraphs (1) or (2) of this section.

(4) Bins. Where bins are provided for envelopes, waste paper, or other purposes, at least one of each type provided shall comply with the applicable reach ranges in paragraph (1), (2), or (3) of this section.

EXCEPTION: Where a function can be performed in a substantially equivalent manner by using an alternate control, only one of the controls needed to perform that function is required to comply with this section. If the controls are identified by tactile markings, such markings shall be provided on both controls.

4.34.4 Controls. Controls for user activation shall comply with 4.27.4.

4.34.5 Equipment for Persons with Vision Impairments. Instructions and all information for use shall be made

accessible to and independently usable by persons with vision impairments.

4.35 Dressing, Fitting, and Locker Rooms.

4.35.1 General. Dressing, fitting, and locker rooms required to be accessible by 4.1 shall comply with 4.35 and shall be on an accessible route.

4.35.2 Clear Floor Space. A clear floor space allowing a person using a wheelchair to make a 180-degree turn shall be provided in every accessible dressing room entered through a swinging or sliding door. No door shall swing into any part of the turning space. Turning space shall not be required in a private dressing room entered through a curtained opening at least 32 in (815 mm) wide if clear floor space complying with section 4.2 renders the dressing room usable by a person using a wheelchair.

4.35.3 Doors. All doors to accessible dressing rooms shall be in compliance with section 4.13.

4.35.4 Bench. A bench complying with 4.37 shall be provided within the room.

4.35.5 Mirror. Where mirrors are provided in dressing rooms of the same use, then in an accessible dressing room, a full-length mirror, measuring at least 18 in wide by 54 in high (460 mm by 1370 mm), shall be mounted in a position affording a view to a person on the bench as well as to a person in a standing position.

4.36 Saunas and Steam Rooms.

4.36.1 General. Saunas and steam rooms required to be accessible by 4.1 shall comply with 4.36.

4.36.2* Wheelchair Turning Space. A wheelchair turning space complying with 4.2.3 shall be provided within the room. Appendix Note

EXCEPTION: Wheelchair turning space shall be permitted to be obstructed by readily removable seats.

4.36.3 Sauna and Steam Room Bench. Where seating is provided, at least one bench shall be provided and shall comply with 4.37.

4.36.4 Door Swing. Doors shall not swing into any part of the clear floor or ground space required at a bench complying with 4.37.

4.37 Benches.

4.37.1 General. Benches required to be accessible by 4.1 shall comply with 4.37.

4.37.2 Clear Floor or Ground Space. Clear floor or ground space complying with 4.2.4 shall be provided and shall be positioned for parallel approach to a short end of a bench seat.

EXCEPTION: Clear floor or ground space required by 4.37.2 shall be permitted to be obstructed by readily removable seats in saunas and steam rooms.

4.37.3* Size. Benches shall be fixed and shall have seats that are 20 inches (510 mm) minimum to 24 inches (610 mm) maximum in depth and 42 inches (1065 mm) minimum in length (see Fig. 47). Appendix Note

4.37.4 Back Support. Benches shall have back support that is 42 inches (1065 mm) minimum in length and that extends from a point 2 inches (51 mm) maximum above the seat to a point 18 inches (455 mm) minimum above the seat (see Fig. 48).

4.37.5 Seat Height. Bench seats shall be 17 inches (430 mm) minimum to 19 inches (485 mm) maximum above the floor or ground.

4.37.6 Structural Strength. Allowable stresses shall not be exceeded for materials used when a vertical or horizontal force of 250 lbs. (1112 N) is applied at any point on the seat, fastener, mounting device, or supporting structure.

4.37.7 Wet Locations. The surface of benches installed in wet locations shall be slip-resistant and shall not

accumulate water.

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5. RESTAURANTS AND CAFETERIAS.

5.1* General. Except as specified or modified in this section, restaurants and cafeterias shall comply with the requirements of section 4. Where fixed tables (or dining counters where food is consumed but there is no service) are provided, at least 5 percent, but not less than one, of the fixed tables (or a portion of the dining counter) shall be accessible and shall comply with 4.32 as required in 4.1.3(18). In establishments where separate areas are designated for smoking and non-smoking patrons, the required number of accessible fixed tables (or counters) shall be proportionally distributed between the smoking and non-smoking areas. In new construction, and where practicable in alterations, accessible fixed tables (or counters) shall be distributed throughout the space or facility. Appendix Note

5.2 Counters and Bars. Where food or drink is served at counters exceeding 34 in (865 mm) in height for consumption by customers seated on stools or standing at the counter, a portion of the main counter which is 60 in (1525 mm) in length minimum shall be provided in compliance with 4.32 or service shall be available at accessible tables within the same area.

5.3 Access Aisles. All accessible fixed tables shall be accessible by means of an access aisle at least 36 in (915 mm) clear between parallel edges of tables or between a wall and the table edges.

5.4 Dining Areas. In new construction, all dining areas, including raised or sunken dining areas, loggias, and outdoor seating areas, shall be accessible. In non-elevator buildings, an accessible means of vertical access to the mezzanine is not required under the following conditions: 1) the area of mezzanine seating measures no more than 33 percent of the area of the total accessible seating area; 2) the same services and decor are provided in an accessible space usable by the general public; and, 3) the accessible areas are not restricted to use by people with disabilities. In alterations, accessibility to raised or sunken dining areas, or to all parts of outdoor seating areas is not required provided that the same services and decor are provided in an accessible space usable by the general public and are not restricted to use by people with disabilities.

5.5 Food Service Lines. Food service lines shall have a minimum clear width of 36 in (915 mm), with a preferred clear width of 42 in (1065 mm) to allow passage around a person using a wheelchair. Tray slides shall be mounted no higher than 34 in (865 mm) above the floor (see Fig. 53). If self-service shelves are provided, at least 50 percent of each type must be within reach ranges specified in 4.2.5 and 4.2.6.

5.6 Tableware and Condiment Areas. Self-service shelves and dispensing devices for tableware, dishware, condiments, food and beverages shall be installed to comply with 4.2 (see Fig. 54).

5.7 Raised Platforms. In banquet rooms or spaces where a head table or speaker's lectern is located on a raised platform, the platform shall be accessible in compliance with 4.8 or 4.11. Open edges of a raised platform shall be protected by placement of tables or by a curb.

5.8 Vending Machines and Other Equipment. Spaces for vending machines and other equipment shall comply with 4.2 and shall be located on an accessible route.

5.9 Quiet Areas. (Reserved).

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6. MEDICAL CARE FACILITIES.

6.1 General. Medical care facilities included in this section are those in which people receive physical or medical treatment or care and where persons may need assistance in responding to an emergency and where the period of stay may exceed 24 hours. In addition to the requirements of section 4, medical care facilities and buildings shall comply with 6.

(1) Hospitals - general purpose hospitals, psychiatric facilities, detoxification facilities - At least 10 percent of patient bedrooms and toilets, and all public use and common use areas are required to be designed and constructed to be accessible.

(2) Hospitals and rehabilitation facilities that specialize in treating conditions that affect mobility, or units within either that specialize in treating conditions that affect mobility - All patient bedrooms and toilets, and all public use and common use areas are required to be designed and constructed to be accessible.

(3) Long term care facilities, nursing homes - At least 50 percent of patient bedrooms and toilets, and all public use and common use areas are required to be designed and constructed to be accessible.

(4) Alterations to patient bedrooms.

(a) When patient bedrooms are being added or altered as part of a planned renovation of an entire wing, a department, or other discrete area of an existing medical facility, a percentage of the patient bedrooms that are being added or altered shall comply with **6.3**. The percentage of accessible rooms provided shall be consistent with the percentage of rooms required to be accessible by the applicable requirements of **6.1(1)**, **6.1(2)**, or **6.1 (3)**, until the number of accessible patient bedrooms in the facility equals the overall number that would be required if the facility were newly constructed. (For example, if 20 patient bedrooms are being altered in the obstetrics department of a hospital, 2 of the altered rooms must be made accessible. If, within the same hospital, 20 patient bedrooms are being altered in a unit that specializes in treating mobility impairments, all of the altered rooms must be made accessible.) Where toilet/bathrooms are part of patient bedrooms which are added or altered and required to be accessible, each such patient toilet/bathroom shall comply with **6.4**.

(b) When patient bedrooms are being added or altered individually, and not as part of an alteration of the entire area, the altered patient bedrooms shall comply with **6.3**, unless either: a) the number of accessible rooms provided in the department or area containing the altered patient bedroom equals the number of accessible patient bedrooms that would be required if the percentage requirements of **6.1(1)**, **6.1(2)**, or **6.1(3)** were applied to that department or area; or b) the number of accessible patient bedrooms in the facility equals the overall number that would be required if the facility were newly constructed. Where toilet/bathrooms are part of patient bedrooms which are added or altered and required to be accessible, each such toilet/bathroom shall comply with **6.4**.

6.2 Entrances. At least one accessible entrance that complies with **4.14** shall be protected from the weather by canopy or roof overhang. Such entrances shall incorporate a passenger loading zone that complies with **4.6.6**.

6.3 Patient Bedrooms. Provide accessible patient bedrooms in compliance with section 4. Accessible patient bedrooms shall comply with the following:

(1) Each bedroom shall have a door that complies with **4.13**.

EXCEPTION: Entry doors to acute care hospital bedrooms for in- patients shall be exempted from the requirement in **4.13.6** for maneuvering space at the latch side of the door if the door is at least 44 in (1120 mm) wide.

(2) Each bedroom shall have adequate space to provide a maneuvering space that complies with **4.2.3**. In rooms with two beds, it is preferable that this space be located between beds.

(3) Each bedroom shall have adequate space to provide a minimum clear floor space of 36 in (915 mm) along each side of the bed and to provide an accessible route complying with **4.3.3** to each side of each bed.

6.4 Patient Toilet Rooms. Where toilet/bathrooms are provided as a part of a patient bedroom, each patient bedroom that is required to be accessible shall have an accessible toilet/bathroom that complies with **4.22** or **4.23** and shall be on an accessible route.

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7. BUSINESS, MERCANTILE AND CIVIC.

7.1 General. In addition to the requirements of section 4, the design of all areas used for business transactions with the public shall comply with 7.

7.2 Sales and Service Counters, Teller Windows, Information Counters.

(1) In areas used for transactions where counters have cash registers and are provided for sales or distribution of goods or services to the public, at least one of each type shall have a portion of the counter which is at least 36 in (915mm) in length with a maximum height of 36 in (915 mm) above the finish floor. It shall be on an accessible route complying with **4.3**. Such counters shall include, but are not limited to, counters in retail stores, and distribution centers. The accessible counters must be dispersed throughout the building or facility. In alterations where it is technically infeasible to provide an accessible counter, an auxiliary counter meeting these requirements may be provided.

(2) In areas used for transactions that may not have a cash register but at which goods or services are sold or distributed including, but not limited to, ticketing counters, teller stations, registration counters in transient lodging facilities, information counters, box office counters and library check-out areas, either:

(i) a portion of the main counter which is a minimum of 36 in (915 mm) in length shall be provided with a maximum height of 36 in (915 mm); or

(ii) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to the main counter shall be provided; or

(iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with a disability can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

All accessible sales and service counters shall be on an accessible route complying with **4.3**.

(3)* In public facilities where counters or teller windows have solid partitions or security glazing to separate personnel from the public, at least one of each type shall provide a method to facilitate voice communication. Such methods may include, but are not limited to, grilles, slats, talk-through baffles, intercoms, or telephone handset devices. The method of communication shall be accessible to both individuals who use wheelchairs and individuals who have difficulty bending or stooping. If provided for public use, at least one telephone communication device shall be equipped with volume controls complying with **4.31.5**. Hand-operable communications devices, if provided, shall comply with **4.27**. **Appendix Note**

(4)* Assistive Listening Systems. (Reserved). **Appendix Note**

7.3* Check-out Aisles.

(1) In new construction, accessible check-out aisles shall be provided in conformance with the table below:

Total Check-out Aisles of Each Design	Minimum Number of Accessible Check-out Aisles (of each design)
1 - 4	1
5 - 8	2
9 - 15	3
over 15	3, plus 20% of additional aisles

EXCEPTION: In new construction, where the selling space is under 5000 square feet, only one check-out aisle is required to be accessible.

EXCEPTION: In alterations, at least one check-out aisle shall be accessible in facilities under 5000 square feet of selling space. In facilities of 5000 or more square feet of selling space, at least one of each design of check-out aisle shall be made accessible when altered until the number of accessible check-out aisles of each design equals the number required in new construction.

Examples of check-out aisles of different "design" include those which are specifically designed to serve different functions. Different "design" includes but is not limited to the

following features - length of belt or no belt; or permanent signage designating the aisle as an express lane.

(2) Clear aisle width for accessible check-out aisles shall comply with **4.2.1** and maximum adjoining counter height shall not exceed 38 in (965 mm) above the finish floor. The top of the lip shall not exceed 40 in (1015 mm) above the finish floor.

(3) Signage identifying accessible check-out aisles shall comply with **4.30.7** and shall be mounted above the check-out aisle in the same location where the check-out number or type of check-out is displayed. **Appendix Note**

7.4 Security Bollards. Any device used to prevent the removal of shopping carts from store premises shall not prevent access or egress to people in wheelchairs. An alternate entry that is equally convenient to that provided for the ambulatory population is acceptable.

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8. LIBRARIES.

8.1 General. In addition to the requirements of **section 4**, the design of all public areas of a library shall comply with 8, including reading and study areas, stacks, reference rooms, reserve areas, and special facilities or collections.

8.2 Reading and Study Areas. At least 5 percent or a minimum of one of each element of fixed seating, tables, or study carrels shall comply with **4.2** and **4.32**. Clearances between fixed accessible tables and between study carrels shall comply with **4.3**.

8.3 Check-Out Areas. At least one lane at each check-out area shall comply with **7.2(1)**. Any traffic control or book security gates or turnstiles shall comply with **4.13**.

8.4 Card Catalogs and Magazine Displays. Minimum clear aisle space at card catalogs and magazine displays shall comply with **Fig. 55**. Maximum reach height shall comply with **4.2**, with a height of 48 in (1220 mm) preferred irrespective of approach allowed.

8.5 Stacks. Minimum clear aisle width between stacks shall comply with **4.3**, with a minimum clear aisle width of 42 in (1065 mm) preferred where possible. Shelf height in stack areas is unrestricted (see **Fig. 56**).

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9. ACCESSIBLE TRANSIENT LODGING.

(1) Except as specified in the special technical provisions of this section, accessible transient lodging shall comply with the applicable requirements of section 4. Transient lodging includes facilities or portions thereof used for sleeping accommodations, when not classed as a medical care facility.

9.1 Hotels, Motels, Inns, Boarding Houses, Dormitories, Resorts and Other Similar Places of Transient Lodging.

9.1.1 General. All public use and common use areas are required to be designed and constructed to comply with **section 4** (Accessible Elements and Spaces: Scope and Technical Requirements).

EXCEPTION: Sections 9.1 through 9.4 do not apply to an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.

9.1.2 Accessible Units, Sleeping Rooms, and Suites. Accessible sleeping rooms or suites that comply with the requirements of **9.2** (Requirements for Accessible Units, Sleeping Rooms, and Suites) shall be provided in conformance with the table below. In addition, in hotels, of 50 or more sleeping rooms or suites, additional accessible sleeping rooms or suites that include a roll- in shower shall also be provided in conformance with the table below. Such accommodations shall comply with the requirements of **9.2**, **4.21**, and **Figure 57(a)** or **(b)**.

Number of Rooms	Accessible Rooms	Rooms with Roll-in Showers

1 to 25	1	
26 to 50	2	
51 to 75	3	1
76 to 100	4	1
101 to 150	5	2
151 to 200	6	2
201 to 300	7	3
301 to 400	8	4
401 to 500	9	4 plus 1 for each additional 100 over 400
501 to 1000	2% of total	
1001 and over	20 plus 1 for each 100 over 1000	

9.1.3 Sleeping Accommodations for Persons with Hearing Impairments. In addition to those accessible sleeping rooms and suites required by **9.1.2**, sleeping rooms and suites that comply with **9.3** (Visual Alarms, Notification Devices, and Telephones) shall be provided in conformance with the following table:

Number of Elements	Accessible Elements
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	2% of total
1001 and over	20 plus 1 for each 100 over 1000

9.1.4 Classes of Sleeping Accommodations.

(1) In order to provide persons with disabilities a range of options equivalent to those available to other persons served by the facility, sleeping rooms and suites required to be accessible by **9.1.2** shall be dispersed among the various classes of sleeping accommodations available to patrons of the place of transient lodging. Factors to be considered include room size, cost, amenities provided, and the number of beds provided.

(2) Equivalent Facilitation. For purposes of this section, it shall be deemed equivalent facilitation if the operator of a facility elects to limit construction of accessible rooms to those intended for multiple occupancy, provided that such rooms are made available at the cost of a single occupancy room to an individual with disabilities who requests a single-occupancy room.

9.1.5. Alterations to Accessible Units, Sleeping Rooms, and Suites. When sleeping rooms are being altered in an existing facility, or portion thereof, subject to the requirements of this section, at least one sleeping room or suite that complies with the requirements of **9.2** (Requirements for Accessible Units, Sleeping Rooms, and Suites) shall be provided for each 25 sleeping rooms, or fraction thereof, of rooms being altered until the number of such rooms provided equals the number required to be accessible with **9.1.2**. In addition, at least one sleeping room or suite that complies with the requirements of **9.3** (Visual Alarms, Notification Devices, and Telephones) shall be provided for each 25 sleeping rooms, or fraction thereof, of rooms being altered until the number of such rooms equals the number required to be accessible by **9.1.3**.

9.2 Requirements for Accessible Units, Sleeping Rooms and Suites.

9.2.1 General. Units, sleeping rooms, and suites required to be accessible by **9.1** shall comply with 9.2.

9.2.2 Minimum Requirements. An accessible unit, sleeping room or suite shall be on an accessible route complying with **4.3** and have the following accessible elements and spaces.

(1) Accessible sleeping rooms shall have a 36 in (915 mm) clear width maneuvering space located along both sides of a bed, except that where two beds are provided, this requirement can be met by

providing a 36 in (915 mm) wide maneuvering space located between the two beds.

(2) An accessible route complying with **4.3** shall connect all accessible spaces and elements, including telephones, within the unit, sleeping room, or suite. This is not intended to require an elevator in multi-story units as long as the spaces identified in **9.2.2(6)** and **(7)** are on accessible levels and the accessible sleeping area is suitable for dual occupancy.

(3) Doors and doorways designed to allow passage into and within all sleeping rooms, suites or other covered units shall comply with **4.13**.

(4) If fixed or built-in storage facilities such as cabinets, shelves, closets, and drawers are provided in accessible spaces, at least one of each type provided shall contain storage space complying with **4.25**. Additional storage may be provided outside of the dimensions required by 4.25.

(5) All controls in accessible units, sleeping rooms, and suites shall comply with **4.27**.

(6) Where provided as part of an accessible unit, sleeping room, or suite, the following spaces shall be accessible and shall be on an accessible route:

(a) the living area.

(b) the dining area.

(c) at least one sleeping area.

(d) patios, terraces, or balconies.

EXCEPTION: The requirements of **4.13.8** and **4.3.8** do not apply where it is necessary to utilize a higher door threshold or a change in level to protect the integrity of the unit from wind/water damage. Where this exception results in patios, terraces or balconies that are not at an accessible level, equivalent facilitation shall be provided (e.g., equivalent facilitation at a hotel patio or balcony might consist of providing raised decking or a ramp to provide accessibility).

(e) at least one full bathroom (i.e., one with a water closet, a lavatory, and a bathtub or shower).

(f) if only half baths are provided, at least one half bath.

(g) carports, garages or parking spaces.

(7) Kitchens, Kitchenettes, or Wet Bars. When provided as accessory to a sleeping room or suite, kitchens, kitchenettes, wet bars, or similar amenities shall be accessible. Clear floor space for a front or parallel approach to cabinets, counters, sinks, and appliances shall be provided to comply with **4.2.4**. Countertops and sinks shall be mounted at a maximum height of 34 in (865 mm) above the floor. At least fifty percent of shelf space in cabinets or refrigerator/freezers shall be within the reach ranges of **4.2.5** or **4.2.6** and space shall be designed to allow for the operation of cabinet and/or appliance doors so that all cabinets and appliances are accessible and usable. Controls and operating mechanisms shall comply with **4.27**.

(8) Sleeping room accommodations for persons with hearing impairments required by **9.1** and complying with **9.3** shall be provided in the accessible sleeping room or suite.

9.3 Visual Alarms, Notification Devices and Telephones.

9.3.1 General. In sleeping rooms required to comply with this section, auxiliary visual alarms shall be provided and shall comply with **4.28.4**. Visual notification devices shall also be provided in units, sleeping rooms and suites to alert room occupants of incoming telephone calls and a door knock or bell. Notification devices shall *not* be connected to auxiliary visual alarm signal appliances. Permanently installed telephones shall have volume controls complying with **4.31.5**; an accessible electrical outlet within 4 ft (1220 mm) of a telephone connection shall be provided to facilitate the use of a text telephone.

9.3.2 Equivalent Facilitation. For purposes of this section, equivalent facilitation shall include the installation of electrical outlets (including outlets connected to a facility's central alarm system) and telephone wiring in sleeping rooms and suites to enable persons with hearing impairments to utilize portable visual alarms and communication devices provided by the operator of the facility.

9.4 Other Sleeping Rooms and Suites. Doors and doorways designed to allow passage into and within all sleeping units or other covered units shall comply with **4.13.5**.

9.5 Transient Lodging in Homeless Shelters, Halfway Houses, Transient Group Homes, and Other Social Service Establishments.

9.5.1 New Construction. In new construction all public use and common use areas are required to be designed and constructed to comply with section **4**. At least one of each type of amenity (such as washers, dryers and similar equipment installed for the use of occupants) in each common area shall be accessible and shall be located on an accessible route to any accessible unit or sleeping accommodation.

EXCEPTION: Where elevators are not provided as allowed in **4.1.3(5)**, accessible amenities are not required on inaccessible floors as long as one of each type is provided in common areas on accessible floors.

9.5.2 Alterations.

(1) Social service establishments which are not homeless shelters:

(a) The provisions of **9.5.3** and **9.1.5** shall apply to sleeping rooms and beds.

(b) Alteration of other areas shall be consistent with the new construction provisions of **9.5.1**.

(2) Homeless shelters. If the following elements are altered, the following requirements apply:

(a) at least one public entrance shall allow a person with mobility impairments to approach, enter and exit including a minimum clear door width of 32 in (815 mm).

(b) sleeping space for homeless persons as provided in the scoping provisions of **9.1.2** shall include doors to the sleeping area with a minimum clear width of 32 in (815 mm) and maneuvering space around the beds for persons with mobility impairments complying with **9.2.2(1)**.

(c) at least one toilet room for each gender or one unisex toilet room shall have a minimum clear door width of 32 in (815 mm), minimum turning space complying with **4.2.3**, one water closet complying with **4.16**, one lavatory complying with **4.19** and the door shall have a privacy latch; and, if provided, at least one tub or shower shall comply with **4.20** or **4.21**, respectively.

(d) at least one common area which a person with mobility impairments can approach, enter and exit including a minimum clear door width of 32 in (815 mm).

(e) at least one route connecting elements (a), (b), (c) and (d) which a person with mobility impairments can use including minimum clear width of 36 in (915 mm), passing space complying with **4.3.4**, turning space complying with **4.2.3** and changes in levels complying with **4.3.8**.

(f) homeless shelters can comply with the provisions of (a)- (e) by providing the above elements on one accessible floor.

9.5.3. Accessible Sleeping Accommodations in New Construction. Accessible sleeping rooms shall be provided in conformance with the table in **9.1.2** and shall comply with **9.2** Accessible Units, Sleeping Rooms and Suites (where the items are provided). Additional sleeping rooms that comply with **9.3** Sleeping Accommodations for Persons with Hearing Impairments shall be provided in conformance with the table provided in **9.1.3**.

In facilities with multi-bed rooms or spaces, a percentage of the beds equal to the table provided in **9.1.2** shall comply with **9.2.2(1)**.

10. TRANSPORTATION FACILITIES.

10.1 General. Every station, bus stop, bus stop pad, terminal, building or other transportation facility, shall comply with the applicable provisions of section 4, the special application sections, and the applicable provisions of this section.

10.2 Bus Stops and Terminals.

10.2.1 New Construction.

(1) Where new bus stop pads are constructed at bus stops, bays or other areas where a lift or ramp is to be deployed, they shall have a firm, stable surface; a minimum clear length of 96 inches (measured from the curb or vehicle roadway edge) and a minimum clear width of 60 inches (measured parallel to the vehicle roadway) to the maximum extent allowed by legal or site constraints; and shall be connected to streets, sidewalks or pedestrian paths by an accessible route complying with **4.3** and **4.4**. The slope of the pad parallel to the roadway shall, to the extent practicable, be the same as the roadway. For water drainage, a maximum slope of 1:50 (2%) perpendicular to the roadway is allowed.

(2) Where provided, new or replaced bus shelters shall be installed or positioned so as to permit a wheelchair or mobility aid user to enter from the public way and to reach a location, having a minimum clear floor area of 30 inches by 48 inches, entirely within the perimeter of the shelter. Such shelters shall be connected by an accessible route to the boarding area provided under paragraph **(1)** of this section.

(3) Where provided, all new bus route identification signs shall comply with **4.30.5**. In addition, to the maximum extent practicable, all new bus route identification signs shall comply with **4.30.2** and **4.30.3**. Signs that are sized to the maximum dimensions permitted under legitimate local, state or federal regulations or ordinances shall be considered in compliance with **4.30.2** and **4.30.3** for purposes of this section.

EXCEPTION: Bus schedules, timetables, or maps that are posted at the bus stop or bus bay are not required to comply with this provision.

10.2.2 Bus Stop Siting and Alterations.

(1) Bus stop sites shall be chosen such that, to the maximum extent practicable, the areas where lifts or ramps are to be deployed comply with section **10.2.1(1)** and **(2)**.

(2) When new bus route identification signs are installed or old signs are replaced, they shall comply with the requirements of **10.2.1(3)**.

10.3 Fixed Facilities and Stations.

10.3.1 New Construction. New stations in rapid rail, light rail, commuter rail, intercity bus, intercity rail, high speed rail, and other fixed guideway systems (e.g., automated guideway transit, monorails, etc.) shall comply with the following provisions, as applicable:

(1) Elements such as ramps, elevators or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public. The circulation path, including an accessible entrance and an accessible route, for persons with disabilities shall, to the maximum extent practicable, coincide with the circulation path for the general public. Where the circulation path is different, signage complying with **4.30.1**, **4.30.2**, **4.30.3**, **4.30.5**, and **4.30.7(1)** shall be provided to indicate direction to and identify the accessible entrance and accessible route.

(2) In lieu of compliance with **4.1.3(8)**, at least one entrance to each station shall comply with **4.14**, Entrances. If different entrances to a station serve different transportation fixed routes or groups of fixed routes, at least one entrance serving each group or route shall comply with **4.14**, Entrances. All accessible entrances shall, to the maximum extent practicable, coincide with those used by the majority of the general public.

(3) Direct connections to commercial, retail, or residential facilities shall have an accessible route complying with **4.3** from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

(4) Where signs are provided at entrances to stations identifying the station or the entrance, or both, at least one sign at each entrance shall comply with **4.30.4** and **4.30.6**. Such signs shall be placed in uniform locations at entrances within the transit system to the maximum extent practicable.

EXCEPTION: Where the station has no defined entrance, but signage is provided, then the accessible signage shall be placed in a central location.

(5) Stations covered by this section shall have identification signs complying with **4.30.1**, **4.30.2**, **4.30.3**, and **4.30.5**. Signs shall be placed at frequent intervals and shall be clearly visible from within the vehicle on both sides when not obstructed by another train. When station identification signs are placed close to vehicle windows (i.e., on the side opposite from boarding) each shall have the top of the highest letter or symbol below the top of the vehicle window and the bottom of the lowest letter or symbol above the horizontal mid-line of the vehicle window.

(6) Lists of stations, routes, or destinations served by the station and located on boarding areas, platforms, or mezzanines shall comply with **4.30.1**, **4.30.2**, **4.30.3**, and **4.30.5**. A minimum of one sign identifying the specific station and complying with **4.30.4** and **4.30.6** shall be provided on each platform or boarding area. All signs referenced in this paragraph shall, to the maximum extent practicable, be placed in uniform locations within the transit system.

(7)* Automatic fare vending, collection and adjustment (e.g., add-fare) systems shall comply with **4.34.2**, **4.34.3**, **4.34.4**, and **4.34.5**. At each accessible entrance such devices shall be located on an accessible route. If self-service fare collection devices are provided for the use of the general public, at least one accessible device for entering, and at least one for exiting, unless one device serves both functions, shall be provided at each accessible point of entry or exit. Accessible fare collection devices shall have a minimum clear opening width of 32 inches; shall permit passage of a wheelchair; and, where provided, coin or card slots and controls necessary for operation shall comply with **4.27**. Gates which must be pushed open by wheelchair or mobility aid users shall have a smooth continuous surface extending from 2 inches above the floor to 27 inches above the floor and shall comply with **4.13**. Where the circulation path does not coincide with that used by the general public, accessible fare collection systems shall be located at or adjacent to the accessible point of entry or exit. **Appendix Note**

(8) Platform edges bordering a drop-off and not protected by platform screens or guard rails shall have a detectable warning. Such detectable warnings shall comply with **4.29.2** and shall be 24 inches wide running the full length of the platform drop-off.

(9) In stations covered by this section, rail-to-platform height in new stations shall be coordinated with the floor height of new vehicles so that the vertical difference, measured when the vehicle is at rest, is within plus or minus 5/8 inch under normal passenger load conditions. For rapid rail, light rail, commuter rail, high speed rail, and intercity rail systems in new stations, the horizontal gap, measured when the new vehicle is at rest, shall be no greater than 3 inches. For slow moving automated guideway "people mover" transit systems, the horizontal gap in new stations shall be no greater than 1 inch.

EXCEPTION 1: Existing vehicles operating in new stations may have a vertical difference with respect to the new platform within plus or minus 1-1/2 inches.

EXCEPTION 2: In light rail, commuter rail and intercity rail systems where it is not operationally or structurally feasible to meet the horizontal gap or vertical difference requirements, mini-high platforms, car-borne or platform-mounted lifts, ramps or bridge plates, or similar manually deployed devices, meeting the applicable requirements of 36 **C.F.R. part 1192**, or 49 C.F.R. part 38 shall suffice.

(10) Stations shall not be designed or constructed so as to require persons with disabilities to board or alight from a vehicle at a location other than one used by the general public.

(11) Illumination levels in the areas where signage is located shall be uniform and shall minimize glare on signs. Lighting along circulation routes shall be of a type and configuration to provide uniform illumination.

(12) Text Telephones: The following shall be provided in accordance with **4.31.9**:

(a) If an interior public pay telephone is provided in a transit facility (as defined by the Department of Transportation) at least one interior public text telephone shall be provided in the station.

(b) Where four or more public pay telephones serve a particular entrance to a rail station and at least one is in an interior location, at least one interior public text telephone shall be provided to serve that entrance. Compliance with this section constitutes compliance with section **4.1.3(17)(c)**;.

(13) Where it is necessary to cross tracks to reach boarding platforms, the route surface shall be level and flush with the rail top at the outer edge and between the rails, except for a maximum 2-1/2 inch gap on the inner edge of each rail to permit passage of wheel flanges. Such crossings shall comply with **4.29.5**. Where gap reduction is not practicable, an above-grade or below-grade accessible route shall be provided.

(14) Where public address systems are provided to convey information to the public in terminals, stations, or other fixed facilities, a means of conveying the same or equivalent information to persons with hearing loss or who are deaf shall be provided.

(15) Where clocks are provided for use by the general public, the clock face shall be uncluttered so that its elements are clearly visible. Hands, numerals, and/or digits shall contrast with the background either light-on-dark or dark-on-light. Where clocks are mounted overhead, numerals and/or digits shall comply with **4.30.3**. Clocks shall be placed in uniform locations throughout the facility and system to the maximum extent practicable.

(16) Where provided in below grade stations, escalators shall have a minimum clear width of 32 inches. At the top and bottom of each escalator run, at least two contiguous treads shall be level beyond the comb plate before the risers begin to form. All escalator treads shall be marked by a strip of clearly contrasting color, 2 inches in width, placed parallel to and on the nose of each step. The strip shall be of a material that is at least as slip resistant as the remainder of the tread. The edge of the tread shall be apparent from both ascending and descending directions.

(17) Where provided, elevators shall be glazed or have transparent panels to allow an unobstructed view both in to and out of the car. Elevators shall comply with **4.10**.

EXCEPTION: Elevator cars with a clear floor area in which a 60 inch diameter circle can be inscribed may be substituted for the minimum car dimensions of 4.10, **Fig. 22**.

(18) Where provided, ticketing areas shall permit persons with disabilities to obtain a ticket and check baggage and shall comply with **7.2**.

(19) Where provided, baggage check-in and retrieval systems shall be on an accessible route complying with **4.3**, and shall have space immediately adjacent complying with **4.2**. If unattended security barriers are provided, at least one gate shall comply with **4.13**. Gates which must be pushed open by wheelchair or mobility aid users shall have a smooth continuous surface extending from 2 inches above the floor to 27 inches above the floor.

10.3.2 Existing Facilities: Key Stations.

(1) Rapid, light and commuter rail key stations, as defined under criteria established by the Department of Transportation in subpart C of 49 C.F.R. part 37 and existing intercity rail stations shall provide at least one accessible route from an accessible entrance to those areas necessary for use of the transportation system.

(2) The accessible route required by **10.3.2(1)** shall include the features specified in 10.3.1(1), (4)-(9), (11)-(15), and (17)-(19).

(3) Where technical infeasibility in existing stations requires the accessible route to lead from the public way to a paid area of the transit system, an accessible fare collection system, complying with **10.3.1 (7)**, shall be provided along such accessible route.

(4) In light rail, rapid rail and commuter rail key stations, the platform or a portion thereof and the vehicle floor shall be coordinated so that the vertical difference, measured when the vehicle is at rest, is within plus or minus 1-1/2 inches under all normal passenger load conditions, and the horizontal gap, measured when the vehicle is at rest, is no greater than 3 inches for at least one door of each vehicle or car required to be accessible by **49 C.F.R. part 37**.

EXCEPTION 1: Existing vehicles retrofitted to meet the requirements of **49 C.F.R. 37.93** (one-car-per-train rule) shall be coordinated with the platform such that, for at least one door, the vertical difference between the vehicle floor and the platform, measured when the vehicle is at rest with 50% normal passenger capacity, is within plus or minus 2 inches and the horizontal gap is no greater than 4 inches.

EXCEPTION 2: Where it is not structurally or operationally feasible to meet the horizontal gap or vertical difference requirements, mini-high platforms, car-borne or platform mounted lifts, ramps or bridge plates, or similar manually deployed devices, meeting the applicable requirements of **36 C.F.R. part 1192**, or 49 C.F.R. part 38, shall suffice.

(5) New direct connections to commercial, retail, or residential facilities shall, to the maximum extent feasible, have an accessible route complying with **4.3** from the point of connection to boarding platforms and all transportation system elements used by the public. Any elements provided to facilitate future direct connections shall be on an accessible route connecting boarding platforms and all transportation system elements used by the public.

10.3.3 Existing Facilities: Alterations.

(1) For the purpose of complying with **4.1.6(2)** (Alterations to an Area Containing a Primary Function), an area of primary function shall be as defined by applicable provisions of **49 C.F.R. 37.43(c)**; (Department of Transportation's ADA Rule) or **28 C.F.R. 36.403** (Department of Justice's ADA Rule).

10.4. Airports.

10.4.1 New Construction.

(1) Elements such as ramps, elevators or other vertical circulation devices, ticketing areas, security checkpoints, or passenger waiting areas shall be placed to minimize the distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public.

(2) The circulation path, including an accessible entrance and an accessible route, for persons with disabilities shall, to the maximum extent practicable, coincide with the circulation path for the general public. Where the circulation path is different, directional signage complying with **4.30.1**, **4.30.2**, **4.30.3** and **4.30.5** shall be provided which indicates the location of the nearest accessible entrance and its accessible route.

(3) Ticketing areas shall permit persons with disabilities to obtain a ticket and check baggage and shall comply with **7.2**.

(4) Where public pay telephones are provided, and at least one is at an interior location, a public text telephone (TTY) shall be provided in compliance with **4.31.9**. Additionally, if four or more public pay telephones are located in any of the following locations, at least one public text telephone (TTY) shall also be provided in that location:

(a) a main terminal outside the security areas;

(b) a concourse within the security areas; or

(c) a baggage claim area in a terminal.

Compliance with this section constitutes compliance with section **4.1.3(17)(c)**;.

(5) Baggage check-in and retrieval systems shall be on an accessible route complying with **4.3**, and shall have space immediately adjacent complying with **4.2.4**. If unattended security barriers are provided, at least one gate shall comply with **4.13**. Gates which must be pushed open by wheelchair or mobility aid users shall have a smooth continuous surface extending from 2 inches above the floor to 27

inches above the floor.

(6) Terminal information systems which broadcast information to the general public through a public address system shall provide a means to provide the same or equivalent information to persons with a hearing loss or who are deaf. Such methods may include, but are not limited to, visual paging systems using video monitors and computer technology. For persons with certain types of hearing loss such methods may include, but are not limited to, an assistive listening system complying with **4.33.7**.

(7) Where clocks are provided for use by the general public the clock face shall be uncluttered so that its elements are clearly visible. Hands, numerals, and/or digits shall contrast with their background either light-on-dark or dark-on-light. Where clocks are mounted overhead, numerals and/or digits shall comply with **4.30.3**. Clocks shall be placed in uniform locations throughout the facility to the maximum extent practicable.

(8)* Security Systems. In public facilities that are airports, at least one accessible route complying with **4.3** shall be provided through fixed security barriers at each single barrier or group of security barriers. A group is two or more security barriers immediately adjacent to each other at a single location. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent circulation path. The circulation path shall permit persons with disabilities passing through security barriers to maintain visual contact with their personal items to the same extent provided other members of the general public. **Appendix Note**

EXCEPTION: Doors, doorways, and gates designed to be operated only by security personnel shall be exempt from **4.13.9**, **4.13.11**, and **4.13.12**.

10.5 Boat and Ferry Docks. [Reserved]

NOTE: Section 11 has not been incorporated in the Department of Justice accessibility standards and therefore is not enforceable.

11. JUDICIAL, LEGISLATIVE AND REGULATORY FACILITIES.

11.1 General. In addition to the requirements in section 4 and 11.1, judicial facilities shall comply with **11.2** and legislative and regulatory facilities shall comply with **11.3**.

11.1.1 Entrances. Where provided, at least one restricted entrance and one secured entrance to the facility shall be accessible in addition to the entrances required to be accessible by **4.1.3(8)**. Restricted entrances are those entrances used only by judges, public officials, facility personnel or other authorized parties on a controlled basis. Secured entrances are those entrances to judicial facilities used only by detainees and detention officers.

EXCEPTION: At secured entrances, doors and doorways operated only by security personnel shall be exempt from **4.13.9**, **4.13.10**, **4.13.11** and **4.13.12.**

11.1.2 Security Systems. An accessible route complying with **4.3** shall be provided through fixed security barriers at required accessible entrances. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent circulation path.

11.1.3* Two-Way Communication Systems. Where a two-way communication system is provided to gain admittance to a facility or to restricted areas within the facility, the system shall provide both visual and audible signals and shall comply with **4.27**. **Appendix Note**

11.2 Judicial Facilities.

11.2.1 Courtrooms.

(1) Where provided, the following elements and spaces shall be on an accessible route complying with **4.3**. Areas that are raised or depressed and accessed by ramps or platform lifts with entry ramps shall

provide unobstructed turning space complying with 4.2.3.

EXCEPTION: Vertical access to raised judges' benches or courtroom stations need not be installed provided that the requisite areas, maneuvering spaces, and, if appropriate, electrical service are installed at the time of initial construction to allow future installation of a means of vertical access complying with 4.8, 4.10, or 4.11 without requiring substantial reconstruction of the space.

(a) Spectator, Press, and Other Areas with Fixed Seats. Where spectator, press or other areas with fixed seats are provided, each type of seating area shall comply with 4.1.3(19)(a).

(b) Jury Boxes and Witness Stands. Each jury box and witness stand shall have within its defined area clear floor space complying with 4.2.4.

EXCEPTION: In alterations, accessible wheelchair spaces are not required to be located within the defined area of raised jury boxes or witness stands and may be located outside these spaces where ramp or lift access poses a hazard by restricting or projecting into a means of egress required by the appropriate administrative authority.

(c) Judges' Benches and Courtroom Stations. Judges' benches, clerks' stations, bailiffs' stations, deputy clerks' stations, court reporters' stations and litigants' and counsel stations shall comply with 4.32.

(2)* Permanently installed assistive listening systems complying with 4.33 shall be provided in each courtroom. The minimum number of receivers shall be four percent of the room occupant load, as determined by applicable State or local codes, but not less than two receivers. An informational sign indicating the availability of an assistive listening system and complying with 4.30.1, 4.30.2, 4.30.3, 4.30.5, and 4.30.7(4) shall be posted in a prominent place. **Appendix Note**

11.2.2 Jury Assembly Areas and Jury Deliberation Areas. Where provided in areas used for jury assembly or deliberation, the following elements or spaces shall be on an accessible route complying with 4.3 and shall comply with the following provisions:

(1) Refreshment Areas. Refreshment areas, kitchenettes and fixed or built-in refreshment dispensers shall comply with the technical provisions of 9.2.2(7).

(2) Drinking Fountains. Where provided in rooms covered under 11.2.2, there shall be a drinking fountain in each room complying with 4.15.

11.2.3 Courthouse Holding Facilities.

(1) Holding Cells - Minimum Number. Where provided, facilities for detainees, including central holding cells and court-floor holding cells, shall comply with the following:

(a) Central Holding Cells. Where separate central holding cells are provided for adult male, juvenile male, adult female, or juvenile female, one of each type shall comply with 11.2.3(2). Where central-holding cells are provided, which are not separated by age or sex, at least one cell complying with 11.2.3(2) shall be provided.

(b) Court-Floor Holding Cells. Where separate court-floor holding cells are provided for adult male, juvenile male, adult female, or juvenile female, each courtroom shall be served by one cell of each type complying with 11.2.3(2). Where court-floor holding cells are provided, which are not separated by age or sex, courtrooms shall be served by at least one cell complying with 11.2.3(2). Cells may serve more than one courtroom.

(2) Requirements for Accessible Cells. Accessible cells shall be on an accessible route complying with 4.3. Where provided, the following elements or spaces serving accessible cells shall be accessible and on an accessible route:

(a) Doors and Doorways. All doors and doorways to accessible spaces and on an accessible route shall comply with 4.13.

EXCEPTION: Doors and doorways operated only by security personnel shall be

exempt from 4.13.9, 4.13.10, 4.13.11 and 4.13.12.

(b)* Toilet and Bathing Facilities. Toilet facilities shall comply with 4.22 and bathing facilities shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures or the accessible route. **Appendix Note**

(c)* Beds. Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a cell, the maneuvering space provided at adjacent beds may overlap. **Appendix Note**

(d) Drinking Fountains and Water Coolers. Drinking fountains shall be accessible to individuals who use wheelchairs in accordance with 4.15 and shall be accessible to those who have difficulty bending or stooping. This can be accomplished by the use of a "hi-lo" fountain; by providing one fountain accessible to those who use wheelchairs and one fountain at a standard height convenient for those who have difficulty bending; by providing a fountain accessible under 4.15 and a water cooler; or by other such means as would achieve the required accessibility for each group.

(e) Fixed or Built-in Seating and Tables. Fixed or built-in seating, tables or counters shall comply with 4.32.

(f) Fixed Benches. Fixed benches shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor and provide back support (e.g., attachment to wall). The structural strength of the bench attachments shall comply with 4.26.3.

(3)* Visiting Areas. The following elements, where provided, shall be located on an accessible route complying with 4.3 and shall comply with the following provisions:

(a) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall comply with 4.32 on both the visitor and detainee sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee sides.

(b) Partitions. Solid partitions or security glazing that separate visitors from detainees shall comply with 7.2(3). **Appendix Note**

11.3* Legislative and Regulatory Facilities. Assembly areas designated for public use, including public meeting rooms, hearing rooms, and chambers shall comply with 11.3. **Appendix Note**

11.3.1 Where provided, the following elements and spaces shall be on an accessible route complying with 4.3. Areas that are raised or depressed and accessed by ramps or platform lifts with entry ramps shall provide unobstructed turning space complying with 4.2.3.

(1) Raised Speakers' Platforms. Where raised speakers' platforms are provided, at least one of each type shall be accessible.

(2) Spectator, Press, and Other Areas with Fixed Seats. Where spectator, press or other areas with fixed seats are provided, each type of seating area shall comply with 4.1.3(19)(a).

11.3.2* Each assembly area provided with a permanently installed audio-amplification system shall have a permanently installed assistive listening system. The minimum number of receivers shall be four percent of the room occupant load, as determined by applicable State or local codes, but not less than two receivers. An informational sign indicating the availability of an assistive listening system and complying with **4.30.1, 4.30.2,** 4.30.3, 4.30.5, and 4.30.7(4) shall be posted in a prominent place. **Appendix Note**

NOTE: Section 12 has not been incorporated in the Department of Justice accessibility standards and therefore is not enforceable.

12. DETENTION AND CORRECTIONAL FACILITIES.

12.1* General. This section applies to jails, holding cells in police stations, prisons, juvenile detention centers,

reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons. Except as specified in this section, detention and correctional facilities shall comply with the applicable requirements of section 4. All common use areas serving accessible cells or rooms and all public use areas are required to be designed and constructed to comply with section 4. **Appendix Note**

EXCEPTIONS: Requirements for areas of rescue assistance in **4.1.3(9)**, **4.3.10**, and **4.3.11** do not apply. Compliance with requirements for elevators in **4.1.3(5)** and stairs **4.1.3(4)** is not required in multi-story housing facilities where accessible cells or rooms, all common use areas serving them, and all public use areas are on an accessible route. Compliance with **4.1.3(16)** is not required in areas other than public use areas.

12.2 Entrances and Security Systems.

12.2.1* Entrances. Entrances used by the public, including those that are secured, shall be accessible as required by **4.1.3(8)**. **Appendix Note**

EXCEPTION: Compliance with **4.13.9**, **4.13.10**, **4.13.11** and **4.13.12** is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

12.2.2 Security Systems. Where security systems are provided at public or other entrances required to be accessible by 12.2.1 or 12.2.2, an accessible route complying with **4.3** shall be provided through fixed security barriers. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent circulation path.

12.3* Visiting Areas. In non-contact visiting areas where inmates or detainees are separated from visitors, the following elements, where provided, shall be accessible and located on an accessible route complying with **4.3:**

(1) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall comply with **4.32** on both the visitor and detainee or inmate sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee or inmate sides.

EXCEPTION: At non-contact visiting areas not serving accessible cells or rooms, the requirements of 12.3(1) do not apply to the inmate or detainee side of cubicles or counters.

(2) Partitions. Solid partitions or security glazing separating visitors from inmates or detainees shall comply with **7.2(3)**. **Appendix Note**

12.4 Holding and Housing Cells or Rooms: Minimum Number.

12.4.1* Holding Cells and General Housing Cells or Rooms. At least two percent, but not less than one, of the total number of housing or holding cells or rooms provided in a facility shall comply with **12.5**. **Appendix Note**

12.4.2* Special Holding and Housing Cells or Rooms. In addition to the requirements of 12.4.1, where special holding or housing cells or rooms are provided, at least one serving each purpose shall comply with **12.5**. An accessible special holding or housing cell or room may serve more than one purpose. Cells or rooms subject to this requirement include, but are not limited to, those used for purposes of orientation, protective custody, administrative or disciplinary detention or segregation, detoxification, and medical isolation. **Appendix Note**

EXCEPTION: Cells or rooms specially designed without protrusions and to be used solely for purposes of suicide prevention are exempt from the requirement for grab bars at water closets in **4.16.4**.

12.4.3* Accessible Cells or Rooms for Persons with Hearing Impairments. In addition to the requirements of **12.4.1**, two percent, but not less than one, of general housing or holding cells or rooms equipped with audible emergency warning systems or permanently installed telephones within the cell or room shall comply with the applicable requirements of **12.6**. **Appendix Note**

12.4.4 Medical Care Facilities. Medical care facilities providing physical or medical treatment or care shall comply with the applicable requirements of section **6.1**, **6.3** and **6.4**, if persons may need assistance in emergencies and the period of stay may exceed 24 hours. Patient bedrooms or cells required to be accessible under **6.1** and **6.3** shall be provided in addition to any medical isolation cells required to be accessible under **12.4.2**.

12.4.5 Alterations to Cells or Rooms. (Reserved.)

12.5 Requirements for Accessible Cells or Rooms.

12.5.1 General. Cells or rooms required to be accessible by 12.4 shall comply with 12.5.

12.5.2* Minimum Requirements. Accessible cells or rooms shall be on an accessible route complying with 4.3. Where provided to serve accessible housing or holding cells or rooms, the following elements or spaces shall be accessible and connected by an accessible route. Appendix Note

(1) Doors and Doorways. All doors and doorways on an accessible route shall comply with 4.13.

EXCEPTION: Compliance with 4.13.9, 4.13.10, 4.13.11 and 4.13.12 is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

(2)* Toilet and Bathing Facilities. At least one toilet facility shall comply with 4.22 and one bathing facility shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures and the accessible route. Appendix Note

(3)* Beds. Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a room or cell, the maneuvering space provided at adjacent beds may overlap. Appendix Note

(4) Drinking Fountains and Water Coolers. At least one drinking fountain shall comply with 4.15.

(5) Fixed or Built-in Seating or Tables. Fixed or built-in seating, tables and counters shall comply with 4.32.

(6) Fixed Benches. At least one fixed bench shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor and provide back support (e.g., attachment to wall). The structural strength of the bench attachments shall comply with 4.26.3.

(7) Storage. Fixed or built-in storage facilities, such as cabinets, shelves, closets, and drawers, shall contain storage space complying with 4.25.

(8) Controls. All controls intended for operation by inmates shall comply with 4.27.

(9) Accommodations for persons with hearing impairments required by 12.4.3 and complying with 12.6 shall be provided in accessible cells or rooms.

12.6 Visual Alarms and Telephones.

Where audible emergency warning systems are provided to serve the occupants of holding or housing cells or rooms, visual alarms complying with 4.28.4 shall be provided. Where permanently installed telephones are provided within holding or housing cells or rooms, they shall have volume controls complying with 4.31.5.

EXCEPTION: Visual alarms are not required where inmates or detainees are not allowed independent means of egress.

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13. RESIDENTIAL HOUSING [RESERVED]

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14. PUBLIC RIGHTS-OF-WAY [RESERVED]

NOTE: Section 15 has not been incorporated in the Department of Justice accessibility standards and therefore is not enforceable.

15* RECREATION FACILITIES.

Newly designed or newly constructed and altered recreation facilities shall comply with the applicable requirements of section 4 and the special application sections, except as modified or otherwise provided in this section. **Appendix Note**

15.1* Amusement Rides **Appendix Note**

15.1.1 General. Newly designed or newly constructed and altered amusement rides shall comply with 15.1.

EXCEPTION 1*: Mobile or portable amusement rides shall not be required to comply with 15.1. **Appendix Note**

EXCEPTION 2*: Amusement rides which are controlled or operated by the rider shall be required to comply only with **15.1.4** and **15.1.5**. **Appendix Note**

EXCEPTION 3*: Amusement rides designed primarily for children, where children are assisted on and off the ride by an adult, shall be required to comply only with **15.1.4** and **15.1.5**. **Appendix Note**

EXCEPTION 4: Amusement rides without amusement ride seats shall be required to comply only with **15.1.4** and **15.1.5**.

15.1.2* Alterations to Amusement Rides. A modification to an existing amusement ride is an alteration subject to 15.1 if one or more of the following conditions apply:

1. The amusement ride's structural or operational characteristics are changed to the extent that the ride's performance differs from that specified by the manufacturer or the original design criteria; or

2. The load and unload area of the amusement ride is newly designed and constructed. **Appendix Note**

15.1.3 Number Required. Each amusement ride shall provide at least one wheelchair space complying with 15.1.7, or at least one amusement ride seat designed for transfer complying with **15.1.8**, or at least one transfer device complying with **15.1.9**.

15.1.4* Accessible Route. When in the load and unload position, amusement rides required to comply with 15.1 shall be served by an accessible route complying with **4.3**. Any part of an accessible route serving amusement rides with a slope greater than 1:20 shall be considered a ramp and shall comply with **4.8**. **Appendix Note**

EXCEPTION 1: The maximum slope specified in **4.8.2** shall not apply in the load and unload areas or on the amusement ride where compliance is structurally or operationally infeasible, provided that the slope of the ramp shall not exceed 1:8.

EXCEPTION 2: Handrails shall not be required in the load and unload areas or on the amusement ride where compliance is structurally or operationally infeasible.

EXCEPTION 3: Limited-use/limited-application elevators and platform lifts complying with **4.11** shall be permitted to be part of an accessible route serving the load and unload area.

15.1.5 Load and Unload Areas. Load and unload areas serving amusement rides required to comply with 15.1 shall provide a maneuvering space complying with **4.2.3**. The maneuvering space shall have a slope not steeper than 1:48.

15.1.6 Signage. Signage shall be provided at the entrance of the queue or waiting line for each amusement ride to identify the type of access provided. Where an accessible unload area also serves as the accessible load area, signage shall be provided at the entrance to the queue or waiting line indicating the location of the accessible load

and unload area.

15.1.7 Amusement Rides with Wheelchair Spaces. Amusement rides with wheelchair spaces shall comply with 15.1.7.

15.1.7.1 Floor or Ground Surface. The floor or ground surface of wheelchair spaces shall comply with 15.1.7.1.

15.1.7.1.1 Slope. The floor or ground surface of wheelchair spaces shall have a slope not steeper than 1:48 when in the load and unload position and shall be stable and firm.

15.1.7.1.2* Gaps. Floors of amusement rides with wheelchair spaces and floors of load and unload areas shall be coordinated so that, when the amusement rides are at rest in the load and unload position, the vertical difference between the floors shall be within plus or minus 5/8 inches (16 mm) and the horizontal gap shall be no greater than 3 inches (75 mm) under normal passenger load conditions. **Appendix Note**

EXCEPTION: Where compliance is not operationally or structurally feasible, ramps, bridge plates, or similar devices complying with the applicable requirements of 36 C.F.R. 1192.83(c) shall be provided.

15.1.7.2 Clearances. Clearances for wheelchair spaces shall comply with 15.1.7.2.

EXCEPTION 1: Where provided, securement devices shall be permitted to overlap required clearances.

EXCEPTION 2: Wheelchair spaces shall be permitted to be mechanically or manually repositioned.

EXCEPTION 3*: Wheelchair spaces shall not be required to comply with **4.4.2. Appendix Note**

15.1.7.2.1 Width and Length. Wheelchair spaces shall provide a clear width of 30 inches (760 mm) minimum and a clear length of 48 inches (1220 mm) minimum measured to 9 inches (230 mm) minimum above the floor surface.

15.1.7.2.2* Wheelchair Spaces - Side Entry. Where the wheelchair space can be entered only from the side, the ride shall be designed to permit sufficient maneuvering space for individuals using a wheelchair or mobility device to enter and exit the ride. **Appendix Note**

15.1.7.2.3 Protrusions in Wheelchair Spaces. Objects are permitted to protrude a distance of 6 inches (150 mm) maximum along the front of the wheelchair space where located 9 inches (230 mm) minimum and 27 inches (685 mm) maximum above the floor or ground surface of the wheelchair space. Objects are permitted to protrude a distance of 25 inches (635 mm) maximum along the front of the wheelchair space, where located more than 27 inches (685 mm) above the floor or ground surface of the wheelchair space (see **Fig. 58**).

15.1.7.3 Openings. Where openings are provided to access wheelchair spaces on amusement rides, the entry shall provide a 32 inch (815 mm) minimum clear opening.

15.1.7.4 Approach. One side of the wheelchair space shall adjoin an accessible route.

15.1.7.5 Companion Seats. Where the interior width of the amusement ride is greater than 53 inches (1346 mm), seating is provided for more than one rider, and the wheelchair is not required to be centered within the amusement ride, a companion seat shall be provided for each wheelchair space.

15.1.7.5.1 Shoulder-to-Shoulder Seating. Where an amusement ride provides shoulder-to-shoulder seating, companion seats shall be shoulder-to-shoulder with the adjacent wheelchair space.

EXCEPTION: Where shoulder-to-shoulder companion seating is not operationally or structurally feasible, compliance with this provision shall be required to the maximum extent feasible.

15.1.8* Amusement Ride Seats Designed for Transfer. Amusement ride seats designed for transfer shall comply with 15.1.8 when positioned for loading and unloading. **Appendix Note**

15.1.8.1 Clear Floor or Ground Space. Clear floor or ground space complying with **4.2.4** shall be provided in the load and unload area adjacent to the amusement ride seats designed for transfer.

15.1.8.2 Transfer Height. The height of the amusement ride seats shall be 14 inches (355 mm) minimum to 24 inches (610mm) maximum measured above the load and unload surface.

15.1.8.3 Transfer Entry. Where openings are provided to transfer to amusement ride seats, the space shall be designed to provide clearance for transfer from a wheelchair or mobility device to the amusement ride seat.

15.1.8.4 Wheelchair Storage Space. Wheelchair storage spaces complying with **4.2.4** shall be provided in or adjacent to unload areas for each required amusement ride seat designed for transfer and shall not overlap any required means of egress or accessible route.

15.1.9* Transfer Devices for Use with Amusement Rides. Transfer devices for use with amusement rides shall comply with 15.1.9 when positioned for loading and unloading. **Appendix Note**

15.1.9.1 Clear Floor or Ground Space. Clear floor or ground space complying with **4.2.4** shall be provided in the load and unload area adjacent to the transfer devices.

15.1.9.2 Transfer Height. The height of the transfer device seats shall be 14 inches (355 mm) minimum to 24 inches (610 mm) maximum measured above the load and unload surface.

15.1.9.3 Wheelchair Storage Space. Wheelchair storage spaces complying with **4.2.4** shall be provided in or adjacent to unload areas for each required transfer device and shall not overlap any required means of egress or accessible route.

15.2 Boating Facilities.

15.2.1 General. Newly designed or newly constructed and altered boating facilities shall comply with 15.2.

15.2.2* Accessible Route. Accessible routes, including gangways that are part of accessible routes, shall comply with **4.3**. **Appendix Note**

EXCEPTION 1. Where an existing gangway or series of gangways is replaced or altered, an increase in the length of the gangway is not required to comply with 15.2.2, unless required by **4.1.6(2)**.

EXCEPTION 2. The maximum rise specified in **4.8.2** shall not apply to gangways.

EXCEPTION 3. Where the total length of the gangway or series of gangways serving as part of a required accessible route is at least 80 feet (24 m), the maximum slope specified in **4.8.2** shall not apply to the gangways.

EXCEPTION 4. In facilities containing fewer than 25 boat slips and where the total length of the gangway or series of gangways serving as part of a required accessible route is at least 30 feet (9140 mm), the maximum slope specified in **4.8.2** shall not apply to the gangways.

EXCEPTION 5. Where gangways connect to transition plates, landings specified by **4.8.4** shall not be required.

EXCEPTION 6. Where gangways and transition plates connect and are required to have handrails, handrail extensions specified by **4.8.5** shall not be required. Where handrail extensions are provided on gangways or transition plates, such extensions are not required to be parallel with the ground or floor surface.

EXCEPTION 7. The cross slope of gangways, transition plates, and floating piers that are part of an accessible route shall be 1:50 maximum measured in the static position.

EXCEPTION 8. Limited-use/limited-application elevators or platform lifts complying with **4.11** shall be permitted in lieu of gangways complying with **4.3**.

15.2.3* Boat Slips: Minimum Number. Where boat slips are provided, boat slips complying with 15.2.5 shall be provided in accordance with Table 15.2.3. Where the number of boat slips is not identified, each 40 feet (12 m) of boat slip edge provided along the perimeter of the pier shall be counted as one boat slip for the purpose of this section. **Appendix Note**

Table 15.2.3

Total Boat Slips in Facility	Minimum Number of Required Accessible Boat Slips
1 to 25	1
26 to 50	2
51 to 100	3
101 to 150	4
151 to 300	5
301 to 400	6
401 to 500	7
501 to 600	8
601 to 700	9
701 to 800	10
801 to 900	11
901 to 1000	12
1001 and over	12, plus 1 for each 100 or fraction thereof over 1000

15.2.3.1* Dispersion. Accessible boat slips shall be dispersed throughout the various types of slips provided. This provision does not require an increase in the minimum number of boat slips required to be accessible. **Appendix Note**

15.2.4* Boarding Piers at Boat Launch Ramps. Where boarding piers are provided at boat launch ramps, at least 5 percent, but not less than one of the boarding piers shall comply with 15.2.4 and shall be served by an accessible route complying with **4.3**. **Appendix Note**

EXCEPTION 1. Accessible routes serving floating boarding piers shall be permitted to use exceptions 1, 2, 5, 6, 7, and 8 in **15.2.2**.

EXCEPTION 2. Where the total length of the gangway or series of gangways serving as part of a required accessible route is at least 30 feet (9140 mm), the maximum slope specified by **4.8.2** shall not apply to the gangways.

EXCEPTION 3. Where the accessible route serving a floating boarding pier or skid pier is located within a boat launch ramp, the portion of the accessible route located within the boat launch ramp shall not be required to comply with **4.8**.

15.2.4.1* Boarding Pier Clearances. The entire length of the piers shall comply with 15.2.5. **Appendix Note**

15.2.5* Accessible Boat Slips. Accessible boat slips shall comply with 15.2.5. **Appendix Note**

15.2.5.1 Clearances. Accessible boat slips shall be served by clear pier space 60 inches (1525 mm) wide minimum and at least as long as the accessible boat slips. Every 10 feet (3050 mm) maximum of linear pier edge serving the accessible boat slips shall contain at least one continuous clear opening 60 inches (1525 mm) minimum in width (see **Fig. 59**).

EXCEPTION 1: The width of the clear pier space shall be permitted to be 36 inches (915 mm) minimum for a length of 24 inches (610 mm) maximum, provided that multiple 36 inch (915mm) wide segments are separated by segments that are 60 inches (1525 mm)

minimum clear in width and 60 inches (1525 mm) minimum clear in length. (see **Fig. 60**)

EXCEPTION 2: Edge protection 4 inches (100 mm) high maximum and 2 inches (51mm) deep maximum shall be permitted at the continuous clear openings. (see **Fig. 61**)

EXCEPTION 3*: In alterations to existing facilities, clear pier space shall be permitted to be located perpendicular to the boat slip and shall extend the width of the boat slip, where the facility has at least one boat slip complying with 15.2.5, and further compliance with 15.2.5 would result in a reduction in the number of boat slips available or result in a reduction of the widths of existing slips. **Appendix Note**

15.2.5.2 Cleats and Other Boat Securement Devices. Cleats and other boat securement devices shall not be required to comply with **4.27.3**.

15.3 Fishing Piers and Platforms.

15.3.1 General. Newly designed or newly constructed and altered fishing piers and platforms shall comply with 15.3.

15.3.2 Accessible Route. Accessible routes, including gangways that are part of accessible routes, serving fishing piers and platforms shall comply with **4.3**.

EXCEPTION 1: Accessible routes serving floating fishing piers and platforms shall be permitted to use exceptions 1, 2, 5, 6, 7, and 8 in **15.2.2**.

EXCEPTION 2*: Where the total length of the gangway or series of gangways serving as part of a required accessible route is at least 30 feet (9140 mm), the maximum slope specified by **4.8.2** shall not apply to the gangways. **Appendix Note**

15.3.3 Railings. Where railings, guards, or handrails are provided, they shall comply with 15.3.3.

15.3.3.1* Edge Protection. Edge protection shall be provided and shall extend 2 inches (51mm) minimum above the ground or deck surface. **Appendix Note**

EXCEPTION: Where the railing, guard, or handrail is 34 inches (865 mm) or less above the ground or deck surface, edge protection shall not be required if the deck surface extends 12 inches (305 mm) minimum beyond the inside face of the railing. Toe clearance shall be 9 inches (230 mm) minimum above the ground or deck surface beyond the railing. Toe clearance shall be 30 inches (760 mm) minimum wide (see **Fig. 62**).

15.3.3.2 Height. At least 25 percent of the railings, guard, or handrail shall be 34 inches (865 mm) maximum above the ground or deck surface.

Exception: This provision shall not apply to that portion of a fishing pier or platform where a guard which complies with sections 1003.2.12.1 (Height) and 1003.2.12.2 (Opening limitations) of the International Building Code (incorporated by reference, see **2.3.2**) is provided.

15.3.3.3* Dispersion. Railings required to comply with 15.3.3.2 shall be dispersed throughout a fishing pier or platform. **Appendix Note**

15.3.4 Clear Floor or Ground Space. At least one clear floor or ground space complying with **4.2.4** shall be provided where the railing height required by 15.3.3.2 is located. Where no railings are provided, at least one clear floor or ground space complying with **4.2.4** shall be provided.

15.3.5 Maneuvering Space. At least one maneuvering space complying with **4.2.3** shall be provided on the fishing pier or platform.

15.4 Golf.

15.4.1 General. Newly designed or newly constructed and altered golf courses, driving ranges, practice putting greens, and practice teeing grounds shall comply with 15.4.

15.4.2* Accessible Route - Golf Course. An accessible route shall connect accessible elements and spaces within the boundary of the golf course. In addition, an accessible route shall connect the golf car rental area, bag drop areas, practice putting greens, accessible practice teeing grounds, course toilet rooms, and course weather shelters. The accessible route required by this section shall be 48 inches (1220 mm) minimum wide. Where handrails are provided, the accessible route shall be 60 inches (1525 mm) minimum wide. **Appendix Note**

EXCEPTION 1: A golf car passage complying with **15.4.7** shall be permitted in lieu of all or part of an accessible route required by 15.4.2.

EXCEPTION 2: The handrail requirements of **4.8.5** shall not apply to an accessible route located within the boundary of a golf course.

15.4.3* Accessible Route - Driving Ranges. An accessible route shall connect accessible teeing stations at driving ranges with accessible parking spaces and shall be 48 inches (1220 mm) wide minimum. Where handrails are provided, the accessible route shall be 60 inches (1525 mm) wide minimum. **Appendix Note**

EXCEPTION: A golf car passage complying with **15.4.7** shall be permitted in lieu of all or part of an accessible route required by 15.4.3.

15.4.4 Teeing Grounds. Teeing grounds shall comply with 15.4.4.

15.4.4.1 Number Required. Where one or two teeing grounds are provided for a hole, at least one teeing ground serving the hole shall comply with 15.4.4.3. Where three or more teeing grounds are provided for a hole, at least two teeing grounds shall comply with 15.4.4.3.

15.4.4.2 Forward Teeing Ground. The forward teeing ground shall be accessible.

EXCEPTION: In alterations, the forward teeing ground shall not be required to be accessible where compliance is not feasible due to terrain.

15.4.4.3 Teeing Grounds. Teeing grounds required by 15.4.4.1 and 15.4.4.2 shall be designed and constructed so that a golf car can enter and exit the teeing ground.

15.4.5 Teeing Stations at Driving Ranges and Practice Teeing Grounds. Where teeing stations or practice teeing grounds are provided, at least 5 percent of the practice teeing stations or practice teeing grounds, but not less than one, shall comply with 15.4.4.3.

15.4.6 Weather Shelters. Where weather shelters are provided on a golf course, each weather shelter shall have a clear floor or ground space 60 inches (1525 mm) minimum by 96 inches (2440 mm) minimum and shall be designed and constructed so that a golf car can enter and exit.

15.4.7 Golf Car Passage. Where curbs or other constructed barriers are provided along a golf car passage to prohibit golf cars from entering a fairway, openings at least 60 inches (1525 mm) wide shall be provided at intervals not to exceed 75 yds (69 m).

15.4.7.1 Width. The golf car passage shall be 48 inches (1220 mm) minimum wide.

15.4.8 Putting Greens. Each putting green shall be designed and constructed so that a golf car can enter and exit the putting green.

15.5* Miniature Golf. Appendix Note

15.5.1 General. Newly designed or newly constructed and altered miniature golf courses shall comply with 15.5.

15.5.2 Accessible Holes. At least fifty percent of holes on a miniature golf course shall comply with 15.5.3 through 15.5.5 and shall be consecutive.

EXCEPTION: One break in the sequence of consecutive accessible holes shall be permitted, provided that the last hole on a miniature golf course is the last hole in the sequence.

15.5.3* Accessible Route. An accessible route complying with **4.3** shall connect the course entrance with the first

accessible hole and the start of play area on each accessible hole. The course shall be configured to allow exit from the last accessible hole to the course exit or entrance and shall not require travel back through other holes. **Appendix Note**

15.5.3.1 Accessible Route - Located On the Playing Surface. Where the accessible route is located on the playing surface of the accessible hole, exceptions 1-5 shall be permitted.

EXCEPTION 1: Where carpet is provided, the requirements of **4.5.3** shall not apply.

EXCEPTION 2: Where the accessible route intersects the playing surface of a hole, a 1 inch (26 mm) maximum curb shall be permitted for a width of 32 inches (815 mm) minimum.

EXCEPTION 3: A slope of 1:4 maximum for a 4 inch (100 mm) maximum rise shall be permitted.

EXCEPTION 4: Landings required by **4.8.4** shall be permitted to be 48 inches (1220 mm) in length minimum. Landing size required by **4.8.4(3)** shall be permitted to be 48 inches (1220 mm) minimum by 60 inches (1525 mm) minimum. Landing slopes shall be permitted to be 1:20 maximum.

EXCEPTION 5: Handrail requirements of **4.8.5** shall not apply.

15.5.3.2 Accessible Route - Adjacent to the Playing Surface. Where the accessible route is located adjacent to the playing surface, the requirements of **4.3** shall apply.

15.5.4 Start of Play Areas. Start of play areas at holes required to comply with 15.5.2 shall have a slope not steeper than 1:48 and shall be 48 inches (1220 mm) minimum by 60 inches (1525 mm) minimum.

15.5.5* Golf Club Reach Range. All areas within accessible holes where golf balls rest shall be within 36 inches (915 mm) maximum of an accessible route having a maximum slope of 1:20 for 48 inches (1220 mm) in length (see **Fig. 63**). **Appendix Note**

15.6 Play Areas.

15.6.1* General. Newly designed and newly constructed play areas for children ages 2 and over and altered portions of existing play areas shall comply with the applicable provisions of section 4, except as modified or otherwise provided by this section. Where separate play areas are provided within a site for specified age groups, each play area shall comply with this section. Where play areas are designed or constructed in phases, this section shall be applied so that when each successive addition is completed, the entire play area complies with all the applicable provisions of this section. **Appendix Note**

EXCEPTION 1: Play areas located in family child care facilities where the proprietor actually resides shall not be required to comply with 15.6.

EXCEPTION 2: Where play components are relocated in existing play areas for the purpose of creating safe use zones, 15.6 shall not apply, provided that the ground surface is not changed or extended for more than one use zone.

EXCEPTION 3: Where play components are altered and the ground surface is not altered, the ground surface shall not be required to comply with **15.6.7**, unless required by **4.1.6(2)**.

EXCEPTION 4: The provisions of 15.6.1 through 15.6.7 shall not apply to amusement attractions.

EXCEPTION 5: Compliance with **4.4** shall not be required within the boundary of the play area.

EXCEPTION 6: Stairs shall not be required to comply with **4.9**.

15.6.2* Ground Level Play Components. Ground level play components shall be provided in the number and types required by 15.6.2.1 and 15.6.2.2. Ground level play components that are provided to comply with 15.6.2.1 shall be permitted to satisfy the number required by 15.6.2.2, provided that the minimum required types of play components are provided. Where more than one ground level play component required by 15.6.2.1 and 15.6.2.2 is provided, the play components shall be integrated in the play area. **Appendix Note**

15.6.2.1 General. Where ground level play components are provided, at least one of each type provided shall be located on an accessible route complying with **15.6.4** and shall comply with **15.6.6**.

15.6.2.2 Additional Number and Types. Where elevated play components are provided, ground level play components shall be provided in accordance with Table 15.6.2.2. Ground level play components required by 15.6.2.2 shall be located on an accessible route complying with **15.6.4** and shall comply with **15.6.6**.

EXCEPTION: If at least 50 percent of the elevated play components are connected by a ramp, and if at least 3 of the elevated play components connected by the ramp are different types of play components, 15.6.2.2 shall not apply.

Table 15.6.2.2 Number and Types of Ground Level Play Components Required to be on Accessible Route

Number of Elevated Play Components Provided	Minimum Number of Ground Level Play Components Required to be on Accessible Route	Minimum Number of Different Types of Ground Level Play Components Required to be on Accessible Route
1	Not applicable	Not applicable
2 to 4	1	1
5 to 7	2	2
8 to 10	3	3
11 to 13	4	3
14 to 16	5	3
17 to 19	6	3
20 to 22	7	4
23 to 25	8	4
More than 25	8 plus 1 for each additional 3 over 25, or fraction thereof	5

15.6.3* Elevated Play Components. Where elevated play components are provided, at least 50 percent shall be located on an accessible route complying with **15.6.4**. Elevated play components connected by a ramp shall comply with **15.6.6**. **Appendix Note**

15.6.4* Accessible Routes. At least one accessible route complying with **4.3**, as modified by 15.6.4, shall be provided. **Appendix Note**

EXCEPTION 1: Transfer systems complying with **15.6.5** shall be permitted to connect elevated play components, except where 20 or more elevated play components are provided, no more than 25 percent of the elevated play components shall be permitted to be connected by transfer systems.

EXCEPTION 2: Where transfer systems are provided, an elevated play component shall be permitted to connect to another elevated play component in lieu of an accessible route.

EXCEPTION 3: Platform lifts (wheelchair lifts) complying with **4.11** and applicable State or local codes shall be permitted to be used as part of an accessible route.

15.6.4.1 Location. Accessible routes shall be located within the boundary of the play area and shall connect ground level play components as required by **15.6.2.1** and **15.6.2.2** and elevated play components as required by **15.6.3**, including entry and exit points of the play components.

15.6.4.2 Protrusions. Objects shall not protrude into ground level accessible routes at or below 80 in (2030 mm) above the ground or floor surface.

15.6.4.3 Clear Width. The clear width of accessible routes within play areas shall comply with 15.6.4.3.

15.6.4.3.1 Ground Level. The clear width of accessible routes at ground level shall be 60 in (1525 mm) minimum.

EXCEPTION 1: In play areas less than 1,000 square feet, the clear width of accessible routes shall be permitted to be 44 in (1120 mm) minimum, provided that at least one turning space complying with **4.2.3** is provided where the restricted accessible route exceeds 30 feet (9.14 m) in length.

EXCEPTION 2: The clear width of accessible routes shall be permitted to be 36 in (915 mm) minimum for a distance of 60 in (1525 mm) maximum, provided that multiple reduced width segments are separated by segments that are 60 in (1525 mm) minimum in width and 60 in (1525 mm) minimum in length.

15.6.4.3.2 Elevated. The clear width of accessible routes connecting elevated play components shall be 36 in (915 mm).

EXCEPTION 1: The clear width of accessible routes connecting elevated play components shall be permitted to be reduced to 32 in (815 mm) minimum for a distance of 24 in (610 mm) maximum provided that reduced width segments are separated by segments that are 48 in (1220 mm) minimum in length and 36 in (915 mm) minimum in width.

EXCEPTION 2: The clear width of transfer systems connecting elevated play components shall be permitted to be 24 in (610 mm) minimum.

15.6.4.4 Ramp Slope and Rise. Any part of an accessible route with a slope greater than 1:20 shall be considered a ramp and shall comply with **4.8**, as modified by 15.6.4.4.

15.6.4.4.1 Ground Level. The maximum slope for ramps connecting ground level play components within the boundary of a play area shall be 1:16.

15.6.4.4.2 Elevated. Where a ramp connects elevated play components, the maximum rise of any ramp run shall be 12 in (305 mm).

15.6.4.5 Handrails. Where required on ramps, handrails shall comply with **4.8.5**, as modified by 15.6.4.5.

EXCEPTION 1: Handrails shall not be required at ramps located within ground level use zones.

EXCEPTION 2: Handrail extensions shall not be required.

15.6.4.5.1 Handrail Gripping Surface. Handrails shall have a diameter or width of 0.95 in (24.1 mm) minimum to 1.55 in (39.4 mm) maximum, or the shape shall provide an equivalent gripping surface.

15.6.4.5.2 Handrail Height. The top of handrail gripping surfaces shall be 20 in (510 mm) minimum to 28 in (710 mm) maximum above the ramp surface.

15.6.5* Transfer Systems. Where transfer systems are provided to connect elevated play components, the transfer systems shall comply with 15.6.5. **Appendix Note**

15.6.5.1 Transfer Platforms. Transfer platforms complying with 15.6.5.1 shall be provided where transfer is intended to be from a wheelchair or other mobility device (see **Fig. 64**).

15.6.5.1.1 Size. Platforms shall have a level surface 14 in (355 mm) minimum in depth and 24 in (610 mm) minimum in width.

15.6.5.1.2 Height. Platform surfaces shall be 11 in (280 mm) minimum to 18 in (455 mm) maximum above the ground or floor surface.

15.6.5.1.3 Transfer Space. A level space complying with **4.2.4** shall be centered on the 48 in (1220 mm) long dimension parallel to the 24 in (610 mm) minimum long unobstructed side of the transfer platform.

15.6.5.1.4 Transfer Supports. A means of support for transferring shall be provided.

15.6.5.2 Transfer Steps. Transfer steps complying with 15.6.5.2 shall be provided where movement is intended from a transfer platform to a level with elevated play components required to be located on an accessible route (see **Fig. 65**).

15.6.5.2.1 Size. Transfer steps shall have a level surface 14 in (355 mm) minimum in depth and 24 in (610 mm) minimum in width.

15.6.5.2.2 Height. Each transfer step shall be 8 in (205 mm) maximum high.

15.6.5.2.3 Transfer Supports. A means of support for transferring shall be provided.

15.6.6* Play Components. Ground level play components located on accessible routes and elevated play components connected by ramps shall comply with 15.6.6. **Appendix Note**

15.6.6.1 Maneuvering Space. Maneuvering space complying with **4.2.3** shall be provided on the same level as the play components. Maneuvering space shall have a slope not steeper than 1:48 in all directions. The maneuvering space required for a swing shall be located immediately adjacent to the swing.

15.6.6.2 Clear Floor or Ground Space. Clear floor or ground space shall be provided at the play components and shall be 30 in (760 mm) by 48 in (1220 mm) minimum. Clear floor or ground space shall have a slope not steeper than 1:48 in all directions.

15.6.6.3 Play Tables: Height and Clearances. Where play tables are provided, knee clearance 24 in (610 mm) high minimum, 17 in deep (430 mm) minimum, and 30 in (760 mm) wide minimum shall be provided. The tops of rims, curbs, or other obstructions shall be 31 in (785 mm) high maximum.

EXCEPTION: Play tables designed or constructed primarily for children ages 5 and under shall not be required to provide knee clearance if the clear floor or ground space required by 15.6.6.2 is arranged for a parallel approach and if the rim surface is 31 in (785 mm) high maximum.

15.6.6.4 Entry Points and Seats: Height. Where a play component requires transfer to the entry point or seat, the entry point or seat shall be 11 in (280 mm) minimum and 24 in (610mm) maximum above the clear floor or ground space.

EXCEPTION: The entry point of a slide shall not be required to comply with 15.6.6.4.

15.6.6.5 Transfer Supports. Where a play component requires transfer to the entry point or seat, a means of support for transferring shall be provided.

15.6.7* Ground Surfaces. Ground surfaces along accessible routes, clear floor or ground spaces, and maneuvering spaces within play areas shall comply with **4.5.1** and 15.6.7. **Appendix Note**

15.6.7.1 Accessibility. Ground surfaces shall comply with **ASTM F 1951 Standard Specification for Determination of Accessibility of Surface Systems Under and Around Playground Equipment** (incorporated by reference, see **2.3.2**). Ground surfaces shall be inspected and maintained regularly and frequently to ensure continued compliance with ASTM F 1951.

15.6.7.2 Use Zones. If located within use zones, ground surfaces shall comply with **ASTM F 1292 Standard Specification for Impact Attenuation of Surface Systems Under and Around Playground Equipment** (incorporated by reference, see **2.3.2**).

15.6.8 Soft Contained Play Structures. Soft contained play structures shall comply with 15.6.8.

15.6.8.1 Accessible Routes to Entry Points. Where three or fewer entry points are provided, at least one entry point shall be located on an accessible route. Where four or more entry points are provided, at least two entry points shall be located on an accessible route. Accessible routes shall comply with **4.3**.

EXCEPTION: Transfer systems complying with **15.6.5** or platform lifts (wheelchair lifts) complying with **4.11** and applicable State or local codes shall be permitted to be used as part of an accessible route.

15.7 Exercise Equipment and Machines, Bowling Lanes, and Shooting Facilities.

15.7.1 General. Newly designed or newly constructed and altered exercise equipment and machines, bowling lanes, and shooting facilities shall comply with 15.7.

15.7.2* Exercise Equipment and Machines. At least one of each type of exercise equipment and machines shall be provided with clear floor or ground space complying with **4.2.4** and shall be served by an accessible route. Clear floor or ground space shall be positioned for transfer or for use by an individual seated in a wheelchair. Clear floor or ground spaces for more than one piece of equipment shall be permitted to overlap. **Appendix Note**

15.7.3 Bowling Lanes. Where bowling lanes are provided, at least 5 percent, but not less than one of each type of lane shall be served by an accessible route.

15.7.4* Shooting Facilities. Where fixed firing positions are provided at a site, at least 5 percent, but not less than one, of each type of firing position shall comply with 15.7.4.1. **Appendix Note**

15.7.4.1 Fixed Firing Position. Fixed firing positions shall contain a 60 inch (1525 mm) diameter space and shall have a slope not steeper than 1:48.

15.8 Swimming Pools, Wading Pools, and Spas.

15.8.1 General. Newly designed or newly constructed and altered swimming pools, wading pools, and spas shall comply with 15.8.

EXCEPTION: An accessible route shall not be required to serve raised diving boards or diving platforms.

15.8.2* Swimming Pools. At least two accessible means of entry shall be provided for each public use and common use swimming pool. The primary means of entry shall comply with **15.8.5** (Swimming Pool Lifts) or **15.8.6** (Sloped Entries). The secondary means of entry shall comply with one of the following: **15.8.5** (Swimming Pool Lifts), **15.8.6** (Sloped Entries), **15.8.7** (Transfer Walls), **15.8.8** (Transfer Systems), or **15.8.9** (Pool Stairs). **Appendix Note**

EXCEPTION 1*: Where a swimming pool has less than 300 linear feet (91 m) of swimming pool wall, at least one accessible means of entry shall be provided and shall comply with **15.8.5** (Swimming Pool Lifts) or **15.8.6** (Sloped Entries). **Appendix Note**

EXCEPTION 2: Wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area, shall provide at least one accessible means of entry that complies with **15.8.5** (Swimming Pool Lifts), **15.8.6** (Sloped Entries), or **15.8.8** (Transfer Systems).

EXCEPTION 3: Catch pools shall be required only to be served by an accessible route that connects to the pool edge.

15.8.3 Wading Pools. At least one accessible means of entry complying with **15.8.6** (Sloped Entries) shall be provided for each wading pool.

15.8.4 Spas. At least one accessible means of entry complying with **15.8.5** (Swimming Pool Lifts), **15.8.7** (Transfer Walls), or **15.8.8** (Transfer Systems) shall be provided for each spa.

EXCEPTION: Where spas are provided in a cluster, 5 percent, but not less than one, in each cluster shall be accessible.

15.8.5* Pool Lifts. Pool lifts shall comply with 15.8.5. **Appendix Note**

15.8.5.1 Pool Lift Location. Pool lifts shall be located where the water level does not exceed 48 inches (1220 mm).

EXCEPTION 1: Where the entire pool depth is greater than 48 inches (1220 mm), 15.8.5.1 shall not apply.

EXCEPTION 2: Where multiple pool lift locations are provided, no more than one shall be required to be located in an area where the water level does not exceed 48 inches (1220 mm).

15.8.5.2 Seat Location. In the raised position, the centerline of the seat shall be located over the deck and 16 inches (405 mm) minimum from the edge of the pool. The deck surface between the centerline of the seat and the pool edge shall have a slope not greater than 1:48 (see **Fig. 68**).

15.8.5.3 Clear Deck Space. On the side of the seat opposite the water, a clear deck space shall be provided parallel with the seat. The space shall be 36 inches (915 mm) wide minimum and shall extend forward 48 inches (1220 mm) minimum from a line located 12 inches (305mm) behind the rear edge of the seat. The clear deck space shall have a slope not greater than 1:48 (see **Fig. 69**).

15.8.5.4 Seat Height. The height of the lift seat shall be designed to allow a stop at 16 inches (405 mm) minimum to 19 inches (485 mm) maximum measured from the deck to the top of the seat surface when in the raised (load) position (see **Fig. 70**).

15.8.5.5 Seat Width. The seat shall be 16 inches (405 mm) minimum wide.

15.8.5.6* Footrests and Armrests. Footrests shall be provided and shall move with the seat. If provided, armrests positioned opposite the water shall be removable or shall fold clear of the seat when the seat is in the raised (load) position. **Appendix Note**

EXCEPTION: Footrests shall not be required on pool lifts provided in spas.

15.8.5.7* Operation. The lift shall be capable of unassisted operation from both the deck and water levels. Controls and operating mechanisms shall be unobstructed when the lift is in use and shall comply with **4.27.4**. **Appendix Note**

15.8.5.8 Submerged Depth. The lift shall be designed so that the seat will submerge to a water depth of 18 inches (455 mm) minimum below the stationary water level (see **Fig. 71**).

15.8.5.9* Lifting Capacity. Single person pool lifts shall have a minimum weight capacity of 300 lbs. (136 kg) and be capable of sustaining a static load of at least one and a half times the rated load. **Appendix Note**

15.8.6 Sloped Entries. Sloped entries designed to provide access into the water shall comply with 15.8.6.

15.8.6.1* Sloped Entries. Sloped entries shall comply with **4.3**, except as modified below. **Appendix Note**

EXCEPTION: Where sloped entries are provided, the surfaces shall not be required to be slip resistant.

15.8.6.2 Submerged Depth. Sloped entries shall extend to a depth of 24 inches (610 mm) minimum to 30 inches (760 mm) maximum below the stationary water level. Where landings are required by **4.8**, at least one landing shall be located 24 inches (610 mm) minimum to 30 inches (760 mm) maximum below the stationary water level (see **Fig. 72**).

EXCEPTION: In wading pools, the sloped entry and landings, if provided, shall extend to the deepest part of the wading pool.

15.8.6.3* Handrails. Handrails shall be provided on both sides of the sloped entry and shall comply with **4.8.5**. The clear width between handrails shall be 33 inches (840 mm) minimum and 38 inches (965 mm) maximum (see **Fig. 73**). **Appendix Note**

EXCEPTION 1: Handrail extensions specified by **4.8.5** shall not be required at the bottom landing serving a sloped entry.

EXCEPTION 2: Where a sloped entry is provided for wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area, the required clear width between handrails shall not apply.

EXCEPTION 3: The handrail requirements of **4.8.5** and 15.8.6.3 shall not be required on sloped entries in wading pools.

15.8.7 Transfer Walls. Transfer walls shall comply with 15.8.7.

15.8.7.1 Clear Deck Space. A clear deck space of 60 inches (1525 mm) minimum by 60 inches (1525 mm) minimum with a slope not steeper than 1:48 shall be provided at the base of the transfer wall. Where one grab bar is provided, the clear deck space shall be centered on the grab bar. Where two grab bars are provided, the clear deck space shall be centered on the clearance between the grab bars (see **Fig. 74**).

15.8.7.2 Height. The height of the transfer wall shall be 16 inches (405 mm) minimum to 19 inches (485 mm) maximum measured from the deck (see **Fig. 75**).

15.8.7.3 Wall Depth and Length. The depth of the transfer wall shall be 12 inches (305 mm) minimum to 16 inches (405 mm) maximum. The length of the transfer wall shall be 60 inches (1525 mm) minimum and shall be centered on the clear deck space (see **Fig. 76**).

15.8.7.4 Surface. Surfaces of transfer walls shall not be sharp and shall have rounded edges.

15.8.7.5 Grab Bars. At least one grab bar shall be provided on the transfer wall. Grab bars shall be perpendicular to the pool wall and shall extend the full depth of the transfer wall. The top of the gripping surface shall be 4 inches (100 mm) minimum and 6 inches (150 mm) maximum above walls. Where one grab bar is provided, clearance shall be 24 inches (610 mm) minimum on both sides of the grab bar. Where two grab bars are provided, clearance between grab bars shall be 24 inches (610 mm) minimum. Grab bars shall comply with **4.26** (see **Fig. 77**).

15.8.8 Transfer Systems. Transfer systems shall comply with 15.8.8.

15.8.8.1 Transfer Platform. A transfer platform 19 inches (485 mm) minimum clear depth by 24 inches (610 mm) minimum clear width shall be provided at the head of each transfer system (see **Fig. 78**).

15.8.8.2 Clear Deck Space. A clear deck space of 60 inches (1525 mm) minimum by 60 inches (1525 mm) minimum with a slope not steeper than 1:48 shall be provided at the base of the transfer platform surface and shall be centered along a 24 inch (610 mm) minimum unobstructed side of the transfer platform (see **Fig. 79**).

15.8.8.3 Height. The height of the transfer platform shall comply with **15.8.7.2**.

15.8.8.4* Transfer Steps. Transfer step height shall be 8 inches (205 mm) maximum. Transfer steps shall extend to a water depth of 18 inches (455 mm) minimum below the stationary water level (see **Fig. 80**). **Appendix Note**

15.8.8.5 Surface. The surface of the transfer system shall not be sharp and shall have rounded edges.

15.8.8.6 Size. Each transfer step shall have a tread clear depth of 14 inches (355 mm) minimum and 17 inches (430 mm) maximum and shall have a tread clear width of 24 inches (610 mm) minimum (see **Fig. 81**).

15.8.8.7* Grab Bars. At least one grab bar on each transfer step and the transfer platform, or a continuous grab bar serving each transfer step and the transfer platform, shall be provided. Where provided, the top of the gripping surface shall be 4 inches (100 mm) minimum and 6 inches (150 mm) maximum above each step and transfer platform. Where a continuous grab bar is provided, the top of the gripping surface shall be 4 inches (100 mm) minimum and 6 inches (150 mm) maximum above the step nosing and transfer platform. Grab bars shall comply with **4.26** and be located on at least one side of the transfer system. The grab bar located at the transfer platform shall not obstruct transfer (see **Fig. 82**). **Appendix Note**

15.8.9 Pool Stairs. Pool stairs shall comply with 15.8.9.

15.8.9.1 Pool Stairs. Pool stairs shall comply with **4.9**, except as modified below.

15.8.9.2 Handrails. The width between handrails shall be 20 inches (510 mm) minimum and 24 inches (610 mm) maximum. Handrail extensions required by **4.9.4** shall not be required at the bottom landing serving a pool stair.

15.8.10* Water Play Components. Where water play components are provided, the provisions of **15.6** and **4.3** shall apply, except as modified or otherwise provided in this section. **Appendix Note**

EXCEPTION 1: Where the surface of the accessible route, clear floor or ground spaces and maneuvering spaces connecting play components is submerged, the provisions of **15.6** and **4.3** for cross slope, running slope, and surface shall not apply.

EXCEPTION 2: Transfer systems complying with **15.6.5** shall be permitted to be used in lieu of ramps to connect elevated play components.

LIST OF FIGURES

APPENDIX

This appendix contains materials of an advisory nature and provides additional information that should help the reader to understand the minimum requirements of the guidelines or to design buildings or facilities for greater accessibility. The paragraph numbers correspond to the sections or paragraphs of the guideline to which the material relates and are therefore not consecutive (for example, A4.2.1 contains additional information relevant to 4.2.1). Sections of the guidelines for which additional material appears in this appendix have been indicated by an asterisk. Nothing in this appendix shall in any way obviate any obligation to comply with the requirements of the guidelines itself.

A2.0 General.

A2.2 Equivalent Facilitation.

Specific examples of equivalent facilitation are found in the following sections:

4.1.6(3)(c) Elevators in Alterations
4.31.9 Text Telephones
7.2 Sales and Service Counters, Teller Windows, Information Counters
9.1.4 Classes of Sleeping Accommodations
9.2.2(6)(d) Requirements for Accessible Units, Sleeping Rooms, and Suites

A3.0 Miscellaneous Instructions and Definitions.

A3.5 Definitions.

Transient Lodging. The Department of Justice's policy and rules further define what is covered as transient lodging.

A4.0 Accessible Elements and Spaces: Scope and Technical Requirements.

A4.1.1 Application.

A4.1.1(3) Areas Used Only by Employees as Work Areas. Where there are a series of individual work stations of the same type (e.g., laboratories, service counters, ticket booths), 5%, but not less than one, of each type of work station should be constructed so that an individual with disabilities can maneuver within the work stations. Rooms housing individual offices in a typical office building must meet the requirements of the guidelines concerning doors, accessible routes, etc. but do not need to allow for maneuvering space around individual desks. Modifications

required to permit maneuvering within the work area may be accomplished as a reasonable accommodation to individual employees with disabilities under Title I of the ADA. Consideration should also be given to placing shelves in employee work areas at a convenient height for accessibility or installing commercially available shelving that is adjustable so that reasonable accommodations can be made in the future.

If work stations are made accessible they should comply with the applicable provisions of 4.2 through 4.35.

A4.1.2 Accessible Sites and Exterior Facilities: New Construction.

A4.1.2(2)(b) Court Sports: The accessible route must be direct and connect both sides of the court without requiring players on one side of the court to traverse through or around another court to get to the other side of the court.A4.1.2(4)

A4.1.2(4) Exception 1. An accessible route is required to connect to the boundary of the area of sport activity. The term "area of sport activity" distinguishes that portion of a room or space where the play or practice of a sport occurs from adjacent areas. Examples of areas of sport activity include: basketball courts, baseball fields, running tracks, bowling lanes, skating rinks, and the area surrounding a piece of gymnastic equipment. While the size of an area of sport activity may vary from sport to sport, each includes only the space needed to play. The following example is provided for additional clarification.

Example. Boundary lines define the field where a football game is played. A safety border is also provided around the field. The game may temporarily be played in the space between the boundary lines and the safety border when players are pushed out of bounds or momentum carries them forward while receiving a pass. In the game of football, the space between the boundary line and the safety border is used to play the game. This space and the football field are included in the area of sport activity.

A4.1.2(4) Exception 2. Public circulation routes where animals may also travel, such as in petting zoos and passageways alongside animal pens in State fairs, are not eligible for the exception.

A4.1.2(5)(e) Valet parking is not always usable by individuals with disabilities. For instance, an individual may use a type of vehicle controls that render the regular controls inoperable or the driver's seat in a van may be removed. In these situations, another person cannot park the vehicle. It is recommended that some self-parking spaces be provided at valet parking facilities for individuals whose vehicles cannot be parked by another person and that such spaces be located on an accessible route to the entrance of the facility.

A4.1.3 Accessible Buildings: New Construction.

A4.1.3(1)(b) Court Sports: The accessible route must be direct and connect both sides of the court without requiring players on one side of the court to traverse through or around another court to get to the other side of the court.

A4.1.3(3) Exception 1. An accessible route is required to connect to the boundary of the area of sport activity. The term "area of sport activity" distinguishes that portion of a room or space where the play or practice of a sport occurs from adjacent areas. Examples of areas of sport activity include: basketball courts, baseball fields, running tracks, bowling lanes, skating rinks, and the area surrounding a piece of gymnastic equipment. While the size of an area of sport activity may vary from sport to sport, each includes only the space needed to play. The following example is provided for additional clarification.

Example. Boundary lines define the field where a football game is played. A safety border is also provided around the field. The game may temporarily be played in the space between the boundary lines and the safety border when players are pushed out of bounds or momentum carries them forward while receiving a pass. In the game of football, the space between the boundary line and the safety border is used to play the game. This space and the football field are included in the area of sport activity.

A4.1.3(3) Exception 2. Public circulation routes where animals may also travel, such as in petting zoos and passageways alongside animal pens in State fairs, are not eligible for the exception.

A4.1.3(5) Only passenger elevators are covered by the accessibility provisions of 4.10. Materials and equipment hoists, freight elevators not intended for passenger use, dumbwaiters, and construction elevators are not covered by these guidelines. If a building is exempt from the elevator requirement, it is not necessary to provide a platform lift or other means of vertical access in lieu of an elevator.

Under Exception 4, platform lifts are allowed where existing conditions make it impractical to install a ramp or elevator. Such conditions generally occur where it is essential to provide access to small raised or lowered areas where space may not be available for a ramp. Examples include, but are not limited to, raised pharmacy platforms, commercial offices raised above a sales floor, or radio and news booths.

While the use of platform lifts is allowed, ramps are recommended to provide access to player seating areas serving an area of sport activity.

A4.1.3(9) Supervised automatic sprinkler systems have built in signals for monitoring features of the system such as the opening and closing of water control valves, the power supplies for needed pumps, water tank levels, and for indicating conditions that will impair the satisfactory operation of the sprinkler system. Because of these monitoring features, supervised automatic sprinkler systems have a high level of satisfactory performance and response to fire conditions.

A4.1.3(10) If an odd number of drinking fountains is provided on a floor, the requirement in 4.1.3(10)(b) may be met by rounding down the odd number to an even number and calculating 50% of the even number. When more than one drinking fountain on a floor is required to comply with 4.15, those fountains should be dispersed to allow wheelchair users convenient access. For example, in a large facility such as a convention center that has water fountains at several locations on a floor, the accessible water fountains should be located so that wheelchair users do not have to travel a greater distance than other people to use a drinking fountain.

A4.1.3(12)(c) Different types of lockers may include full-size and half-size lockers, as well as those specifically designed for storage of various sports equipment.

A4.1.3(17)(b) In addition to the requirements of section 4.1.3(17)(b), the installation of additional volume controls is encouraged. Volume controls may be installed on any telephone.

A4.1.3(19)(a) Readily removable or folding seating units may be installed in lieu of providing an open space for wheelchair users. Folding seating units are usually two fixed seats that can be easily folded into a fixed center bar to allow for one or two open spaces for wheelchair users when necessary. These units are more easily adapted than removable seats which generally require the seat to be removed in advance by the facility management.

Either a sign or a marker placed on seating with removable or folding arm rests is required by this section. Consideration should be given for ensuring identification of such seats in a darkened theater. For example, a marker which contrasts (light on dark or dark on light) and which also reflects light could be placed on the side of such seating so as to be visible in a lighted auditorium and also to reflect light from a flashlight.

A4.1.6 Accessible Buildings: Alterations.

A4.1.6(1)(h) When an entrance is being altered, it is preferable that those entrances being altered be made accessible to the extent feasible.

A4.1.7 Accessible Buildings: Historic Preservation.

A4.1.7(1) The Department of Justice's regulations implementing titles II and III of the ADA require alternative methods of access where compliance with the special access provisions in 4.1.7(3) would threaten or destroy the historic significance of a qualified historic facility. The requirement for public facilities subject to title II is provided at **28 C.F.R. 35.154(b)** and the requirement for private facilities subject to title III is provided at **28 C.F.R. 36.405 (b)**.

A4.2 Space Allowances and Reach Ranges.

A4.2.1 Wheelchair Passage Width.

(1) Space Requirements for Wheelchairs. Many persons who use wheelchairs need a 30 in (760 mm) clear opening width for doorways, gates, and the like, when the latter are entered head-on. If the person is unfamiliar with a building, if competing traffic is heavy, if sudden or frequent movements are needed, or if the wheelchair must be turned at an opening, then greater clear widths are needed. For most situations, the addition of an inch of leeway on either side is sufficient. Thus, a minimum clear width of 32 in (815 mm) will provide adequate clearance. However, when an opening or a restriction in a passageway is more than 24 in (610 mm) long, it is essentially a passageway and must be at least 36 in (915 mm) wide.

(2) Space Requirements for Use of Walking Aids. Although people who use walking aids can maneuver through clear width openings of 32 in (815 mm), they need 36 in (915 mm) wide passageways and walks for comfortable gaits. Crutch tips, often extending down at a wide angle, are a hazard in narrow passageways where they might not be seen by other pedestrians. Thus, the 36 in (915 mm) width provides a safety allowance both for the person with a disability and for others.

(3) Space Requirements for Passing. Able-bodied persons in winter clothing, walking straight ahead with arms swinging, need 32 in (815 mm) of width, which includes 2 in (50 mm) on either side for sway, and another 1 in (25 mm) tolerance on either side for clearing nearby objects or other pedestrians. Almost all wheelchair users and those who use walking aids can also manage within this 32 in (815 mm) width for short distances. Thus, two streams of traffic can pass in 64 in (1625 mm) in a comfortable flow. Sixty inches (1525 mm) provides a minimum width for a somewhat more restricted flow. If the clear width is less than 60 in (1525 mm), two wheelchair users will not be able to pass but will have to seek a wider place for passing. Forty-eight inches (1220 mm) is the minimum width needed for an ambulatory person to pass a nonambulatory or semi-ambulatory person. Within this 48 in (1220 mm) width, the ambulatory person will have to twist to pass a wheelchair user, a person with a service animal, or a semi-ambulatory person. There will be little leeway for swaying or missteps (see Fig. A1).

A4.2.3 Wheelchair Turning Space. These guidelines specify a minimum space of 60 in (1525 mm) diameter or a 60 in by 60 in (1525 mm by 1525 mm) T-shaped space for a pivoting 180-degree turn of a wheelchair. This space is usually satisfactory for turning around, but many people will not be able to turn without repeated tries and bumping into surrounding objects. The space shown in Fig. A2 will allow most wheelchair users to complete U-turns without difficulty.

A4.2.4 Clear Floor or Ground Space for Wheelchairs. The wheelchair and user shown in Fig. A3 represent typical dimensions for a large adult male. The space requirements in this guideline are based upon maneuvering clearances that will accommodate most wheelchairs. Fig. A3 provides a uniform reference for design not covered by this guideline.

A4.2.5 & A4.2.6 Reach. Reach ranges for persons seated in wheelchairs may be further clarified by Fig. A3(a). These drawings approximate in the plan view the information shown in Fig. 4, 5, and 6.

The following table provides guidance on reach ranges for children according to age where building elements such as coat hooks, lockers, or controls and operating mechanisms are designed for use primarily by children. These dimensions apply to either forward or side reaches. Accessible elements, controls, and operating mechanisms designed for adult use or children over age 12 can be located outside these ranges but must be within the adult reach ranges required by 4.2.5 and 4.2.6.

Children's Reach Ranges

Forward or Side Reach	Ages 3 and 4	Ages 5 through 8	Ages 9 through 12
High (maximum)	36 in (915 mm)	40 in (1015 mm)	44 in (1120 mm)
Low (minimum)	20 in (510 mm)	18 in (455 mm)	16 in (405 mm)

A4.3 Accessible Route.

A4.3.1 General.

(1) Travel Distances. Many people with mobility impairments can move at only very slow speeds; for many, traveling 200 ft (61 m) could take about 2 minutes. This assumes a rate of about 1.5 ft/s (455 mm/s) on level ground. It also assumes that the traveler would move continuously. However, on trips over 100 ft (30 m), disabled people are apt to rest frequently, which substantially increases their trip times. Resting periods of 2 minutes for every 100 ft (30 m) can be used to estimate travel times for people with severely limited stamina. In inclement weather, slow progress and resting can greatly increase a disabled person's exposure to the elements.

(2) Sites. Level, indirect routes or those with running slopes lower than 1:20 can sometimes provide more convenience than direct routes with maximum allowable slopes or with ramps.

A4.3.10 Egress. Because people with disabilities may visit, be employed or be a resident in any building, emergency management plans with specific provisions to ensure their safe evacuation also play an essential role in fire safety and life safety.

A4.3.11.3 Stairway Width. A 48 in (1220 mm) wide exit stairway is needed to allow assisted evacuation (e.g., carrying a person in a wheelchair) without encroaching on the exit path for ambulatory persons.

A4.3.11.4 Two-way Communication. It is essential that emergency communication not be dependent on voice communications alone because the safety of people with hearing or speech impairments could be jeopardized. The visible signal requirement could be satisfied with something as simple as a button in the area of rescue assistance that lights, indicating that help is on the way, when the message is answered at the point of entry.

A4.4 Protruding Objects.

A4.4.1 General. Service animals are trained to recognize and avoid hazards. However, most people with severe impairments of vision use the long cane as an aid to mobility. The two principal cane techniques are the touch technique, where the cane arcs from side to side and touches points outside both shoulders; and the diagonal technique, where the cane is held in a stationary position diagonally across the body with the cane tip touching or just above the ground at a point outside one shoulder and the handle or grip extending to a point outside the other shoulder. The touch technique is used primarily in uncontrolled areas, while the diagonal technique is used primarily in certain limited, controlled, and familiar environments. Cane users are often trained to use both techniques.

Potential hazardous objects are noticed only if they fall within the detection range of canes (see **Fig. A4**). Visually impaired people walking toward an object can detect an overhang if its lowest surface is not higher than 27 in (685 mm). When walking alongside protruding objects, they cannot detect overhangs. Since proper cane and service animal techniques keep people away from the edge of a path or from walls, a slight overhang of no more than 4 in (100 mm) is not hazardous.

A4.5 Ground and Floor Surfaces.

A4.5.1 General. People who have difficulty walking or maintaining balance or who use crutches, canes, or walkers, and those with restricted gaits are particularly sensitive to slipping and tripping hazards. For such people, a stable and regular surface is necessary for safe walking, particularly on stairs. Wheelchairs can be propelled most easily on surfaces that are hard, stable, and regular. Soft loose surfaces such as shag carpet, loose sand or gravel, wet clay, and irregular surfaces such as cobblestones can significantly impede wheelchair movement.

Slip resistance is based on the frictional force necessary to keep a shoe heel or crutch tip from slipping on a walking surface under conditions likely to be found on the surface. While the *dynamic* coefficient of friction during walking varies in a complex and non-uniform way, the *static* coefficient of friction, which can be measured in several ways, provides a close approximation of the slip resistance of a surface. Contrary to popular belief, some slippage is *necessary* to walking, especially for persons with restricted gaits; a truly "non-slip" surface could not be negotiated.

The Occupational Safety and Health Administration recommends that walking surfaces have a static coefficient of friction of 0.5. A research project sponsored by the Architectural and Transportation Barriers Compliance Board (Access Board) conducted tests with persons with disabilities and concluded that a higher coefficient of friction was needed by such persons. A static coefficient of friction of 0.6 is recommended for accessible routes and 0.8 for ramps.

It is recognized that the coefficient of friction varies considerably due to the presence of contaminants, water, floor finishes, and other factors not under the control of the designer or builder and not subject to design and construction guidelines and that compliance would be difficult to measure on the building site. Nevertheless, many common building materials suitable for flooring are now labeled with information on the static coefficient of friction. While it may not be possible to compare one product directly with another, or to guarantee a constant measure, builders and designers are encouraged to specify materials with appropriate values. As more products include information on slip resistance, improved uniformity in measurement and specification is likely. The Access Board's advisory guidelines on Slip Resistant Surfaces provides additional information on this subject.

Cross slopes on walks and ground or floor surfaces can cause considerable difficulty in propelling a wheelchair in a straight line.

A4.5.3 Carpet. Much more needs to be done in developing both quantitative and qualitative criteria for carpeting (i.e., problems associated with texture and weave need to be studied). However, certain functional characteristics are well established. When both carpet and padding are used, it is desirable to have minimum movement (preferably none) between the floor and the pad and the pad and the carpet which would allow the carpet to hump or warp. In heavily trafficked areas, a thick, soft (plush) pad or cushion, particularly in combination with long carpet pile, makes it difficult for individuals in wheelchairs and those with other ambulatory disabilities to get about. Firm carpeting can be achieved through proper selection and combination of pad and carpet, sometimes with the

elimination of the pad or cushion, and with proper installation. Carpeting designed with a weave that causes a zig-zag effect when wheeled across is strongly discouraged.

A4.6 Parking and Passenger Loading Zones.

A4.6.3 Parking Spaces. The increasing use of vans with side- mounted lifts or ramps by persons with disabilities has necessitated some revisions in specifications for parking spaces and adjacent access aisles. The typical accessible parking space is 96 in (2440 mm) wide with an adjacent 60 in (1525 mm) access aisle. However, this aisle does not permit lifts or ramps to be deployed and still leave room for a person using a wheelchair or other mobility aid to exit the lift platform or ramp. In tests conducted with actual lift/van/wheelchair combinations, (under a Board-sponsored Accessible Parking and Loading Zones Project) researchers found that a space and aisle totaling almost 204 in (5180 mm) wide was needed to deploy a lift and exit conveniently. The "van accessible" parking space required by these guidelines provides a 96 in (2440 mm) wide space with a 96 in (2440 mm) adjacent access aisle which is just wide enough to maneuver and exit from a side mounted lift. If a 96 in (2440 mm) access aisle is placed between two spaces, two "van accessible" spaces are created. Alternatively, if the wide access aisle is provided at the end of a row (an area often unused), it may be possible to provide the wide access aisle without additional space (see **Fig. A5(a)**).

A sign is needed to alert van users to the presence of the wider aisle, but the space is not intended to be restricted only to vans.

"Universal" Parking Space Design. An alternative to the provision of a percentage of spaces with a wide aisle, and the associated need to include additional signage, is the use of what has been called the "universal" parking space design. Under this design, *all* accessible spaces are 132 in (3350 mm) wide with a 60 in (1525 mm) access aisle (see **Fig. A5(b)**). One advantage to this design is that no additional signage is needed because all spaces can accommodate a van with a side-mounted lift or ramp. Also, there is no competition between cars and vans for spaces since all spaces can accommodate either. Furthermore, the wider space permits vehicles to park to one side or the other within the 132 in (3350 mm) space to allow persons to exit and enter the vehicle on either the driver or passenger side, although, in some cases, this would require exiting or entering without a marked access aisle.

An essential consideration for any design is having the access aisle level with the parking space. Since a person with a disability, using a lift or ramp, must maneuver within the access aisle, the aisle cannot include a ramp or sloped area. The access aisle must be connected to an accessible route to the appropriate accessible entrance of a building or facility. The parking access aisle must either blend with the accessible route or have a curb ramp complying with 4.7. Such a curb ramp opening must be located within the access aisle boundaries, not within the parking space boundaries. Unfortunately, many facilities are designed with a ramp that is blocked when any vehicle parks in the accessible space. Also, the required dimensions of the access aisle cannot be restricted by planters, curbs or wheel stops.

A4.6.4 Signage. Signs designating parking places for disabled people can be seen from a driver's seat if the signs are mounted high enough above the ground and located at the front of a parking space.

A4.6.5 Vertical Clearance. High-top vans, which disabled people or transportation services often use, require higher clearances in parking garages than automobiles.

A4.8 Ramps.

A4.8.1 General. Ramps are essential for wheelchair users if elevators or lifts are not available to connect different levels. However, some people who use walking aids have difficulty with ramps and prefer stairs.

A4.8.2 Slope and Rise. Ramp slopes between 1:16 and 1:20 are preferred. The ability to manage an incline is related to both its slope and its length. Wheelchair users with disabilities affecting their arms or with low stamina have serious difficulty using inclines. Most ambulatory people and most people who use wheelchairs can manage a slope of 1:16. Many people cannot manage a slope of 1:12 for 30 ft (9 m).

A4.8.4 Landings. Level landings are essential toward maintaining an aggregate slope that complies with these guidelines. A ramp landing that is not level causes individuals using wheelchairs to tip backward or bottom out when the ramp is approached.

A4.8.5 Handrails. The requirements for stair and ramp handrails in this guideline are for adults. When children are principal users in a building or facility (e.g. elementary schools), a second set of handrails at an appropriate height can assist them and aid in preventing accidents. A maximum height of 28 inches measured to the top of the gripping surface from the ramp surface or stair nosing is recommended for handrails designed for children. Sufficient

vertical clearance between upper and lower handrails (9 inches minimum) should be provided to help prevent entrapment.

A4.9 Stairs.

A4.9.1 Minimum Number. Only interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access have to comply with 4.9.

A4.9.4 Handrails. See A4.8.5.

A4.10 Elevators.

A4.10.6 Door Protective and Reopening Device. The required door reopening device would hold the door open for 20 seconds if the doorway remains obstructed. After 20 seconds, the door may begin to close. However, if designed in accordance with ASME A17.1-1990, the door closing movement could still be stopped if a person or object exerts sufficient force at any point on the door edge.

A4.10.7 Door and Signal Timing for Hall Calls. This paragraph allows variation in the location of call buttons, advance time for warning signals, and the door-holding period used to meet the time requirement.

A4.10.12 Car Controls. Industry-wide standardization of elevator control panel design would make all elevators significantly more convenient for use by people with severe visual impairments. In many cases, it will be possible to locate the highest control on elevator panels within 48 in (1220 mm) from the floor.

A4.10.13 Car Position Indicators. A special button may be provided that would activate the audible signal within the given elevator only for the desired trip, rather than maintaining the audible signal in constant operation.

A4.10.14 Emergency Communications. A device that requires no handset is easier to use by people who have difficulty reaching. Also, small handles on handset compartment doors are not usable by people who have difficulty grasping.

Ideally, emergency two-way communication systems should provide both voice and visual display intercommunication so that persons with hearing impairments and persons with vision impairments can receive information regarding the status of a rescue. A voice intercommunication system cannot be the only means of communication because it is not accessible to people with speech and hearing impairments. While a voice intercommunication system is not required, at a minimum, the system should provide both an audio and visual indication that a rescue is on the way.

A4.11 Platform Lifts (Wheelchair Lifts).

A4.11.2 Other Requirements. Inclined stairway chairlifts, and inclined and vertical platform lifts (wheelchair lifts) are available for short-distance, vertical transportation of people with disabilities. Care should be taken in selecting lifts as some lifts are not equally suitable for use by both wheelchair users and semi-ambulatory individuals.

A4.12 Windows.

A4.12.1 General. Windows intended to be operated by occupants in accessible spaces should comply with 4.12.

A4.12.2 Window Hardware. Windows requiring pushing, pulling, or lifting to open (for example, double-hung, sliding, or casement and awning units without cranks) should require no more than 5 lbf (22.2 N) to open or close. Locks, cranks, and other window hardware should comply with 4.27.

A4.13 Doors.

A4.13.8 Thresholds at Doorways. Thresholds and surface height changes in doorways are particularly inconvenient for wheelchair users who also have low stamina or restrictions in arm movement because complex maneuvering is required to get over the level change while operating the door.

A4.13.9 Door Hardware. Some disabled persons must push against a door with their chair or walker to open it. Applied kickplates on doors with closers can reduce required maintenance by withstanding abuse from wheelchairs and canes. To be effective, they should cover the door width, less approximately 2 in (51 mm), up to a height of 16 in (405 mm) from its bottom edge and be centered across the width of the door.

A4.13.10 Door Closers. Closers with delayed action features give a person more time to maneuver through doorways. They are particularly useful on frequently used interior doors such as entrances to toilet rooms.

A4.13.11 Door Opening Force. Although most people with disabilities can exert at least 5 lbf (22.2N), both pushing and pulling from a stationary position, a few people with severe disabilities cannot exert 3 lbf (13.13N). Although some people cannot manage the allowable forces in this guideline and many others have difficulty, door closers must have certain minimum closing forces to close doors satisfactorily. Forces for pushing or pulling doors open are measured with a push-pull scale under the following conditions:

(1) Hinged doors: Force applied perpendicular to the door at the door opener or 30 in (760 mm) from the hinged side, whichever is farther from the hinge.

(2) Sliding or folding doors: Force applied parallel to the door at the door pull or latch.

(3) Application of force: Apply force gradually so that the applied force does not exceed the resistance of the door. In high-rise buildings, air-pressure differentials may require a modification of this specification in order to meet the functional intent.

A4.13.12 Automatic Doors and Power-Assisted Doors. Sliding automatic doors do not need guard rails and are more convenient for wheelchair users and visually impaired people to use. If slowly opening automatic doors can be reactivated before their closing cycle is completed, they will be more convenient in busy doorways.

A4.15 Drinking Fountains and Water Coolers.

A4.15.2 Spout Height. Two drinking fountains, mounted side by side or on a single post, are usable by people with disabilities and people who find it difficult to bend over.

A4.16 Water Closets.

A4.16.3 Height. Height preferences for toilet seats vary considerably among disabled people. Higher seat heights may be an advantage to some ambulatory disabled people, but are often a disadvantage for wheelchair users and others. Toilet seats 18 in (455 mm) high seem to be a reasonable compromise. Thick seats and filler rings are available to adapt standard fixtures to these requirements.

A4.16.4 Grab Bars. Fig. A6(a) and (b) show the diagonal and side approaches most commonly used to transfer from a wheelchair to a water closet. Some wheelchair users can transfer from the front of the toilet while others use a 90-degree approach. Most people who use the two additional approaches can also use either the diagonal approach or the side approach.

A4.16.5 Flush Controls. Flush valves and related plumbing can be located behind walls or to the side of the toilet, or a toilet seat lid can be provided if plumbing fittings are directly behind the toilet seat. Such designs reduce the chance of injury and imbalance caused by leaning back against the fittings. Flush controls for tank-type toilets have a standardized mounting location on the left side of the tank (facing the tank). Tanks can be obtained by special order with controls mounted on the right side. If administrative authorities require flush controls for flush valves to be located in a position that conflicts with the location of the rear grab bar, then that bar may be split or shifted toward the wide side of the toilet area.

A4.16.7 Water Closets for Children. The requirements in 4.16.7 are to be followed where the exception for children's water closets in 4.16.1 is utilized. Use of this exception is optional since these guidelines do not require water closets or other building elements to be designed according to children's dimensions. The following table provides additional guidance in applying the specifications for water closets for children according to the age group served and reflects the differences in the size, stature, and reach ranges of children 3 through 12. The specifications chosen should correspond to the age of the primary user group. The specifications of one age group should be applied consistently in the installation of a water closet and related elements.

Table A3
Specifications for Water Closets Serving Children Ages 3 through 12

	Ages 3 and 4	Ages 5 through 8	Ages 9 through 12
(1) Water Closet Centerline	12 in (305 mm)	12 to 15 in (305 to 380 mm)	15 to 18 in (380 to 455 mm)
(2) Toilet Seat Height	11 to 12 in	12 to 15 in	15 to 17 in

	(280 to 305 mm)	(305 to 380 mm)	(380 to 430 mm)
(3) Grab Bar Height	18 to 20 in (455 to 510 mm)	20 to 25 in (510 to 635 mm)	25 to 27 in (635 to 685 mm)
(4) Dispenser Height	14 in (355 mm)	14 to 17 in (355 to 430 mm)	17 to 19 in (430 to 485 mm)

A4.17 Toilet Stalls.

A4.17.3 Size and Arrangement. This section requires use of the 60 in (1525 mm) standard stall (**Figure 30(a)**) and permits the 36 in (915 mm) or 48 in (1220 mm) wide alternate stall (**Figure 30(b)**) only in alterations where provision of the standard stall is technically infeasible or where local plumbing codes prohibit reduction in the number of fixtures. A standard stall provides a clear space on one side of the water closet to enable persons who use wheelchairs to perform a side or diagonal transfer from the wheelchair to the water closet. However, some persons with disabilities who use mobility aids such as walkers, canes or crutches are better able to use the two parallel grab bars in the 36 in (915 mm) wide alternate stall to achieve a standing position.

In large toilet rooms, where six or more toilet stalls are provided, it is therefore required that a 36 in (915 mm) wide stall with parallel grab bars be provided *in addition* to the standard stall required in new construction. The 36 in (915 mm) width is necessary to achieve proper use of the grab bars; wider stalls would position the grab bars too far apart to be easily used and narrower stalls would position the grab bars too close to the water closet. Since the stall is primarily intended for use by persons using canes, crutches and walkers, rather than wheelchairs, the length of the stall could be conventional. The door, however, must swing outward to ensure a usable space for people who use crutches or walkers.

A4.17.5 Doors. To make it easier for wheelchair users to close toilet stall doors, doors can be provided with closers, spring hinges, or a pull bar mounted on the inside surface of the door near the hinge side.

A4.17.7 Toilet Stalls for Children. See **A4.16.7**.

A4.19 Lavatories and Mirrors.

A4.19.6 Mirrors. If mirrors are to be used by both ambulatory people and wheelchair users, then they must be at least 74 in (1880 mm) high at their topmost edge. A single full length mirror can accommodate all people, including children. Clear floor space for a forward approach 30 by 48 inches (760 mm by 1220 mm) should be provided in front of full length mirrors. Doors should not swing into this clear floor space. Mirrors provided above lavatories designed for children should be mounted with the bottom edge of the reflecting surface no higher than 34 inches (865 mm) above the finish floor or at the lowest mounting height permitted by fixtures and related elements.

A4.21 Shower Stalls.

A4.21.1 General. Shower stalls that are 36 in by 36 in (915 mm by 915 mm) wide provide additional safety to people who have difficulty maintaining balance because all grab bars and walls are within easy reach. Seated people use the walls of 36 in by 36 in (915 mm by 915 mm) showers for back support. Shower stalls that are 60 in (1525 mm) wide and have no curb may increase usability of a bathroom by wheelchair users because the shower area provides additional maneuvering space.

A4.22 Toilet Rooms.

A4.22.3 Clear Floor Space. In many small facilities, single- user restrooms may be the only facilities provided for all building users. In addition, the guidelines allow the use of "unisex" or "family" accessible toilet rooms in alterations when technical infeasibility can be demonstrated. Experience has shown that the provision of accessible "unisex" or single-user restrooms is a reasonable way to provide access for wheelchair users and any attendants, especially when attendants are of the opposite sex. Since these facilities have proven so useful, it is often considered advantageous to install a "unisex" toilet room in new facilities in addition to making the multi-stall restrooms accessible, especially in shopping malls, large auditoriums, and convention centers.

Figure 28 (section 4.16) provides minimum clear floor space dimensions for toilets in accessible "unisex" toilet rooms. The dotted lines designate the minimum clear floor space, depending on the direction of approach, required for wheelchair users to transfer onto the water closet. The dimensions of 48 in (1220 mm) and 60 in (1525 mm), respectively, correspond to the space required for the two common transfer approaches utilized by wheelchair users (see **Fig. A6**). It is important to keep in mind that the placement of the lavatory to the immediate side of the water closet will preclude the side approach transfer illustrated in **Figure A6(b)**. To accommodate the side transfer, the space adjacent to the water closet must remain clear of obstruction for 42 in (1065 mm) from the centerline of the

toilet (Figure 28) and the lavatory must not be located within this clear space. A turning circle or T-turn, the clear floor space at the lavatory, and maneuvering space at the door must be considered when determining the possible wall locations. A privacy latch or other accessible means of ensuring privacy during use should be provided at the door.

RECOMMENDATIONS:

1. In new construction, accessible single-user restrooms may be desirable in some situations because they can accommodate a wide variety of building users. However, they cannot be used in lieu of making the multi-stall toilet rooms accessible as required.

2. Where strict compliance to the guidelines for accessible toilet facilities is technically infeasible in the alteration of existing facilities, accessible "unisex" toilets are a reasonable alternative.

3. In designing accessible single-user restrooms, the provisions of adequate space to allow a side transfer will provide accommodation to the largest number of wheelchair users.

A4.23 Bathrooms, Bathing Facilities, and Shower Rooms.

A4.23.3 Clear Floor Space. Figure A7 shows two possible configurations of a toilet room with a roll-in shower. The specific shower shown is designed to fit exactly within the dimensions of a standard bathtub. Since the shower does not have a lip, the floor space can be used for required maneuvering space. This would permit a toilet room to be smaller than would be permitted with a bathtub and still provide enough floor space to be considered accessible. This design can provide accessibility in facilities where space is at a premium (i.e., hotels and medical care facilities). The alternate roll-in shower (Fig. 57b) also provides sufficient room for the "T-turn" and does not require plumbing to be on more than one wall.

A4.23.9 Medicine Cabinets. Other alternatives for storing medical and personal care items are very useful to disabled people. Shelves, drawers, and floor-mounted cabinets can be provided within the reach ranges of disabled people.

A4.25.3 Height. For guidance on children's reach ranges, see A4.2.5 & 4.2.6.

A4.26 Handrails, Grab Bars, and Tub and Shower Seats.

A4.26.1 General. Many disabled people rely heavily upon grab bars and handrails to maintain balance and prevent serious falls. Many people brace their forearms between supports and walls to give them more leverage and stability in maintaining balance or for lifting. The grab bar clearance of 1-1/2 in (38 mm) required in this guideline is a safety clearance to prevent injuries resulting from arms slipping through the openings. It also provides adequate gripping room.

A4.26.2 Size and Spacing of Grab Bars and Handrails. This specification allows for alternate shapes of handrails as long as they allow an opposing grip similar to that provided by a circular section of 1-1/4 in to 1-1/2 in (32 mm to 38 mm).

A4.27 Controls and Operating Mechanisms.

A4.27.3 Height. Fig. A8 further illustrates mandatory and advisory control mounting height provisions for typical equipment.

Electrical receptacles installed to serve individual appliances and not intended for regular or frequent use by building occupants are not required to be mounted within the specified reach ranges. Examples would be receptacles installed specifically for wall-mounted clocks, refrigerators, and microwave ovens. For guidance on children's reach ranges, see A4.2.5 & 4.2.6.

A4.28 Alarms.

A4.28.2 Audible Alarms. Audible emergency signals must have an intensity and frequency that can attract the attention of individuals who have partial hearing loss. People over 60 years of age generally have difficulty perceiving frequencies higher than 10,000 Hz. An alarm signal which has a periodic element to its signal, such as single stroke bells (clang-pause-clang- pause), hi-low (up-down-up-down) and fast whoop (on-off-on-off) are best. Avoid continuous or reverberating tones. Select a signal which has a sound characterized by three or four clear

tones without a great deal of "noise" in between.

A4.28.3 Visual Alarms. The specifications in this section do not preclude the use of zoned or coded alarm systems.

A4.28.4 Auxiliary Alarms. Locating visual emergency alarms in rooms where persons who are deaf may work or reside alone can ensure that they will always be warned when an emergency alarm is activated. To be effective, such devices must be located and oriented so that they will spread signals and reflections throughout a space or raise the overall light level sharply. However, visual alarms alone are not necessarily the best means to alert sleepers. A study conducted by Underwriters Laboratory (UL) concluded that a flashing light more than seven times brighter was required (110 candela v. 15 candela, at the same distance) to awaken sleepers as was needed to alert awake subjects in a normal daytime illuminated room.

For hotel and other rooms where people are likely to be asleep, a signal-activated vibrator placed between mattress and box spring or under a pillow was found by UL to be much more effective in alerting sleepers. Many readily available devices are sound- activated so that they could respond to an alarm clock, clock radio, wake-up telephone call or room smoke detector. Activation by a building alarm system can either be accomplished by a separate circuit activating an auditory alarm which would, in turn, trigger the vibrator or by a signal transmitted through the ordinary 110-volt outlet. Transmission of signals through the power line is relatively simple and is the basis of common, inexpensive remote light control systems sold in many department and electronic stores for home use. So-called "wireless" intercoms operate on the same principal.

A4.29 Detectable Warnings.

A4.29.2 Detectable Warnings on Walking Surfaces. The material used to provide contrast should contrast by at least 70%. Contrast in percent is determined by:

$$\textbf{Contrast} = [(B_1 - B_2)/B_1] \times 100$$

where B_1 = light reflectance value (LRV) of the lighter area and B_2 = light reflectance value (LRV) of the darker area.

Note that in any application both white and black are never absolute; thus, B_1 never equals 100 and B_2 is always greater than 0.

A4.30 Signage.

A4.30.1 General. In building complexes where finding locations independently on a routine basis may be a necessity (for example, college campuses), tactile maps or prerecorded instructions can be very helpful to visually impaired people. Several maps and auditory instructions have been developed and tested for specific applications. The type of map or instructions used must be based on the information to be communicated, which depends highly on the type of buildings or users.

Landmarks that can easily be distinguished by visually impaired individuals are useful as orientation cues. Such cues include changes in illumination level, bright colors, unique patterns, wall murals, location of special equipment or other architectural features.

Many people with disabilities have limitations in movement of their heads and reduced peripheral vision. Thus, signage positioned perpendicular to the path of travel is easiest for them to notice. People can generally distinguish signage within an angle of 30 degrees to either side of the centerlines of their faces without moving their heads.

A4.30.2 Character Proportion. The legibility of printed characters is a function of the viewing distance, character height, the ratio of the stroke width to the height of the character, the contrast of color between character and background, and print font. The size of characters must be based upon the intended viewing distance. A severely nearsighted person may have to be much closer to recognize a character of a given size than a person with normal visual acuity.

A4.30.4 Raised and Brailled Characters and Pictorial Symbol Signs (Pictograms). The standard dimensions for literary Braille are as follows:

Dot diameter: .059 in.
Inter-dot spacing: .090 in.

Horizontal separation between cells: .241 in.
Vertical separation between cells: .395 in.

Raised borders around signs containing raised characters may make them confusing to read unless the border is set far away from the characters. Accessible signage with descriptive materials about public buildings, monuments, and objects of cultural interest may not provide sufficiently detailed and meaningful information. Interpretive guides, audio tape devices, or other methods may be more effective in presenting such information.

A4.30.5 Finish and Contrast. An eggshell finish (11 to 19 degree gloss on 60 degree glossimeter) is recommended. Research indicates that signs are more legible for persons with low vision when characters contrast with their background by at least 70 percent. Contrast in percent shall be determined by:

$$\textbf{Contrast} = [(B_1 - B_2)/B_1] \times 100$$

where B_1 = light reflectance value (LRV) of the lighter area and B_2 = light reflectance value (LRV) of the darker area.

Note that in any application both white and black are never absolute; thus, B_1 never equals 100 and B_2 is always greater than 0.

The greatest readability is usually achieved through the use of light-colored characters or symbols on a dark background.

A4.30.7 Symbols of Accessibility for Different Types of Listening Systems. Paragraph 4 of this section requires signage indicating the availability of an assistive listening system. An appropriate message should be displayed with the international symbol of access for hearing loss since this symbol conveys general accessibility for people with hearing loss. Some suggestions are:

INFRARED
ASSISTIVE LISTENING SYSTEM
AVAILABLE
----PLEASE ASK----

AUDIO LOOP IN USE
TURN T-SWITCH FOR
BETTER HEARING
----OR ASK FOR HELP----

FM
ASSISTIVE LISTENING
SYSTEM AVAILABLE
----PLEASE ASK----

The symbol may be used to notify persons of the availability of other auxiliary aids and services such as: real time captioning, captioned note taking, sign language interpreters, and oral interpreters.

A4.30.8 Illumination Levels. Illumination levels on the sign surface shall be in the 100 to 300 lux range (10 to 30 footcandles) and shall be uniform over the sign surface. Signs shall be located such that the illumination level on the surface of the sign is not significantly exceeded by the ambient light or visible bright lighting source behind or in front of the sign.

A4.31 Telephones.

A4.31.3 Mounting Height. In localities where the dial-tone first system is in operation, calls can be placed at a coin telephone through the operator without inserting coins. The operator button is located at a height of 46 in (1170 mm) if the coin slot of the telephone is at 54 in (1370 mm). A generally available public telephone with a coin slot mounted lower on the equipment would allow universal installation of telephones at a height of 48 in (1220 mm) or less to all operable parts.

A4.31.9(1) A public text telephone (TTY) may be an integrated text telephone (TTY) pay telephone unit or a conventional portable text telephone (TTY) that is permanently affixed within, or adjacent to, the telephone enclosure. In order to be usable with a pay telephone, a text telephone (TTY) which is not a single integrated text

telephone (TTY) pay telephone unit will require a shelf large enough (10 in (255 mm) wide by 10 in (255 mm) deep with a 6 in (150 mm) vertical clearance minimum) to accommodate the device, an electrical outlet, and a power cord.

A4.31.9(3) Movable or portable text telephones (TTYs) may be used to provide equivalent facilitation. A text telephone (TTY) should be readily available so that a person using it may access the text telephone (TTY) easily and conveniently. As currently designed, pocket-type text telephones (TTYs) for personal use do not accommodate a wide range of users. Such devices would not be considered substantially equivalent to conventional text telephones (TTYs). However, in the future as technology develops this could change.

A4.32 Fixed or Built-in Seating and Tables.

A4.32.4 Height of Tables or Counters. Different types of work require different table or counter heights for comfort and optimal performance. Light detailed work such as writing requires a table or counter close to elbow height for a standing person. Heavy manual work such as rolling dough requires a counter or table height about 10 in (255 mm) below elbow height for a standing person. This principle of high/low table or counter heights also applies for seated persons; however, the limiting condition for seated manual work is clearance under the table or counter.

Table A1 shows convenient counter heights for seated persons. The great variety of heights for comfort and optimal performance indicates a need for alternatives or a compromise in height if people who stand and people who sit will be using the same counter area.

Table A1 Convenient Heights of Tables and Counters for Seated People[1]

Conditions of Use	Short Women		Tall Men	
Seated in a wheelchair:	in	mm	in	mm
Manual work:				
Desk or removeable armrests	26	660	30	760
Fixed, full size armrests[2]	32[3]	815	32[3]	815
Light, detailed work:				
Desk or removable armrests	29	735	34	865
Fixed, full size armrests [2]	32[3]	815	34	865
Seated in a 16-in. (405 mm) high chair:				
Manual work	26	660	27	685
Light, detailed work	28	710	31	785

(1) All dimensions are based on a work-surface thickness of 1 1/2 in (38 mm) and a clearance of 1 1/2 in (38 mm) between legs and the underside of a work surface.

(2) This type of wheelchair arm does not interfere with the positioning of a wheelchair under a work surface.

(3) This dimension is limited by the height of the armrests; a lower height would be preferable. Some people in this group prefer lower work surfaces, which require positioning the wheelchair back from the edge of the counter.

A4.33 Assembly Areas.

A4.33.2 Size of Wheelchair Locations. Spaces large enough for two wheelchairs allow people who are coming to a performance together to sit together.

A4.33.3 Placement of Wheelchair Locations. The location of wheelchair areas can be planned so that a variety of positions within the seating area are provided. This will allow choice in viewing and price categories.

Building/life safety codes set minimum distances between rows of fixed seats with consideration of the number of seats in a row, the exit aisle width and arrangement, and the location of exit doors. "Continental" seating, with a greater number of seats per row and a commensurate increase in row spacing and exit doors, facilitates emergency egress for all people and increases ease of access to mid-row seats especially for people who walk with difficulty. Consideration of this positive attribute of "continental" seating should be included along with all other factors in the design of fixed seating areas.

Removable armrests are recommended on fixed companion seats provided in assembly areas in amusement facilities. This provides the option for an individual using a wheelchair or other mobility device to transfer into a seat where motion and other effects may be provided as part of the amusement experience.

A4.33.6 Placement of Listening Systems. A distance of 50 ft (15 m) allows a person to distinguish performers' facial expressions.

A4.33.7 Types of Listening Systems. An assistive listening system appropriate for an assembly area for a group of persons or where the specific individuals are not known in advance, such as a playhouse, lecture hall or movie theater, may be different from the system appropriate for a particular individual provided as an auxiliary aid or as part of a reasonable accommodation. The appropriate device for an individual is the type that individual can use, whereas the appropriate system for an assembly area will necessarily be geared toward the "average" or aggregate needs of various individuals. A listening system that can be used from any seat in a seating area is the most flexible way to meet this specification. Earphone jacks with variable volume controls can benefit only people who have slight hearing loss and do not help people who use hearing aids. At the present time, magnetic induction loops are the most feasible type of listening system for people who use hearing aids equipped with "T- coils," but people without hearing aids or those with hearing aids not equipped with inductive pick-ups cannot use them without special receivers. Radio frequency systems can be extremely effective and inexpensive. People without hearing aids can use them, but people with hearing aids need a special receiver to use them as they are presently designed. If hearing aids had a jack to allow a by-pass of microphones, then radio frequency systems would be suitable for people with and without hearing aids. The Department of Justice's regulations implementing titles II and III of the ADA require public accommodations to provide appropriate auxiliary aids and services to ensure effective communication. See **28 C.F.R. 35.160**, **28 C.F.R. 35.164**, and **28 C.F.R. 36.303**. Where assistive listening systems are used to provide effective communication, the Department of Justice considers it essential that a portion of receivers be compatible with hearing aids.

Some listening systems may be subject to interference from other equipment and feedback from hearing aids of people who are using the systems. Such interference can be controlled by careful engineering design that anticipates feedback sources in the surrounding area.

Table A2, shows some of the advantages and disadvantages of different types of assistive listening systems. In addition, the Access Board has published a pamphlet on Assistive Listening Systems which lists demonstration centers across the country where technical assistance can be obtained in selecting and installing appropriate systems. The state of New York has also adopted a detailed technical specification which may be useful.

Table A2 (Text version)

Summary of Assistive Listening Devices and Systems

COMPARISON OF LARGE AREA ASSISTIVE LISTENING SYSTEMS			
System Description	**Advantages**	**Disadvantages**	**Typical Applications**
FM BROADCAST (40 frequencies available on narrow band transmission systems. Ten frequencies available on wideband transmission systems.) ***Transmitters:*** FM base station or personal transmitter broadcasts signal to listening area. ***Receiver:*** Pocket size with: a)earphone(s), or b)headset, or c)induction neck-loop or silhouette coil coupling to personal hearing aid equipped	Highly portable when used with body-worn, personal transmitter. Easy to install. May be used separately or integrated with existing PA-systems. Multiple frequencies allow for use by different groups within same area (e.g., multi-language translation).	Signal spill-over to adjacent rooms/ listening areas (can prevent interference by using different transmission frequencies for each room/listening area). Choose infrared if privacy is essential. Receivers required for everyone. Requires administration and maintenance of receivers. Susceptible to electrical interference when used with induction neck-loop/silhouette (Provision of DAI audio shoes and cords is impractical for public applications).	Service counters Outdoor guided tours Tour busses Meeting rooms Conference rooms Auditoriums Classrooms Courtrooms Churches and Temples Theaters

with telecoil, or d)direct audio input (DAI) to personal hearing aid.		Some systems more susceptible to radio wave interference and signal drift than others.	Museums Theme parks Arenas Sport stadiums Retirement/nursing homes Hospitals
INFRARED LIGHT ***Transmitter:*** Amplifier drives emitter panel(s) covering listening area. ***Receivers:*** Under-chin or Pendant type receiver with: a) headset, or b) earphone(s), or c) induction neck-loop or silhouette coil coupling to personal hearing aid equipped with telecoil, or d) direct audio input (DAI) to personal hearing aid.	Unlike induction or FM transmission, IR transmission does not travel through walls or other solid surfaces. Insures confidentiality. Infrared receivers compatible with most infrared emitters. May be used separately or integrated with existing PA-systems. Can be used for multi-language translation (must use special multi-frequency receivers).	Receivers required for everyone. Requires administration and maintenance of receivers. Ineffective in direct sunlight. Careful installation required to insure entire listening area will receive IR signal. Susceptible to electrical interference when used with induction neckloop/silhouette (Provision of DAI audio shoes and cords is impractical for public applications). Lifetime of emitters varies with company. Historical buildings may pose installation problems.	Indoor service counters Meetings requiring confidentiality Meeting rooms Conference rooms Auditoriums Classrooms Courtrooms Churches and Temples Theaters Museums Arenas (indoors only) Sport stadiums (indoors only) Retirement/nursing homes Hospitals
CONVENTIONAL INDUCTION LOOP ***Transmitter:*** Amplifier drives an induction loop that surrounds listening area. ***Receivers:*** a)Personal hearing aid with telecoil. b)Pocket size induction receiver with earphone or headset. c)Self-contained wand. d)Telecoil inside plastic chassis which looks like a BTE, ITE, or canal hearing aid.	Requires little, or no administration of receivers, if most people have telecoil-equipped hearing aids. Induction receivers must be used where hearing aids in use are not equipped with telecoils. Induction receivers are compatible with all loop systems. Unobtrusive with telecoil hearing aid. May be used separately or integrated with existing PA-systems.	Signal spill-over to adjacent rooms. Susceptible to electrical interference. Limited portability unless areas are pre- looped or small, portable system is used (see advantages). Requires installation of loop wire. Installation may be difficult in pre- existing buildings. Skilled installation essential in historical buildings (and may not be permitted at all). If listener does not have telecoil-equipped hearing	Service counters Ports of transportation Public transportation vehicles Tour busses Meeting rooms Conference rooms Auditoriums Classrooms Courtrooms Churches and

	Portable systems are available for use with small groups of listeners. These portable systems can be stored in a carrying case and set up temporarily, as needed.	aid then requires administration and maintenance of receivers.	Temples Theaters Museums Theme parks Arenas Sport stadiums Retirement/nursing homes Hospitals
3-D LOOP SYSTEM ***Transmitter:*** Amplifier drives a 3-D mat that is placed under the carpet of the listening area. ***Receivers:*** a) Personal hearing aid with telecoil. b) Pocket size induction receiver with earphone or head-set. c) Self-contained wand. d) Telecoil inside plastic chassis which looks like a BTE, ITE, or canal hearing aid.	Requires little, or no administration of receivers, provided most listeners have telecoil-equipped hearing aids. Induction receivers are compatible with all loops systems. May be used separately or integrated with existing PA-systems. Three-dimensional reception of loop signal regardless of telecoil position. Reduced signal spillover allows adjacent rooms to be looped without signal interference. 3-D loop mats must be separated by 6 feet to avoid signal spillover.	Limited portability (areas may be pre-3-D Loop matted to facilitate portability). Requires installation of 3-D Loop mats. Instal- lation may be difficult in pre-existing build- ings. Skilled installa- tion essential in historical buildings (and may not be permitted at all). If listener does not have telecoil-equipped hearing aid then requires administra- tion and maintenance of receivers. Susceptible to electrical interference.	Service counters Ports of Transportation Meeting rooms Conference rooms Auditoriums Classrooms Courtrooms Museums Theme Parks Retirement/nursing homes Meetings requiring confidentiality Hospitals
Modified from a chart published by Centrum Sound, Cupertino, California Cynthia L. Compton, Assistive Devices Center Department of Audiology and Speech-Language Pathology Gallaudet University, Washington, DC			

A4.36.2 Saunas and Steam Rooms. A 60-inch turning diameter space or a T-shaped space is required within the sauna or steam room. Removable benches or seats are permitted to obstruct the 60-inch or T-shaped space.

A4.37.3 Benches. Back support may be achieved through locating benches adjacent to walls or by other designs that will meet the minimum dimensions specified.

A5.0 Restaurants and Cafeterias.

A5.1 General. Dining counters (where there is no service) are typically found in small carry-out restaurants, bakeries, or coffee shops and may only be a narrow eating surface attached to a wall. This section requires that where such a dining counter is provided, a portion of the counter shall be at the required accessible height.

A7.0 Business, Mercantile and Civic.

A7.2(3)(iii) Counter or Teller Windows with Partitions. Methods of facilitating voice communication may include grilles, slats, talk-through baffles, and other devices mounted directly into the partition which users can speak directly into for effective communication. These methods are required to be designed or placed so that they are accessible to a person who is standing or seated. However, if the counter is only used by persons in a seated position, then a method of facilitating communication which is accessible to standing persons would not be necessary.

A7.2(4) Assistive Listening Systems. At all sales and service counters, teller windows, box offices, and information kiosks where a physical barrier separates service personnel and customers, it is recommended that at least one permanently installed assistive listening device complying with 4.33 be provided at each location or series. Where assistive listening devices are installed, signage should be provided identifying those stations which are so equipped.

A7.3 Check-out Aisles. Section 7.2 refers to counters without aisles; section 7.3 concerns check-out aisles. A counter without an aisle (7.2) can be approached from more than one direction such as in a convenience store. In order to use a check-out aisle (7.3), customers must enter a defined area (an aisle) at a particular point, pay for goods, and exit at a particular point.

A10.0 Transportation Facilities.

A10.3 Fixed Facilities and Stations.

A10.3.1(7) Route Signs. One means of making control buttons on fare vending machines usable by persons with vision impairments is to raise them above the surrounding surface. Those activated by a mechanical motion are likely to be more detectable. If farecard vending, collection, and adjustment devices are designed to accommodate farecards having one tactually distinctive corner, then a person who has a vision impairment will insert the card with greater ease. Token collection devices that are designed to accommodate tokens which are perforated can allow a person to distinguish more readily between tokens and common coins. Thoughtful placement of accessible gates and fare vending machines in relation to inaccessible devices will make their use and detection easier for all persons with disabilities.

A10.4 Airports.

A10.4.1(8) Security Systems. This provision requires that, at a minimum, an accessible route or path of travel be provided but does not require security equipment or screening devices to be accessible. However, where barriers consist of movable equipment, it is recommended that they comply with the provisions of this section to provide persons with disabilities the ability to travel with the same ease and convenience as other members of the general public.

A11.0 Judicial, Legislative and Regulatory Facilities.

A11.1.3 Two-Way Communication Systems. Two-way communication entry systems must provide both voice and visual display so that persons with hearing or speech impairments can utilize the system. This requirement may be met with a device that would allow security personnel to respond to a caller with a light indicating that assistance is on the way. It is important that signage be provided to indicate the meaning of visual signals.

A11.2.1(2) Assistive Listening Systems. People who wear hearing aids often need them while using assistive listening systems. The Department of Justice's regulation implementing title II of the ADA requires public entities to provide appropriate auxiliary aids and services where necessary to ensure effective communication. See **28 C.F.R. 35.160** and **28 C.F.R. 35.164**. Where assistive listening systems are used to provide effective communication, the Department of Justice considers it essential that a portion of receivers be compatible with hearing aids. Receivers that are not compatible include ear buds, which require removal of hearing aids, and headsets that must be worn over the ear, which can create disruptive interference in the transmission.

A11.2.3(2)(b) Toilet and Bathing Facilities. The requirements of 4.22 for toilet rooms and 4.23 for bathrooms, bathing facilities, and shower rooms do not preclude the placement of toilet or bathing fixtures within housing or holding cells or rooms as long as the requirements for toilet rooms and bathrooms, including maneuvering space, are met. In such instances, the maneuvering space required within housing or holding cells or rooms may also serve as the maneuvering space required in toilet rooms by 4.22 or in bathrooms or shower rooms by 4.23.

A11.2.3(2)(c) Beds. The height of beds should be 17 in to 19 in (430 mm to 485 mm) measured from the finish floor to the bed surface, including mattresses or bed rolls, to ensure appropriate transfer from wheelchairs and other mobility aids. Where upper bunks are provided, sufficient clearance should be provided between bunks so that the

transfer from wheelchairs to lower bunks is not restricted. Figure A3 provides average human dimensions that should be considered in determining this clearance.

A11.2.3(3) Visiting Areas. Accessible cubicles or portions of counters may have fixed seats if the required clear floor space is provided within the area defined by the cubicle. Consideration should be given to the placement of grilles, talk-thru baffles, intercoms, telephone handsets or other communication devices so they are usable from both the fixed seat and from the accessible seating area. If an assistive listening system is provided, the needs of the intended user and characteristics of the setting should be considered as described in **A4.33.7** and **Table A2**.

A11.3 Legislative and Regulatory Facilities. Legislative facilities include town halls, city council chambers, city or county commissioners' meeting rooms, and State capitols. Regulatory facilities are those which house State and local entities whose functions include regulating, governing, or licensing activities. Section 11.3 applies to rooms where public debate, or discussion of local issues, laws, ordinances, or regulations take place. Examples include, but are not limited to, legislative chambers and hearing rooms, facilities where town, county council or school Board meetings, and housing authority meetings are held, and rooms accommodating licensing or other regulatory board hearings, adjudicatory administrative hearings (e.g., drivers license suspension hearings) and zoning application and waiver proceedings.

A11.3.2 See **A11.2.1(2)**.

A12.0 Detention and Correctional Facilities.

A12.1 General. All common use areas serving accessible cells or rooms are required to be accessible. In detention and correctional facilities, common use areas include those areas serving a group of inmates or detainees, including, but not limited to, exercise yards and recreation areas, workshops and areas of instruction or vocational training, counseling centers, cafeterias, commissaries, medical facilities, and any other rooms, spaces, or elements that are made available for the use of a group of inmates or detainees. Detention and correctional facilities also contain areas that may be regarded as common use areas which specifically serve a limited number of housing cells or rooms. Where this occurs, only those common use areas serving accessible cells or rooms would need to be accessible as required by 12.5. For example, several housing cells may be located at and served by a dayroom or recreation room. In this instance, only those dayrooms serving accessible housing cells or rooms would need to be accessible. However, common use areas that do not serve accessible cells but that are used by the public or by employees as work areas are still subject to the requirements for public use areas and employee work areas in section 4.

A12.2.1 Entrances. Persons other than inmates and facility staff, such as counselors and instructors, may have access to secured areas. It is important that evacuation planning address egress for all possible users since a person with a disability might not be able to independently operate doors permitted by this exception.

A12.3 Visiting Areas. Accessible cubicles or portions of counters may have fixed seats if the required clear floor space is provided within the area defined by the cubicle. Consideration should be given to the placement of grilles, talk-thru baffles, intercoms, telephone handsets or other communication devices so they are usable from both the fixed seat and from the accessible seating area. If an assistive listening system is provided, the needs of the intended user and characteristics of the setting should be considered as described in **A4.33.7** and **Table A2**.

A12.4.1 Holding Cells and General Housing Cells or Rooms. Accessible cells or rooms should be dispersed among different levels of security, housing categories and holding classifications (e.g., male/female and adult/juvenile) to facilitate access. Many detention and correctional facilities are designed so that certain areas (e.g., "shift" areas) can be adapted to serve as different types of housing according to need. For example, a shift area serving as a medium security housing unit might be redesignated for a period of time as a high security housing unit to meet capacity needs. Placement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms.

A12.4.2 Special Holding and Housing Cells or Rooms. While one of each type of special purpose cell is required to be accessible at a facility, constructing more than one of each type to be accessible will facilitate access at large facilities where cells of each type serve different holding areas or housing units. The requirement for medical isolation cells applies only to those specifically designed for medical isolation. Cells or rooms primarily designed for other purposes, such as general housing or medical care, are subject to the requirements in 12.4.1 or 12.4.4, respectively. Medical isolation cells required to be accessible by 12.4.2 shall not be counted as part of the minimum number of patient bedrooms or cells required to be accessible in 12.4.4. Thus, if a medical care facility has both types of cells, at least one medical isolation cell must be accessible under 12.4.2 in addition to the number of patient bedrooms or cells required to be accessible by 12.4.4. While only one medical isolation cell per facility is required to be accessible, it is recommended that consideration be given to ensuring the accessibility of all medical isolation cells.

A12.4.3 Accessible Cells or Rooms for Persons with Hearing Impairments. Many correctional facilities do not provide permanently installed telephones or alarms within individual housing cells. Such facilities are not subject to the requirements of 12.4.3. However, some categories of housing, such as minimum security prisons, may be equipped with such devices. The minimum two percent is based on the number of cells or rooms equipped with these devices and not on the total number of cells or rooms in the facility. In addition, this requirement applies only where permanently installed telephones or alarms are provided within individual cells. Permanently installed telephones and alarms located in common use areas, such as dayrooms, are required to be accessible according to the requirements for common use areas. See 12.1.

A12.5.2 Minimum Requirements. The requirements of this section apply to elements provided within housing or holding cells or rooms. Elements located outside cells or rooms for common use, such as in a day room, are subject to 12.1 and its application of requirements in section 4. For example, if a drinking fountain is provided within an accessible housing or holding cell, at least one must be wheelchair accessible under section 12.5.2(4). Drinking fountains located outside the cells in common use areas serving accessible cells or in public use areas, are subject to the requirements of 4.1.3(10).

A12.5.2(2) Toilet and Bathing Facilities. The requirements of 4.22 for toilet rooms and 4.23 for bathrooms, bathing facilities, and shower rooms do not preclude the placement of toilet or bathing fixtures within housing or holding cells or rooms as long as the requirements for toilet rooms and bathrooms, including maneuvering space, are met. In such instances, the maneuvering space required within housing or holding cells or rooms may also serve as the maneuvering space required in toilet rooms by 4.22 or in bathrooms or shower rooms by 4.23.

A12.5.2(3) Beds. Since beds may not always be fixed, a minimum number of accessible beds has not been specified. In barracks-style rooms with many beds, it is recommended that the scoping requirement for housing or holding cells or rooms (2 percent) also be applied to the number of beds in accessible cells or rooms.

The height of beds should be 17 to 19 in (430 mm to 485 mm) measured from the finish floor to the bed surface, including mattresses or bed rolls, to ensure appropriate transfer from wheelchairs and other mobility aids. Where upper bunks are provided, sufficient clearance must be provided between bunks so that the transfer from wheelchairs to lower bunks is not restricted. Figure A3 provides standard human dimensions that should be considered in determining this clearance.

A15.0 Recreation Facilities.

Unless otherwise modified in Section 4 or specifically addressed in section 15, all other ADAAG provisions apply for the design and construction of recreation facilities and elements. The provisions in this section apply wherever these elements are provided. For example, office buildings may contain a room with exercise equipment and these sections therefore apply.

A15.1 Amusement Rides. These guidelines apply to newly designed or newly constructed amusement rides. A custom designed and constructed ride is new upon its "first use," which is the first time amusement park patrons take the ride. With respect to amusement rides purchased from other entities, "new" refers to the first permanent installation of the ride, whether it is used "off the shelf" or it is modified before it is installed. Where amusement rides are moved after several seasons to another area of the park or to another park, the ride would not be considered newly designed or newly constructed.

Amusement rides designed primarily for children, amusement rides that are controlled or operated by the rider, and amusement rides without seats, are not required to provide wheelchair spaces, transfer seats, or transfer systems, and need not meet the signage requirements in 15.1.6. The load and unload areas of these rides must, however, be on an accessible route and must provide maneuvering space under 15.1.4 and 15.1.5.

The scoping and technical provisions of the guidelines were developed to address common amusement rides. There will be other amusement attractions that have unique designs and features which are not adequately addressed by the guidelines. In those situations, the guidelines are to be applied to the extent possible.

An accessible route must be provided to these areas. Where an attraction or ride has unique features for which there are no applicable scoping provisions, then a reasonable number, but at least one, of the features must be located on an accessible route. Where there are appropriate technical provisions, they must be applied to the elements that are covered by the scoping provisions. Where an attraction has unique designs for which the technical provisions are not appropriate, the operators of those attractions are still subject to all the other requirements of the ADA, including program accessibility, barrier removal and the general obligation to provide individuals with disabilities an equal opportunity to enjoy the goods and services provided by their facilities. An example of an amusement ride not specifically addressed by the guidelines includes "virtual reality" rides where the device does

not move through a fixed course within a defined area.

A15.1 Exception 1. Mobile or temporary rides are those set up for short periods of time such as traveling carnivals, State and county fairs, and festivals. The amusement rides that are covered by section 15.1 are ones that are not regularly assembled and disassembled.

A15.1 Exception 2. The exception does not apply to those rides where patrons may cause the ride to make incidental movements, but where the patron otherwise has no control over the ride.

A15.1 Exception 3. The exception is limited to those rides designed "primarily" for children, where children are assisted on and off the ride by an adult. This exception is limited to those rides designed for children and not for the occasional adult user. An accessible route to and maneuvering space in the load and unload area will provide access for adults and family members assisting children on and off these rides.

A15.1.2 Alterations to Amusement Rides. Routine maintenance, painting, and changing of theme boards are examples of activities that do not constitute an alteration subject to section 15.1.2. Where existing amusement rides are moved and not altered, section 15.1 does not apply unless the load and unload area of the amusement ride is newly designed and constructed. If a load or unload area is altered, the alteration provisions of ADAAG 4.1.6 must be applied to the altered area.

A15.1.4 Accessible Route. Steeper slopes are permitted (not to exceed 1:8) where the accessible route connects to the amusement ride in the load and unload position. This is permitted only where compliance with 4.8.2 (maximum slope 1:12) is "structurally or operationally infeasible". In most cases, this will be limited to areas where the accessible route leads directly to the amusement ride and where there are space limitations on the ride, not the queue line. Where possible, the least possible slope should be used on the accessible route that serves the amusement ride.

A15.1.7.1.2 Amusement Rides with Wheelchair Spaces. 36 C.F.R. 1192.83(c) ADA Accessibility Guidelines for Transportation Vehicles - Light Rail Vehicles and Systems - Mobility Aid Accessibility is available at **www.access-board.gov/transit/html/vguide.htm#LRVM**. It references provisions for bridge plates and ramps used for gaps between wheelchair spaces and floors of load and unload areas.

A15.1.7.2 Exception 3. This exception for protruding objects applies to the ride devices, not to circulation areas or accessible routes in the queue lines or the load and unload areas.

A15.1.7.2.2 Wheelchair Spaces - Side Entry. Under certain circumstances, a 32-inch clear opening will not provide sufficient width to accommodate a turn into an amusement ride. The amount of clear space needed within the ride, and the size and position of the opening are interrelated. Additional space for maneuvering and a wider door will be needed where a side opening is centered on the ride. For example, where a 42-inch opening is provided, a minimum clear space of 60 inches in length and 36 inches in depth is needed (see **Fig. A9**). This is necessary to ensure adequate space for maneuvering. For additional guidance refer to Figure 3 (Wheelchair Turning Space) and Figure 4 (Minimum Clear Floor Space for Wheelchairs) on minimum space requirements.

A15.1.8 Amusement Ride Seats Designed for Transfer. There are many different ways that individuals transfer to and from their wheelchairs or mobility devices. The proximity of the clear floor or ground space next to an element and the height of the element one is transferring to are both critical for a safe and independent transfer. Providing additional clear floor or ground space both in front of and diagonally to the element will provide flexibility and increased usability for a more diverse population of individuals with disabilities. Ride seats designed for transfer should involve only one transfer. Where possible, designers are encouraged to locate the ride seat no higher than 17 to 19 inches above the load and unload surface. Where greater distances are required for transfers, consideration should be given to providing gripping surfaces, seat padding, and avoiding sharp or protruding objects in the path of transfer to better facilitate the transfer process.

A15.1.9 Transfer Devices for Use with Amusement Rides. Transfer devices for use with amusement rides should permit individuals to make independent transfers to and from their wheelchairs or mobility devices. There are a variety of transfer devices available that could be adapted to provide access onto an amusement ride. Examples of devices that may provide for transfers include, but are not limited to, transfer systems (see 15.8.8), lifts, mechanized seats, and other custom designed systems. Operators and designers have flexibility in developing designs that will facilitate individuals to transfer onto amusement rides. These systems or devices should be designed to be reliable and sturdy. A transfer board, for example, would not be sufficient because it will not provide enough support or stability and may cause injury.

Designs which limit the number of transfers required from one's wheelchair or mobility device to the ride seat are

encouraged. When using a transfer device to access an amusement ride, the least amount of transfers for the least amount of distance is desired. Where possible, designers are encouraged to locate the transfer device seat no higher than 17 to 19 inches above the load and unload surface. Where greater distances are required for transfers, extra consideration should be given to providing gripping surfaces, seat padding, and avoiding sharp or protruding objects in the path of transfer to better facilitate the transfer process. Where a series of transfers are required to reach the amusement ride seat, each vertical transfer should not exceed 8 inches.

As discussed with amusement rides seats designed for transfer, there are many different ways that individuals transfer to and from their wheelchairs or mobility devices. The proximity of the clear floor or ground space next to an element and the height of the element one is transferring to are both critical for a safe and independent transfer. Providing additional clear floor or ground space both in front of and diagonally to the element will provide flexibility and increased usability for a more diverse population of individuals with disabilities.

A15.2 Boating Facilities.

A15.2.2 Accessible Route. The following two examples apply exceptions two and three.

Example 1. Boat slips which are required to be accessible are provided at a floating pier. The vertical distance an accessible route must travel to the pier when the water is at its lowest level is six feet, although the water level only fluctuates three feet. To comply with exceptions 2 and 3, at least one design solution would provide a gangway at least 72.25 feet long which ensures the slope does not exceed 1:12.

Example 2. A gangway is provided to a floating pier which is required to be on an accessible route. The vertical distance is 10 feet between the elevation where the gangway departs the landside connection and the elevation of the pier surface at the lowest water level. Exceptions 2 and 3, which modify 4.8.2, permit the gangway to be at least 80 feet long. Another design solution would be to have two 40-foot plus continuous gangways joined together at a float, where the float (as the water level falls) will stop dropping at an elevation five feet below the landside connection.

A15.2.3 Boat Slips: Minimum Number. Accessible boat slips are not "reserved" for persons with disabilities in the same manner as accessible vehicle parking spaces. Rather, accessible boat slip use is comparable to accessible hotel rooms. The Department of Justice is responsible for addressing operational issues relating to the use of accessible facilities and elements. The Department of Justice currently advises that hotels should hold accessible rooms for persons with disabilities until all other rooms are filled. At that point, accessible rooms can be open for general use on a first come, first serve basis.

The following two examples apply to a boating facility with a single non-demarcated pier.

Example 1. A site contains a new boating facility which consists of a single 60-foot pier. Boats are only moored parallel with the pier on both sides to allow occupants to embark or disembark. Since the number of slips cannot be identified, section 15.2.3 requires each 40 feet of boat slip edge to be counted as one slip for purposes of determining the number of slips available and determines the number required to be accessible. The 120 feet of boat slip edge at the pier would equate with 3 boat slips. Table 15.2.3 would require 1 slip to be accessible and comply with 15.2.5. Section 15.2.5 (excluding the exceptions within the section) requires a clear pier space 60 inches wide minimum extending the length of the slip. In this example, because the pier is at least 40 feet long, the accessible slip must contain a clear pier space at least 40 feet long which has a minimum width of 60 inches.

Example 2. A new boating facility consisting of a single pier 25 feet long and 3 feet wide is being planned for a site. The design intends to allow boats to moor and occupants to embark and disembark on both sides, and at one end. As the number of boat slips cannot be identified, applying section 15.2.3 would translate to 53 feet of boat slip edge at the pier. This equates with two slips. Table 15.2.3 would require 1 slip to be accessible. To comply with 15.2.5 (excluding the exceptions within the section), the width of the pier must be increased to 60 inches. Neither 15.2.3 or 15.2.5 requires the pier length to be increased to 40 feet.

A15.2.3.1 Dispersion. Types of boat slips are based on the size of the boat slips; whether single berths or double berths, shallow water or deep water, transient or longer-term lease, covered or uncovered; and whether slips are equipped with features such as telephone, water, electricity and cable connections. The term "boat slip" is intended to cover any pier area where recreational boats embark or disembark, unless classified as a launch ramp boarding pier. For example, a fuel pier may contain boat slips, and this type of short term slip would be included in determining compliance with 15.2.3.1.

A15.2.4 Boarding Piers at Boat Launch Ramps. The following two examples apply to a boat launch ramp boarding pier.

Example 1. A chain of floats is provided on a launch ramp to be used as a boarding pier which is required to be accessible by 15.2.4. At high water, the entire chain is floating and a transition plate connects the first float to the surface of the launch ramp. As the water level decreases, segments of the chain end up resting on the launch ramp surface, matching the slope of the launch ramp. As water levels drop, segments function also as gangways because one end of a segment is resting on the launch ramp surface and the other end is connecting to another floating segment in the chain.

Under ADAAG 4.1.2(2), an accessible route must serve the last float because it would function as the boarding pier at the lowest water level. Under exception 3 in 15.2.4, each float is not required to comply with ADAAG 4.8, but must meet all other requirements in ADAAG 4.3, unless exempted by exception 1 in 15.2.4. In this example, because the entire chain also functions as a boarding pier, the entire chain must comply with the requirements of 15.2.5, including the 60-inch minimum clear pier width provision.

Example 2. A non-floating boarding pier supported by piles divides a launching area into two launch ramps and is required to be accessible. Under ADAAG 4.1.2(2), an accessible route must connect the boarding pier with other accessible buildings, facilities, elements, and spaces on the site. Although the boarding pier is located within a launch ramp, because the pier is not a floating pier or a skid pier, none of the exceptions in 15.2.4 apply. To comply with ADAAG 4.3, either the accessible route must run down the launch ramp or the fixed boarding pier could be relocated to the side of the two launch ramps. The second option leaves the slope of the launch ramps unchanged, because the accessible route runs outside the launch ramps.

A15.2.4.1 Boarding Pier Clearances. The guidelines do not establish a minimum length for accessible boarding piers at boat launch ramps. The accessible boarding pier would have a length which is at least equal to other boarding piers provided at the facility. If no other boarding pier is provided, the pier would have a length equal to what would have been provided if no access requirements applied. The entire length of accessible boarding piers would be required to comply with the same technical provisions that apply to accessible boat slips. For example, at a launch ramp, if a 20-foot long accessible boarding pier is provided, the entire 20 feet must comply with the pier clearance requirements in 15.2.5. Likewise, if a 60-foot long accessible boarding pier is provided, the pier clearance requirements in 15.2.5 would apply to the entire 60 feet.

A15.2.5 Accessible Boat Slips. Although the minimum width of the clear pier space is 60 inches, it is recommended that piers be wider than 60 inches to improve the safety for persons with disabilities, particularly on floating piers.

A15.2.5.1 Clearances, Exception 3. Where the conditions in exception 3 are satisfied, existing facilities are only required to have one accessible boat slip with a pier clearance which runs the length of the slip. All other accessible slips are allowed to have the required pier clearance at the head of the slip. Under this exception, at piers with perpendicular boat slips, the width of most "finger piers" will remain unchanged. However, where mooring systems for floating piers are replaced as part of pier alteration projects, an opportunity may exist for increasing accessibility. Piers may be reconfigured to allow an increase in the number of wider finger piers, and serve as accessible boat slips.

A.15.3 Fishing Piers and Platforms.

A15.3.2 Accessible Route, Exception 2. For example, to provide access to an accessible floating fishing pier, a gangway is used. The vertical distance is 60 inches between the elevation that the gangway departs the landside connection and the elevation of the pier surface at the lowest water level. Exception 2 permits the use of a gangway at least 30 feet long, or a series of connecting gangways with a total length of at least 30 feet. The length of transition plates would not be included in determining if the gangway(s) meet the requirements of the exception.

A15.3.3.1 Edge Protection. Edge protection is required only where railings, guards, or handrails are provided on a fishing pier or platform. Edge protection will prevent wheelchairs or other mobility devices from slipping off the fishing pier or platform. Extending the deck of the fishing pier or platform 12 inches where the 34-inch high railing is provided is an alternative design, permitting individuals using a wheelchair or other mobility device to pull into a clear space and move beyond the face of the railing. In such a design, edge protection is not required.

A15.3.3.3 Dispersion. Portions of the railings that are lowered to provide fishing opportunities for persons with disabilities must be located in a variety of locations on the fishing pier or platform to give people a variety of locations to fish. Different fishing locations may provide varying water depths, shade (at certain times of the day), vegetation, and proximity to the shoreline or bank.

A15.4 Golf.

A15.4.2 Accessible Routes. The accessible route or golf car passage must serve accessible elements and spaces located within the boundary of a golf course. The 48-inch minimum width for the accessible route is necessary to ensure passage of a golf car on either the accessible route or the golf car passage. This is important where the accessible route is used to connect the golf car rental area, bag drop areas, practice putting greens, accessible practice teeing grounds, course toilet rooms, and course weather shelters. These are areas outside the boundary of the golf course, but are areas where an individual using an adapted golf car may travel. A golf car passage may not be substituted for other accessible routes, required by ADAAG 4.1.2, located outside the boundary of the course. For example, an accessible route connecting an accessible parking space to the entrance of a golf course clubhouse is not covered by this provision.

A15.4.3 Accessible Route - Driving Ranges. Both a stand alone driving range or a driving range next to a golf course must provide an accessible route or golf car passage that connects accessible teeing stations with accessible parking spaces. The accessible route must be a minimum width of 48 inches; 60 inches if handrails are provided. The additional width permits the use of a golf car on the accessible route. Providing a golf car passage will permit a person that uses a golf car to practice driving a golf ball from the same position and stance used when playing the game. Additionally, the space required for a person using a golf car to enter and maneuver within the teeing stations required to be accessible should be considered.

A15.5 Miniature Golf. Where possible, providing access to all holes on a miniature golf course is recommended. If a course is designed with the minimum 50 percent accessible holes, designers or operators are encouraged to select holes which provide for an equivalent experience to the maximum extent possible. Accessible holes are required to be consecutive with one break permitted, if the last hole on the course is in the sequence.

A15.5.3 Accessible Route. Where only the minimum 50 percent of the holes are accessible, an accessible route from the last accessible hole to the course exit or entrance must not require travel back through other holes. In some cases, this may require an additional route. Other options include increasing the number of accessible holes in a way that limits the distance needed to connect the last accessible hole with the course exit or entrance. In any case, careful consideration to the layout of the course will be important to minimize space impacts.

The 1-inch curb for a 32-inch minimum opening can be located in an area where the ball is less likely to ricochet. Where the accessible route on the hole is provided, steeper slopes are permitted for a limited distance. A landing or level area must separate each of these steeper sloping segments. This will provide a resting area between the steeper segments.

A15.5.5 Golf Club Reach Range. Accessible holes on a miniature golf course may be provided with an accessible route leading through the hole or with the accessible route next to the hole. Where the accessible route is provided adjacent to the hole, the route must be located within the golf club reach range. This allows individuals sufficient space and reach to play the game outside of the hole. Where possible, the distance between the level areas and the accessible route should be as close as possible, affording more opportunities for play.

A15.6 Play Areas.

A15.6.1 General. This section is to be applied during the design, construction, and alteration of play areas for children ages 2 and over. Play areas are the portion of a site where play components are provided. This section does not apply to other portions of a site where elements such as sports fields, picnic areas, or other gathering areas are provided. Those areas are addressed by other sections of ADAAG. Play areas may be located on exterior sites or within a building. Where separate play areas are provided within a site for children in specified age groups (e.g., preschool (ages 2 to 5) and school age (ages 5 to 12)), each play area must comply with this section. Where play areas are provided for the same age group on a site but are geographically separated (e.g., one is located next to a picnic area and another is located next to a softball field), they are considered separate play areas and each play area must comply with this section.

A15.6.2 Ground Level Play Components. A ground level play component is a play component approached and exited at the ground level. Examples of ground level play components include spring rockers, swings, diggers, and stand alone slides. When distinguishing between the different types of ground level play components, consider the general experience provided by the play component. Examples of different types of experiences include, but are not limited to, rocking, swinging, climbing, spinning, and sliding. A spiral slide may provide a slightly different experience from a straight slide, but sliding is the general experience and therefore a spiral slide is not considered a different type of play component than a straight slide.

The number of ground level play components is not dependent on the number of children who can play on the play component. A large seesaw designed to accommodate ten children at once is considered one ground level play component.

Where a large play area includes two or more composite play structures designed for the same age group, the total number of elevated play components on all the composite play structures must be added to determine the additional number and types of ground level play components that must be provided on an accessible route, and the type of accessible route (e.g., ramps or transfer systems) that must be provided to the elevated play components.

Ground level play components accessed by children with disabilities must be integrated in the play area. Designers should consider the optimal layout of ground level play components accessed by children with disabilities to foster interaction and socialization among all children. Grouping all ground level play components accessed by children with disabilities in one location is not considered integrated.

A15.6.3 Elevated Play Components. Elevated play components are approached above or below grade and are part of a composite play structure. A double or triple slide that is part of a composite play structure is one elevated play component. For purposes of this section, ramps, transfer systems, steps, decks, and roofs are not considered elevated play components. These elements are generally used to link other elements on a composite play structure. Although socialization and pretend play can occur on these elements, they are not primarily intended for play. Some play components that are attached to a composite play structure can be approached or exited at the ground level or above grade from a platform or deck. For example, a climber attached to a composite play structure can be approached or exited at the ground level or above grade from a platform or deck on a composite play structure. Play components that are attached to a composite play structure and can be approached from a platform or deck (e.g., climbers and overhead play components), are considered elevated play components. These play components are not considered ground level play components also, and do not count toward the requirements in 15.6.2 regarding the number of ground level play components that must be located on an accessible route.

A15.6.4 Accessible Routes. Accessible routes within the boundary of the play area must comply with 15.6.4. Accessible routes connecting the play area to parking, drinking fountains, and other elements on a site must comply with 4.3. Accessible routes provide children who use wheelchairs or other mobility devices the opportunity to access play components. Accessible routes should coincide with the general circulation path used within the play area. Careful placement and consideration of the layout of accessible routes will enhance the ability of children with disabilities to socialize and interact with other children.

Where possible, designers and operators are encouraged to provide wider ground level accessible routes within the play area or consider designing the entire ground surface to be accessible. Providing more accessible spaces will enhance the integration of all children within the play area and provide access to more play components. A maximum slope of 1:16 is required for ground level ramps; however, a lesser slope will enhance access for those children who have difficulty negotiating the 1:16 maximum slope. Handrails are not required on ramps located within ground level use zones.

Where a stand-alone slide is provided, an accessible route must connect the base of the stairs at the entry point, and the exit point of the slide. A ramp or transfer system to the top of the slide is not required. Where a sand box is provided, an accessible route must connect to the border of the sand box. Accessibility to the sand box would be enhanced by providing a transfer system into the sand or by providing a raised sand table with knee clearance complying with 15.6.6.3.

Elevated accessible routes must connect the entry and exit points of at least 50 percent of elevated play components. Ramps are preferred over transfer systems since not all children who use wheelchairs or other mobility devices may be able to use or may choose not to use transfer systems. Where ramps connect elevated play components, the maximum rise of any ramp run is limited to12 inches. Where possible, designers and operators are encouraged to provide ramps with a lesser slope than the 1:12 maximum. Berms or sculpted dirt may be used to provide elevation and may be part of an accessible route to composite play structures.

Platform lifts complying with 4.11 and applicable State and local codes are permitted as a part of an accessible route. Because lifts must be independently operable, operators should carefully consider the appropriateness of their use in unsupervised settings.

A15.6.5 Transfer Systems. Transfer systems are a means of accessing composite play structures. Transfer systems generally include a transfer platform and a series of transfer steps. Children who use wheelchairs or other mobility devices transfer from their wheelchair or mobility devices onto the transfer platform and lift themselves up or down the transfer steps and scoot along the decks or platforms to access elevated play components. Some children may be unable or may choose not to use transfer systems. Where transfer systems are provided, consideration should be given to the distance between the transfer system and the elevated play components. Moving between a transfer platform and a series of transfer steps requires extensive exertion for some children. Designers should minimize the distance between the points where a child transfers from a wheelchair or mobility device and where the elevated play components are located. Where elevated play components are used to connect to another elevated play component in lieu of an accessible route, careful consideration should be used in the

selection of the play components used for this purpose. Transfer supports are required on transfer platforms and transfer steps to assist children when transferring. Some examples of supports include a rope loop, a loop type handle, a slot in the edge of a flat horizontal or vertical member, poles or bars, or D rings on the corner posts.

A15.6.6 Play Components. Clear floor or ground spaces, maneuvering spaces, and accessible routes may overlap within play areas. A specific location has not been designated for the clear floor or ground spaces or maneuvering spaces, except swings, because each play component may require that the spaces be placed in a unique location. Where play components include a seat or entry point, designs that provide for an unobstructed transfer from a wheelchair or other mobility device are recommended. This will enhance the ability of children with disabilities to independently use the play component.

When designing play components with manipulative or interactive features, consider appropriate reach ranges for children seated in wheelchairs. The following table provides guidance on reach ranges for children seated in wheelchairs. These dimensions apply to either forward or side reaches. The reach ranges are appropriate for use with those play components that children seated in wheelchairs may access and reach. Where transfer systems provide access to elevated play components, the reach ranges are not appropriate.

Children's Reach Ranges

Forward or Side Reach	Ages 3 and 4	Ages 5 through 8	Ages 9 through 12
High (maximum)	36 in (915 mm)	40 in (1015 mm)	44 in (1120 mm)
Low (minimum)	20 in (510 mm)	18 in (455 mm)	16 in (405 mm)

Where a climber is located on a ground level accessible route, some of the climbing rings should be within the reach ranges. A careful balance of providing access to play components but not eliminating the challenge and nature of the activity is encouraged.

A15.6.7 Ground Surfaces. Ground surfaces along clear floor or ground spaces, maneuvering spaces, and accessible routes must comply with the ASTM F 1951 Standard Specification for Determination of Accessibility of Surface Systems Under and Around Playground Equipment. The ASTM F 1951 standard is available from the American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, West Conshohocken, PA 19428-2959, telephone (610) 832-9585. The ASTM F 1951 standard may be ordered online from ASTM (**http://www.astm.org**). The ASTM 1951 standard determines the accessibility of a surface by measuring the work required to propel a wheelchair across the surface. The standard includes tests of effort for both straight ahead and turning movement, using a force wheel on a rehabilitation wheelchair as the measuring device. To meet the standard, the force required must be less than that required to propel the wheelchair up a ramp with a 1:14 slope. When evaluating ground surfaces, operators should request information about compliance with the ASTM F 1951 standard.

Ground surfaces must be inspected and maintained regularly and frequently to ensure continued compliance with the ASTM F 1951 standard. The type of surface material selected and play area use levels will determine the frequency of inspection and maintenance activities.

When using a combination of surface materials, careful design is necessary to provide appropriate transitions between the surfaces. Where a rubber surface is installed on top of asphalt to provide impact attenuation, the edges of the rubber surface may create a change in level between the adjoining ground surfaces. Where the change in level is greater than ½ inch, a sloped surface with a maximum slope of 1:12 must be provided. Products are commercially available that provide a 1:12 slope at transitions. Transitions are also necessary where the combination of surface materials include loose fill products. Where edging is used to prevent the loose surface from moving onto the firmer surface, the edging may create a tripping hazard. Where possible, the transition should be designed to allow for a smooth and gradual transition between the two surfaces.

A15.7 Exercise Equipment and Machines, Bowling Lanes, and Shooting Facilities.

A15.7.2 Exercise Equipment and Machines. Fitness facilities often provide a range of choices of exercise equipment. At least one of each type of exercise equipment and machine must be served by an accessible route. Most strength training equipment and machines are considered different types. For example, a bench press machine is considered a different type than a biceps curl machine. The requirement for providing access to each type is intended to cover the variety of strength training machines. Where operators provide a biceps curl machine and free weights, both are required to meet the provisions in this section, even though an individual may be able to work on their biceps through both types of equipment. Where the exercise equipment and machines provided are only different in that different manufacturers provide them, only one of each type of machine is required to meet these guidelines. For example, where two bench press machines are provided and each is manufactured by a different

company, only one is required to comply.

Similarly, there are many types of cardiovascular exercise machines, such as stationary bicycles, rowing machines, stair climbers, and treadmills. Each machine provides a cardiovascular exercise and is considered a different type for purposes of these guidelines.

One clear floor or ground space is permitted to be shared between two pieces of exercise equipment. Designers should carefully consider layout options to maximize space such as connecting ends of the row and center aisle spaces.

The position of the clear floor space may vary greatly depending on the use of the equipment or machine. For example, to make a shoulder press accessible, clear floor space next to the seat would be appropriate to allow for transfer. Clear floor space for a bench press machine designed for use by an individual seated in a wheelchair, however, will most likely be centered on the operating mechanisms.

Designers and operators are encouraged to select exercise equipment and machines that provide fitness opportunities for persons with lower body extremity disabilities. Upper body exercise equipment and machines that offer either cardiovascular or strength training will enhance fitness opportunities for persons with disabilities from a wheelchair or mobility device. Examples include: equipment or machines that provide arm ergometry, free weights, and weighted pulley systems that are usable from a wheelchair or mobility device.

A15.7.4 Shooting Facilities. Examples of different types of firing positions include, but are not limited to: positions having different admission prices, positions with or without weather covering or lighting, and positions supporting different shooting events such as argon, muzzle loading rifle, small bore rifle, high power rifle, bull's eye pistol, action pistol, silhouette, trap, skeet, and archery (bow and crossbow).

A15.8 Swimming Pools, Wading Pools, and Spas.

A15.8.2 Swimming Pools. Where more than one means of access is provided into the water, it is recommended that the means be different. Providing different means of access will better serve the varying needs of people with disabilities in getting into and out of a swimming pool. It is also recommended that where two or more means of access are provided, they not be provided in the same location in the pool. Different locations will provide increased options for entry and exit, especially in larger pools.

A15.8.2 Swimming Pools, Exception 1. Pool walls at diving areas and areas along pool walls where there is no pool entry because of landscaping or adjacent structures should be counted when determining the number of accessible means of entry required.

A15.8.5 Pool Lifts. There are a variety of seats available on pool lifts ranging from sling seats to those that are preformed or molded. Pool lift seats with backs will enable a larger population of persons with disabilities to use the lift. Pool lift seats that consist of materials that resist corrosion and provide a firm base to transfer will be usable by a wider range of people with disabilities. Additional options such as armrests, head rests, seat belts, and leg support will enhance accessibility and better accommodate people with a wide range of disabilities.

A15.8.5.6 Footrests and Armrests. Footrests are encouraged on lifts used in larger spas, where the foot well water depth is 34 inches or greater. Providing footrests, especially ones that support the entire foot, will facilitate safe and independent transfers by a larger population of persons with disabilities.

A15.8.5.7 Operation. Pool lifts must be capable of unassisted operation from both the deck and water levels. This will permit a person to call the pool lift when the pool lift is in the opposite position. It is extremely important for a person who is swimming alone to be able to call the pool lift when it is in the up position so he or she will not be stranded in the water for extended periods of time awaiting assistance. The requirement for a pool lift to be independently operable does not preclude assistance from being provided.

A15.8.5.9 Lifting Capacity. Single person pool lifts must be capable of supporting a minimum weight of 300 pounds and sustaining a static load of at least one and a half times the rated load. Pool lifts should be provided that meet the needs of the population it is serving. Providing a pool lift with a weight capacity greater than 300 pounds may be advisable.

A15.8.6.1 Sloped Entries. Personal wheelchairs and mobility devices may not be appropriate for submerging in water. Some may have batteries, motors, and electrical systems that when submerged in water may cause damage to the personal mobility device or wheelchair or may contaminate the pool water. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination

and avoid damage to personal wheelchairs or other mobility aids.

A15.8.6.3 Handrails. Handrails on both sides of a sloped entry provides stability to both persons with mobility impairments and persons using wheelchairs. For safety reasons, a single handrail is permitted on sloped entries provided at wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area.

A15.8.8.4 Transfer Steps. Where possible, the height of the transfer step should be as minimal as possible. This will decrease the distance an individual is required to lift up or move down to reach the next step to gain access.

A15.8.8.7 Grab Bars. Pool operators have the choice of providing a grab bar on one side of each step and transfer platform or a continuous grab bar on one side serving each transfer step and the transfer platform. If provided on each step, the top of the gripping surface must be 4 to 6 inches above each step. Where a continuous grab bar is provided, the top of the gripping surface must be 4 to 6 inches above the step nosing. Each type has its advantages: A continuous handrail allows the person that is transferring to maintain a constant grip on the handrail while moving up or down the transfer steps. Grab bars provided on each step provide the gripping surface parallel to each step rather than on a diagonal.

A15.8.10 Water Play Components. Personal wheelchairs and mobility devices may not be appropriate for submerging in water when accessing play components located in water. Some may have batteries, motors, and electrical systems that when submerged in water may cause damage to the personal mobility device or wheelchair or may contaminate the water. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs.

Table of Contents

DSA Access Compliance Regulations

DSA – 2008 CALIFORNIA ACCESS COMPLIANCE REFERENCE MANUAL

Introduction

Section 2 – Regulations: The California Code of Regulations (CCR) is the official compilation and publication of the regulations adopted, amended or repealed by state agencies. The CCR consists of 28 titles; Title 24, the California Building Standards Code, serves as the basis for the design and construction of buildings in California. The regulations included in this document are excerpted from Title 24 and include building regulations, adopted by DSA, which govern accessibility for persons with disabilities.

TABLE OF CONTENTS

PARTS 1—12

Division of the State Architect – Access Compliance (DSA–AC)
Based on Regulations as Published in the 2007 Editions of the
California Code of Regulations (CCR)
Title 24 (T-24) – Parts 1 – 12

PART 1 – 2007 CALIFORNIA ADMINISTRATIVE CODE

Effective January 1, 2008

CHAPTER 5
ACCESS TO PUBLIC BUILDINGS BY PERSONS WITH DISABILITIES

PART 2 – 2007 CALIFORNIA BUILDING CODE

Based on the 2006 International Building Code (IBC)
Effective January 1, 2008

DSA — 2008 CALIFORNIA ACCESS COMPLIANCE REFERENCE MANUAL

Section

Section

PART 3 – 2007 CALIFORNIA ELECTRICAL CODE

Based on 2005 National Electrical Code (NEC)
Effective January 1, 2008

PART 4 – 2007 CALIFORNIA MECHANICAL CODE

Based on the 2006 Uniform Mechanical Code (UMC)
Effective January 1, 2008

Section

PART 5 – 2007 CALIFORNIA PLUMBING CODE

Based on the 2006 Uniform Plumbing Code (UPC)
Effective January 1, 2008

PART 8 – 2007 CALIFORNIA HISTORICAL BUILDING CODE

Effective January 1, 2008

PART 9 – 2007 CALIFORNIA FIRE CODE

Based on the 2006 International Fire Code (IFC)
Effective January 1, 2008

PART 12 – 2007 CALIFORNIA REFERENCED STANDARDS CODE

Effective January 1, 2008

8. *If located on a curve, the sides of the ramp need not be parallel, but the minimum width of the ramp shall be 4 feet (1219 mm).*

9. *The ramp shall have a 12 inch wide (305 mm) border with 1/4 inch (6 mm) grooves approximately 3/4 inch (19 mm) on center. See grooving detail, Figure 11B-20 D, Case H.*

SECTION 1128B
PEDESTRIAN GRADE SEPARATION (OVERPASSES AND UNDERPASSES)

Pedestrian ramps on pedestrian grade separations shall comply with the requirements of Section 1133B.5 for ramps.

Cross slopes of walking surfaces shall be the minimum possible and shall not exceed 1/4 inch (6 mm) per foot (2.083-percent gradient). The slope of any appreciably warped walking surface shall not exceed 1 unit vertical in 12 units horizontal (8.33-percent slope) in any direction. Where pedestrian grade separations cross streets or other vehicular traffic ways, and where a street level crossing can reasonably and safely be used by persons with physical disabilities, there shall be provided conforming curb ramps and a usable pathway.

Exceptions:

1. *When the grade differential of the walking surface of a pedestrian grade separation exceeds 14 feet (4267 mm) due to required height clearance and grade conditions, and the enforcing agency finds that because of right-of-way restrictions, topography or natural barriers, wheelchair accessibility or equivalent facilitation would create an unreasonable hardship, such accessibility need not be provided. However, the requirements in these regulations relating to other types of mobility shall be complied with.*

2. *For existing facilities, this section shall not apply where, due to legal or physical constraints, the site of the project will not allow compliance with these regulations or equivalent facilitation without creating an unreasonable hardship. See Section 109.1.5.*

SECTION 1129B
ACCESSIBLE PARKING REQUIRED

1129B.1 General. *Each lot or parking structure where parking is provided for the public as clients, guests or employees, shall provide accessible parking as required by this section. Accessible parking spaces serving a particular building shall be located on the shortest accessible route of travel (complying with Section 1114B.1.2) from adjacent parking to an accessible entrance. In parking facilities that do not serve a particular building, accessible parking shall be located on the shortest accessible route of travel to an accessible pedestrian entrance of the parking facility. In buildings with multiple accessible entrances with adjacent parking, accessible parking spaces shall be dispersed and located closest to the accessible entrances. Table 11B-6 establishes the number of accessible parking spaces required.*

1129B.2 Medical Care Outpatient Facilities. *At facilities providing medical care and other services for persons with mobility impairments, parking spaces complying with this section shall be provided in accordance with Table 11B-6 except as follows:*

1. ***Outpatient units and facilities.*** *Ten percent of the total number of parking spaces provided serve each such outpatient unit or facility.*

2. ***Units and facilities that specialize in treatment or services for persons with mobility impairments.*** *Twenty percent of the total number of parking spaces provided serve each such unit or facility.*

TABLE 11B-6
SPACES REQUIRED
Establishes the number of accessible parking spaces required.

TOTAL NUMBER OF PARKING SPACES IN LOT OR GARAGE	*MINIMUM REQUIRED NUMBER OF SPACES*
1-25	*1*
26-50	*2*
51-75	*3*
76-100	*4*
101-150	*5*
151-200	*6*
201-300	*7*
301-400	*8*
401-500	*9*
501-1,000	*
1,001 and over	**

**Two percent of total.*
***Twenty plus one for each 100, or fraction over 1,001.*

1129B.3 Parking space size. *Accessible parking spaces shall be located as near as practical to a primary entrance and shall be sized as follows:*

1. ***Dimensions.*** *Where single spaces are provided, they shall be 14 feet (4267 mm) wide and lined to provide a 9-foot (2743 mm) parking area and a 5-foot (1524 mm) loading and unloading access aisle on the passenger side of the vehicle. When more than one space is provided in lieu of providing a 14-foot-wide (4267 mm) space for each parking space, two spaces can be provided within a 23-foot-wide (7010 mm) area lined to provide a 9-foot (2743 mm) parking area on each side of a 5-foot (1524 mm) loading and unloading access aisle in the center. The loading and unloading access aisle shall be marked by a border painted blue. Within the blue border, hatched lines a maximum of 36 inches (914 mm) on center shall be painted a color contrasting with the parking surface, preferably blue or white. See Figure 11B-18A. Parking access aisles shall be part of an accessible route of travel (complying with Section 1114B.1.2) to the building or facility entrance. Parked vehicle overhangs shall not reduce the clear width of an accessible route. The minimum length of each parking space shall be 18 feet (5486 mm). The words NO PARKING shall be painted on the ground within each five-foot (1524 mm) loading and unloading access aisle. This notice shall be painted in white letters no less than 12 inches (305 mm) high and located so that it is visible to traffic enforcement officials. See Figures 11B-18A, 11B-18B and 11B-18C.*

2. ***Van space(s).*** *One in every eight accessible spaces, but not less than one, shall be served by a loading and unloading access aisle 96 inches (2438 mm) wide minimum placed on the side opposite the driver's side when the vehicle is going forward into the parking space and shall be designated van accessible as required by Section 1129B.4. All such spaces may be grouped on one level of a parking structure. The loading and unloading access aisle shall be marked by a border painted blue. Within the blue border, hatched lines a maximum of 36 inches (914 mm) on center shall be painted a color contrasting with the parking surface, preferably blue or white. The words NO PARKING shall be painted on the ground within each eight-foot (2438 mm) loading and unloading access aisle. This notice shall be painted in white letters no less than 12 inches (305 mm) high and located so that it is visible to traffic enforcement officials. See Figures 11B-18A, 11B-18B and 11B-18C.*

3. ***Arrangement of parking space.*** *In each parking area, a bumper or curb shall be provided and located to prevent encroachment of cars over the required width of walkways. Also, the space shall be so located that persons with disabilities are not compelled to wheel or walk behind parked cars other than their own. Pedestrian ways which are accessible to persons with disabilities shall be provided from each such parking space to related facilities, including curb cuts or ramps as needed. Ramps shall not encroach into any accessible parking space or the adjacent access aisle. The maximum cross slope in any direction of an accessible parking space and adjacent access aisle shall not exceed 2 percent.*

Exceptions: *See Figures 11B-18A through 11B-18C.*

1. *Where the enforcing agency determines that compliance with any regulation of this section would create an unreasonable hardship, a variance or waiver may be granted when equivalent facilitation is provided.*

2. *Parking spaces may be provided which would require a person with a disability to wheel or walk behind other than accessible parking spaces when the enforcing agency determines that compliance with these regulations or providing equivalent facilitation would create an unreasonable hardship. See Section 109.1.5.*

4. ***Slope of parking space.*** *Surface slopes of accessible parking spaces shall be the minimum possible and shall not exceed one unit vertical to 50 units horizontal (2-percent slope) in any direction.*

1129B.4 Identification of parking spaces for off-street parking facilities. *Each parking space reserved for persons with disabilities shall be identified by a reflectorized sign permanently posted immediately adjacent to and visible from each stall or space, consisting of the International Symbol of Accessibility in white on dark blue background. The sign shall not be smaller than 70 square inches (4516 mm²) in area and, when in a path of travel, shall be posted at a minimum height of 80 inches (2032 mm) from the bottom of the sign to the parking space finished grade. Signs may also be centered on the wall at the interior end of the parking space. An additional sign or additional language below the symbol of accessibility shall state "Minimum Fine $250". Spaces complying with Section 1129B.3, Item 2 shall have an additional sign stating "Van-Accessible" mounted below the symbol of accessibility. Signs identifying accessible parking spaces shall be located so they cannot be obscured by a vehicle parked in the space.*

An additional sign shall also be posted in a conspicuous place at each entrance to off-street parking facilities, or immediately adjacent to and visible from each stall or space. The sign shall not be less than 17 inches by 22 inches (432 mm by 559 mm) in size with lettering not less than 1 inch (25 mm) in height, which clearly and conspicuously states the following:

> *"Unauthorized vehicles parked in designated accessible spaces not displaying distinguishing placards or license plates issued for persons with disabilities may be towed away at owner's expense. Towed vehicles may be reclaimed at_____ or by telephoning _____."*

Blank spaces are to be filled in with appropriate information as a permanent part of the sign.

In addition to the above requirements, the surface of each accessible parking space or stall shall have a surface identification duplicating either of the following schemes:

1. *By outlining or painting the stall or space in blue and outlining on the ground in the stall or space in white or suitable contrasting color a profile view depicting a wheelchair with occupant; or*

2. *By outlining a profile view of a wheelchair with occupant in white on blue background. The profile view shall be located so that it is visible to a traffic enforcement officer when a vehicle is properly parked in the space and shall be 36 inches high by 36 inches wide (914 mm by 914 mm). See Figures 11B-18A through 11B-18C.*

SECTION 1130B
PARKING STRUCTURES

All entrances to and vertical clearances within parking structures shall have a minimum vertical clearance of 8 feet 2 inches (2489 mm) where required for accessibility to accessible parking spaces.

Exceptions:

1. *Where the enforcing agency determines that compliance with Section 1130B would create an unreasonable hardship, an exception may be granted when equivalent facilitation is provided.*

2. *This section shall not apply to existing buildings where the enforcing agency determines that, due to legal or physical constraints, compliance with these regulations or equivalent facilitation would create an unreasonable hardship. See Section 109.1.5.*

SECTION 1131B
PASSENGER DROP-OFF AND LOADING ZONES

1131B.1 Location. *When provided, passenger drop-off and loading zones shall be located on an accessible route of travel (complying with Section 1114B.1.2) and shall comply with 1131B.2.*

1131B.2 Passenger loading zones.

1. ***General.*** *Where provided, one passenger drop-off and loading zone shall provide an access aisle at least 60 inches (1524 mm) wide and 20 feet (6096 mm) long adjacent and parallel to the vehicle pull-up space. Vehicle standing spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2 percent) in all directions. If there are curbs between the access aisle and the vehicle pull-up space, a curb ramp shall be provided. Each passenger drop-off and loading zone designed for persons with disabilities shall be identified by a reflectorized sign, complying with 1117B.5.1 Items 2 and 3, permanently posted immediately adjacent to and visible from the passenger drop-off or loading zone stating "Passenger Loading Zone Only" and including the International Symbol of Accessibility, in white on dark blue background.*

2. ***Vertical clearance.*** *Provide minimum vertical clearance of 114 inches (2896 mm) at accessible passenger loading zones and along at least one vehicle access route to such areas from site entrances and exits.*

1131B.3 Valet parking. *Valet parking facilities shall provide a passenger loading zone complying with Section 1131B.2 above and shall be located on an accessible route of travel (complying with Section 1114B.1.2) to the entrance of the facility. The parking space requirements of Sections 1129B through 1130B apply to facilities with valet parking.*

1131B.4 Bus stop pads and shelters. *See Section 1121B.2.1.*

SECTION 1132B
OUTDOOR OCCUPANCIES

1132B.1 General. *Outdoor occupancies shall be accessible as required in this chapter. See also the general requirements in Section 1114B.1.1.*

1132B.2 Parks and recreational areas. *The following parks and recreational areas shall comply with these regulations.*

Exceptions:

1. *In existing buildings, when the enforcing agency determines that compliance would create an unreasonable hardship, a variance shall be granted when equivalent facilitation is provided.*
2. *Where the enforcing agency finds that, in specific areas, the natural environment would be materially damaged by compliance with these regulations, such areas shall be subject to these regulations only to the extent that such material damage would not occur.*
3. *Automobile access shall not be provided or paths of travel shall not be made accessible when the enforcing agency determines that compliance with these regulations would create an unreasonable hardship.*

1. ***Campsites.*** *Campsites, a minimum of two and no fewer than three for each 100 campsites provided, shall be accessible by level path or ramp and shall have travel routes with slopes not exceeding 1 unit vertical in 12 units horizontal (8.33-percent slope) to sanitary facilities. Permanent sanitary facilities serving campgrounds shall be accessible to wheelchair occupants.*

2. ***Beaches, picnic areas.*** *Beaches, picnic areas, day-use areas, vista points and similar areas shall be accessible.*

3. ***Sanitary facilities.*** *Sanitary facilities, to the extent that such facilities are provided, each public use area that is accessible to wheelchair occupants by automobile, walks or other paths of travel.*

4. ***Boat docks.*** *Boat docks, fishing piers, etc., shall be accessible.*

5. ***Parking lots.*** *Parking lots shall be provided with accessible parking spaces and with curb cuts leading to all adjacent walks, paths or trails.*

6. ***Trails and paths.*** *Trails, paths and nature walk areas, or portions of these, shall be constructed with gradients which will permit at least partial use by wheelchair occupants. Hard surface paths or walks shall be provided to serve buildings and other functional areas.*

HISTORY NOTE APPENDIX

California Building Code
California Code of Regulations, Title 24, Part 2

For prior history, see the History Note Appendix to the *California Building Code*, 2001 Triennial Edition effective November 1, 2002.

1. (BSC 01/06, BSC 06/06, DSA-AC 01/06, DSA-AC 02/06, DSA-SS 01/06, DSA-SS 02/06, HCD 04/06, OSHPD 02/06, OSHPD 03/06, OSHPD 04/06, SFM 05/06) Adoption by reference of the 2006 *International Building Code* with necessary state amendments and repeal of the 1997 edition of the *Uniform Building Code*. Filed with the Secretary of State of February 15, 2007 and effective on January 1, 2008.

2. Erratum to correct editorial errors in Chapter 1, Section 108.2.1.3. Chapter 1, Section 109.1.2.1. Chapter 2, Definitions - Matrix Adoption Table correction. Chapter 4, Section 430 - Article reference change. Chapter 5, Table 503. Chapter 5, Section 507.3, Chapter 11A, Section 1110A.2. Chapter 11A, Figure 11A-9D and 11A-9E out of order. Chapter 11A, Section 1121B.3.1 (8)(a), Chapter 11A, Section 1124A.3.2.1. Chapter 11A, Section 1143A.4. Chapter 11B, Section 1111B, 1115B.3, 1129B.4, 1133B.4.5.3, 1133B.7.1.3 and Figure 11B-11. Chapter 12, Matrix Adoption Table. Chapter 12, Section 1250.1 and 1250.4. Chapter 15, Section 1511.1. Chapter 16A, Section 1614A.1.13. Chapter 17A, Section 1714A.5.2. Chapter 18, Matrix Adoption Tables. Chapter 29, Fixture Table 2902.1. Chapter 31, Section 3109.4.4.2 trough 3109.4.4.8. Chapter 31A - Clarify reference to Title 8 for provisions. Chapter 35, NFPA 13-02. Appendix Chapter 1, Section 101.4.2, 101.4.5, 102.6 and 103.3.

3. Emergency Standards pertaining to Required Accessible Parking - (DSA-AC EF 01/08) On May 21, 2008 the California Building Standards Commission approved revised regulations proposed by DSA-AC implementing AB. 1531. The revised regulations become effective July 1, 2008 and are contained in California Building Code Sections 1129B.3 & 1129B.4, and Figures 11B-18A, 11B-18B & 11B-18C.

For Errata and Supplements refer to California Building Standards Commission at www.bsc.ca.gov

COMMONLY ASKED QUESTIONS ABOUT DSP&S EXPENDITURES

BUDGET IDENTIFICATION

Q. Does a college/district need to designate a unique budget identifier code for direct excess cost expenditures?

A. Yes, each college/district that accepts direct excess cost funding must certify through fiscal and accounting reports that direct excess cost funding was expended for the intended purpose of serving/instructing students with disabilities. The most efficient or effective manner to accomplish this objective is to establish a unique budget identifier code. (Title 5 section 56074)

INDIRECT COSTS

Q. May a college/district utilize direct excess cost funding to support indirect costs (lighting, heating, janitorial service, etc.).

A. No, direct excess cost funding was established to provide direct services to students with disabilities. In no way are these funds to be spent for indirect costs. (Title 5 section 56068)

Q. What about the implications of indirect costs when a college/district offers a special class(es)? May indirect costs be borne by DSP&S special classes?

A. Yes, under these circumstances indirect costs are allowable when calculating Full Time Equivalent Status (FTES) revenue for special classes (Title 5 section 56076). The campus/district Chancellor's Office approved, non-instructional cost rate may be deducted from the average dollars per FTES for both on and off campus classes. These funds are designed to pay for indirect costs including those described above.

DIRECT EXCESS COSTS

1000 Certificated Salaries

Q. May direct excess cost funding be utilized for DSP&S certificated (1100-1400) personnel?

A. Yes, all certificated personnel assigned to DSP&S positions may be charged for the percentage of time assigned to DSP&S.

2000 Classified Salaries

Q. May direct excess cost funding be utilized for DSP&S (2100-2400) personnel?

A. Yes, all classified personnel assigned to DSP&S positions may be charged for the percentage of time assigned to DSP&S.

3000 Employee Benefits

Q. May direct excess cost funding be utilized for the benefits (3100-3900) paid to all DSP&S personnel?

A. Yes, employee benefits are allowable costs proportionate to the percentage of time assigned to DSP&S.

4000 Supplies and Materials

Q. May direct excess cost be utilized for purchasing supplies and materials necessary for operations of the DSP&S program?

A. Yes, supplies and materials used in the DSP&S program are a legitimate direct excess cost expense.

5000 Other operating Expenses and Services

Q. May a college/district hire additional consultant personnel to provide direct instruction or service to eligible students with disabilities?

A. Yes, personnel service costs are allowable expenditures. It is important to remember these personnel must provide direct instruction or service to students with disabilities and these costs must be prorated to the percentage of time employed in DSP&S.

Q. Many professional activity and staff development opportunities are available to DSP&S personnel. Is the cost for this type of activity an appropriate and allowable expenditure?

A. Yes, the Chancellor's Office recognizes the importance of maintaining the currency in the profession and allows for expenditures for travel and conferences for DSP&S staff identified in categories 1000-2000 with appropriate advance approval of the college.

Q: May campus DSP&S programs use direct excess cost funding to pay for individual or campus/program dues and memberships?

A. No, excess cost funding may not be used for dues or memberships. These expenses are to be paid by the individual or general campus budget.

Q. Occasionally DSP&S departments enter into instructional or service areas that require the purchase of insurance. Are these expenditures allowed from excess cost funding?

A. Yes, this type of expenditure is allowable if directly related to the provision of DSP&S instruction or services and not otherwise covered by the college/district.

Q. Is it legitimate for a campus to bill DSP&S for utilities and housekeeping services for campus space utilized by the DSP&S department?

A. No, under no circumstances are these type of expenditures allowed for existing campus programs.

Q. Are costs for legal matters, election campaigns or audit expenses allowable?

A. No, these costs are not a direct excess cost and are not eligible for reimbursement. These costs, if authorized, would need to be borne by the campus/district general fund.

Q. Occasionally other operating expenses for services or administrative operations surface. Would this type of expense be allowable?

A. No, this type of cost must be paid from the campus/district general fund and not from direct excess cost funds.

6000 Capital Outlay

Q. May a college/district use direct excess cost funding for site and site improvements?

A. These costs are not allowable, except for minor architectural barrier removal. There is no specific definition of "minor" as regards this issue.

Q. Are building costs allowed?

A. No, under no circumstance are building costs allowable even if the new building were for exclusive use of DSP&S.

Q. May DSP&S establish a resource library using direct excess cost funding?

A. Yes, books or other resource material purchases are allowable provided they are directly for the DSP&S "library". Other general/main library expansions or acquisitions are not allowed.

Q. Frequently DSP&S departments need to purchase equipment. May direct excess funding be used for this purpose?

A. Yes, the purchase of equipment used strictly by disabled students is allowable. In addition, purchase of equipment for special classes is allowable provided the minimum net apportionment generated by special classes has been expended by DSP&S. However, direct excess funding may not be used to purchase administrative equipment for staff.

Q. The sale of surplus items purchased with DSP&S resources causes some confusion among college/district personnel. When an item purchased with DSP&S resources is sold through a surplus sale must the dollars received for the sale be deposited or credited to the DSP&S department?

A. Yes, funds received as a result of the sale of equipment purchases with DSP&S funds must be returned to the DSP&S department for use in providing service and instruction to students with disabilities.

7000 Other Outgo

Q. Are costs associated in the Other category allowable?

A. No, any costs not previously discussed are not allowable.

AB 422

Page 1

CONCURRENCE IN SENATE AMENDMENTS
AB 422 (Steinberg)
As Amended June 30, 1999
Majority vote

ASSEMBLY: 73-4 (May 27, 1999) SENATE: 24-0 (August 23, 1999)

Original Committee Reference: HIGHER ED.

SUMMARY : Requires publishers and producers of instructional materials for students attending the University of California (UC), the California State University (CSU) or California community colleges (CCCs) to provide the material, at no cost, in an electronic format for use by disabled students.

The Senate amendments:

1) Refine the definition of "instructional material and materials," "printed instructional material and materials," and "nonprinted instructional material and materials" which are subject to electronic format for disabled students and have been requested by the instructor at a postsecondary institution.

2) Require publishers to provide instructional materials in ASCII text, in order to preserve as much of the structural integrity of the printed instructional materials as possible, in the event publishers and universities and/or colleges fail to reach an agreement on the best way to provide materials in an electronic format.

EXISTING LAW :

1) Requires UC, CSU, and CCCs to provide full and complete access to all services, instruction, and materials to those with disabilities, including access to transcription services for Braille and printed materials.

2) Requires that the appropriate funding commitments be made to secure access for those with disabilities.

3) Requires that publishers of textbooks and other instructional materials offered for sale to K -12 school districts meet

AB 422

Page 2

certain conditions in order for those materials to be used in the classroom. Furthermore, publishers must allow schools to transcribe, reproduce and distribute instructional materials in formats for pupils with visual impairments.

AS PASSED BY THE ASSEMBLY , this bill:

1) Required publishers and producers of textbooks and other printed instructional materials to provide an electronic version of the material so it can be easily transcribed or converted for persons with vision impairments or other like disabilities when those materials are required as part of a course or study in a class at the UC, the CSU or CCCs.

2) Defined "instructional materials" and "specialized format."

3) Ensured certain copyright protections are in place by putting the burden on colleges and universities to ensure precautions exist to avoid students duplicating in an inappropriate

manner.

4) Allowed the Chancellor of CCCs, the Chancellor of CSU, and the President of UC to create centralized centers to take the lead in dispersing the materials to various campuses and students in order to limit the disbursement of material and enhance the protection of various copyright laws.

FISCAL EFFECT : Potential minor General Fund savings, probably less than $100,000, to CCCs, UC, and CSU, to the extent that the use of the electronic versions of instructional materials reduces the cost to transcribe or convert materials for disabled students.

COMMENTS : Technology has been developed whereby visually impaired persons can access textbooks and other college reading material by adopting programs for Braille conversion and other audio formats. In many instances, software programs have been written whereby if the text of a document is scanned or transferred electronically, it can be read aloud to a visually impaired user.

Public colleges and universities make available the instructional materials in a format for the visually impaired, but oftentimes these materials must be "manually" in -putted in

order to have them converted appropriately. This is a time consuming and expensive process. A way to expedite this process and reduce costs is to have the materials available in easily readable electronic format.

This bill has been amended several times, including Senate amendments, to best define and protect publishers from having their work "pirated" or misused in a manner, yet still meet the objectives of getting materials in the hands of non -traditional, disabled students.

Analysis Prepared by : Paul A. Smith / HIGHER ED. / (916) 319-2021

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