

January 30, 1984

EXPLANATION OF CHANGES IN DEPARTMENT OF JUSTICE'S
DECEMBER 16, 1983 NOTICE OF PROPOSED RULEMAKING

INTRODUCTION

The language for all of the changes to the Justice Department's proposed rule is taken from one of three sources: the Preamble to the proposed rule; the government-wide guidelines for the implementation of Section 504, federally-assisted programs (28 C.F.R. Part 41); and the HEW regulation for the implementation of Section 504, HEW-assisted programs (45 C.F.R. Part 84).

1. §39.103 Definitions--"Auxiliary Aids"

The Department of Justice rule discusses auxiliary aids in the context of communication only. Yet the Preamble to the rule states that auxiliary aids "may also be necessary to meet other requirements of the regulation." p.55996, col. 3. Since preambles are rarely, if ever, published in the Code of Federal Regulations, we have added the explanatory language to the regulation itself.

2. §39.103 Definitions--"Facility"

The proposed rule differs from the HEW federally-assisted rule and from the government-wide guideline by omitting the phrase "interest in such property" from the description of real and personal property. The deletion suggests that the Department of Justice intends to exclude

coverage of partially owned and leased facilities from the coverage of Section 504. Since the federal government makes extensive use of leased facilities, excluding them from coverage is both contrary to the mandate of §504, the Architectural Barriers Act, and good public policy.

3. §39.103 Definitions--"Physical or Mental Impairment"

The Department of Justice's proposed rule omits the listing of impairments that appears in the earlier §504 regulations. It is important for the listing to appear because it includes impairments that some have assumed are not covered by Section 504. For example, "hidden" disabilities, such as cancer and diabetes are listed, as are epilepsy and heart disease. When HEW (now the Department of Health and Human Services) published the first §504 regulation, it conducted lengthy and thoughtful discussions with the Department of Justice and the disability community about the listing. Therefore, to omit the listing in the proposed Department of Justice regulations would unnecessarily resurrect problems that have been successfully resolved.

4. §39.103 Definitions--"Qualified Handicapped Person"

The Department of Justice definition, Part 1, should be omitted, and, in its place, the definition that appears in previously published §504 regulations should be substituted. The Department of Justice's definition is unacceptable for a number of reasons.

The new definition of qualified handicapped person that the Department of Justice is proposing, will alter the way in which providers and courts have been evaluating the qualifications of disabled people and evaluating the types of accommodations that are required by the law.

Under the Hew definition, questions of accommodation do not arise until the disabled person is deemed to possess the ability to "perform the essential functions of the job in question ... with reasonable accommodation." The Justice Department proposes a new standard of "fundamental alteration in the nature ... of the program or activity." Thus the focus is shifted from the ability of the disabled person to do the job to the way in which the program or activity must change before the person can be hired. This shift reflects the traditional response to a disabled applicant--that is, how difficult and troublesome it will be to employ the disabled. This new standard will, perhaps unintentionally, encourage employers to focus on the difficulties of employing the disabled instead of the benefits.

Most importantly, the questions of "qualification" and "modification" should be separate inquiries. A disabled person should be deemed "qualified," if like any other applicant, s/he meets the essential eligibility requirements. At that point, inquiry can be made as to the type of accommodation, if any, which is needed in order for the person to participate in the program. These inquiries must be separated in order to ensure that the disabled applicants' qualifications are fairly evaluated. This two-step process is recognized in the Section 504 recipient regulations on employment. An applicant for employment can be given a physical examination only after an offer has been made. Without this protection, it would often be impossible for an applicant to show that his/her rejection was based on his/her disability. The same concerns hold true in other areas. Since only "qualified handicapped persons" are protected by Section 504, the person's disability and/or the question of accommodation should not be allowed to enter into this threshold determination.

5. §39.110 Self Evaluation

The self-evaluation mechanism that was published in the HEW rule represented a significant advance in civil rights enforcement. It reflected an understanding that, given the opportunity, all providers and employers prefer to change their policies and practices voluntarily, rather than in adversarial

contexts. The self-evaluation procedure, as published in the HEW rule, provided an education mechanism that has achieved laudable results, both in terms of enforcing the statute and in selecting cost-effective means of doing so.

While the Department of Justice rule has retained the self-evaluation concept, it has abbreviated the rule so drastically as to suggest that its implementation is not to be taken seriously. There is no reason to diminish the importance of self-evaluations, and doing so is contrary to the Administration's goals of deregulation, voluntary compliance, and cost-containment.

6. §39.111 Blank

The HEW regulation defines the provider's responsibilities to notify "participating beneficiaries, applicants, and employees" of its non-discrimination obligations. For no apparent reason, the Department of Justice has omitted this "notice" requirement. For all of the reasons discussed above, with regard to "self-evaluation," the same section ought to be added to the Department of Justice regulation.

7. §39.130 General Prohibitions Against Discrimination

Section 130 of the Justice Department rule omits certain provisions of the federal financial assistance regulations concerning aiding or perpetuating discrimination by assisting an agency, organization, or person that discriminates against handicapped persons. 28 C.F.R. §41.51(b)(1)(v) and (b)(3)(iii) (1982). The preamble does not mention this omission. There is

no apparent rationale for allowing government agencies to perpetuate discrimination by assisting discriminators when recipients of federal financial assistance are prohibited from doing so.

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

8. §39.150(a) Program Accessibility: Existing Facilities

The Department of Justice rule omits the language of the federal financial assistance regulations (28 C.F.R. §41.56) providing that no qualified handicapped person will be discriminated against because of a lack of program accessibility. It may appear that the same effect is accomplished by section 150(a) of the prototype, which requires programs or activities, when viewed in their entirety, to be "readily accessible to and

usable by handicapped persons" (this language is drawn from §41.57 of the federal financial assistance regulations). There is, however, a notable difference in the two formulations. The federal financial assistance provision makes it clear that each individual handicapped person is entitled to access to the program or activity. The prototype formulation can be interpreted as more of a general or group accessibility requirement. On its face, it does not clearly guarantee a right to each handicapped person to have access to a particular program or activity. Such an individual accessibility right should be clearly delineated.

9. §39.150(a)(2) Program Accessibility: Existing Facilities

Section 150(a)(3) incorporates very broad defenses of "undue financial and administrative burdens" and "fundamental alterations" to the obligation of making programs accessible. These limitations are not found in the program accessibility requirements of the federal financial assistance regulations.

The "undue administrative and financial burden" language is inconsistent with the recently reaffirmed 1978 Section 504 guidelines for recipients of federal financial assistance. For over 18 months Department of Justice reviewed the 1978 "recipient" guidelines. Every Department of Justice draft of revisions to those guidelines contained some formulation of the "undue burden" defense. This was the major rallying point for disabled people who objected strenuously to the incorporation of any undue burden language in the guidelines.

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

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

Vice-President Bush assured the disabled community that the:

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

Hence, the disability community believes that the incorporation of an undue burden defense in the guidelines has already been rejected by the Administration.

The Department of Justice states in the preamble that the "undue burden" language is in response to Davis v. Southeastern Community College. However, the Supreme Court in Davis did not invalidate the HEW regulations or require that they be modified. In fact, Department of Justice published its own recipient regulations which are identical to the 1977 HEW regulations one year after the Davis decision.

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

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

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

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

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

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

Finally, there is an unfortunate likelihood that inclusion of an "undue burden" defense in Section 504 regulations will diminish the availability of equal opportunity for the disabled and will therefore perpetuate discrimination against them. That is because no matter how carefully such a defense is worded, it will be abused. Agency administrators, pressured to conserve their administrative and financial resources, will rely on this defense to avoid the requirements of Section 504. The disabled, like all other applicants, must depend upon agency officials for the protection of their rights and the provision of needed services. Nonetheless, the agency official is less likely to provide the services and benefits if the non-discrimination regulations themselves warn the official against assuming "burdensome" responsibilities.

10. §39.160(1)(iii) Communications

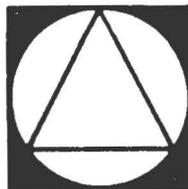
The language in the Justice regulation is confusing, because it does not distinguish between accommodations necessary for employment or program-related activity and purely personal activities. Only a redraft of the language, as opposed to the concept, is required.

11. §39.160(e) Communications

This section reflects the use of the "undue financial and administrative burden" defense, as well as the "fundamental alteration" language. We have discussed the problems associated with these phrases above, in items 4 and 9.

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January 30, 1984

The Honorable
Ms. Judith A. Buckalew
Special Assistant to the President
for Public Liaison
The White House
Washington, D.C. 20500

Dear Ms. Buckalew:

On the morning of January 27, 1984, the Subcommittee on Section 504 of the American Coalition of Citizens with Disabilities (ACCD) Roundtable Discussion Group, which is composed of leaders in the disability field, met in response to your phone calls concerning our position on the Department of Justice's Notice of Proposed Rulemaking of December 16, 1983. The enclosed document represents the disability community's position on a minimally acceptable rule for federally conducted programs and activities.

After thoughtful deliberations, the disability community we represent has agreed to delay our planned activities on the Justice Department's Notice of Proposed Rulemaking for one week. Our agreement to delay depends upon the Administration's fulfillment of the following commitments to us:

1. That we discuss and agree upon a substitute Justice Department Notice of Proposed Rulemaking;
2. That once an agreement is reached, the December 16, 1983 Notice of Proposed Rulemaking be withdrawn from the Federal Register;
3. That the agreed upon substitute Justice Department Notice of Proposed Rulemaking be published in the Federal Register;

The only national membership organization of and for all people with disabilities.

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Ms. Judith A. Buckalew
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4. That the substitute be used as the prototype for all 91 federal agencies, and that the notice in the Federal Register so note.

The enclosed document reflects the Section 504 federally assisted regulations. This Administration endorsed that language and the use of those regulations in March 1983. Withdrawing the December 16, 1983 Justice Department Proposed Rule and simultaneously publishing the substitute regulations will be consistent with plaintiff's position in Williams v. USA.

We believe that we can reach agreement and that a substitute Notice of Proposed Rulemaking can be published in an expeditious fashion. We are encouraged by the White House's recognition of the significance of these issues to the disability organizations and to the 36 million people they represent. We look forward to meeting with you to resolve our differences. However, because the deadline for comment on the December 16, 1983 Notice of Proposed Rulemaking is swiftly approaching, we cannot delay our advocacy activities longer than one week.

In order for the negotiations to begin, a phone call to the President of ACCD at (202) 785-4265 should be initiated by you.

Very truly yours,



Phyllis Rubenfeld, Ed.D.
President, ACCD

on behalf of ACCD and the
following organizations:

Affiliated Leadership League of and for the Blind
of America
American Association of Mental Deficiency
American Coalition of Citizens with Disabilities

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American Council of the Blind
American Speech-Language-Hearing Association
Association for Children and Adults with Learning
Disabilities
Association for Retarded Citizens
California State Council on Developmental
Disabilities
Center for Law and Social Policy
Children's Defense Fund
Conference of Educational Administrators Serving
the Deaf, Inc.
Convention of American Instructors of the Deaf
Council for Exceptional Children
Disability Rights Center
Disability Rights Education and Defense Fund
Endeppendence Center of Northern Virginia
Epilepsy Foundation of America
National Alliance for the Mentally Ill
National Association of Developmental
Disabilities Councils
National Association of Private Residential
Facilities for the Mentally Retarded
National Association of the Deaf
National Center for Law and the Deaf
National Council for Independent Living Programs
National Council on Rehabilitation Education
National Easter Seal Society
National Head Injury Foundation
National Mental Health Association
National Rehabilitation Association
National Society for Autistic Children
National Spinal Cord Injury Association
Paralyzed Veterans of America
Spina Bifida Association of America
United Cerebral Palsy Associations, Inc.

PR/gdl

Enclosures (2)

cc: James Baker
Chief of Staff and Assistant to the President

James Ciconi
Special Assistant to the President and
Special Assistant to the Chief of Staff

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**PART 39—ENFORCEMENT OF
NONDISCRIMINATION ON THE BASIS
OF HANDICAP IN PROGRAMS OR
ACTIVITIES CONDUCTED BY THE
DEPARTMENT OF JUSTICE**

Sec.

39.101 Purpose.

39.102 Application.

39.103 Definitions.

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39.110 Self-evaluation.

39.111-39.129 [Reserved]

39.130 General prohibitions against
discrimination.

39.131-39.139 [Reserved]

39.140 Employment.

39.141-39.149 [Reserved]

39.150 Program accessibility: Existing
facilities.

39.151 Program accessibility: New
construction and alterations.

39.152-39.159 [Reserved]

39.160 Communications.

39.161-39.169 [Reserved]

39.170 Compliance procedures.

39.171-39.999 [Reserved]

Authority: 29 U.S.C. 794.

§ 39.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, which amends section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 39.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 39.103 Definitions.

For purposes of this part, the term—
"Agency" means the Department of Justice.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complaint Adjudication Officer" means the Complaint Adjudication Officer appointed by the Assistant Attorney General for Civil Rights.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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 shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record or such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) 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

(INSERT)

Although auxiliary aids are required explicitly only by § 39.160(a)(1), they may also be necessary to meet other requirements of the regulation.

(Preamble, 55996, col. 3.)

insert)

terest in such property.

or in-

(HEW 504 regulations 45CFR 84.31 and Government-wide Regulations 28 CFR 41.1 (A))

speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "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) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency 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 the agency as having such an impairment.

"Official" or "Responsible Official" means the Director of Equal Employment Opportunity for the Department of Justice or his or her designee.

"Qualified handicapped person" means—

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

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Respondent" means the organizational unit in which a complainant alleges that discrimination occurred.

"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 by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88

(insert)

ing disabilities. The term "physical or mental impairment" includes, but is not limited to, 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 drug addiction and alcoholism.

(Government-wide guidelines, federally assisted, 28 CFR §41.31(b))

substitute

"Qualified handicapped person" means: (a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and

(HEW federally assisted 3504 regulations, 45 CFR §84.3(k) and Government-wide guidelines, 28 CFR §41.32.)

Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955): As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 39.104-39.109. [Reserved]

§ 39.110 Self-evaluation.

Within one year of the effective date of this part, the agency shall conduct, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, a self-evaluation of its compliance with section 504.

§§ 39.111-39.129 [Reserved]

(INSERT)

(2) The agency

(1) The agency (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 and make available for public inspection, and provide to the Director 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.

NEW, 45 C.F.R. 84.6 (c)

(a) The agency

§

the agency

the agency

The agency

Notice.

(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 programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to ~~§ 84.7(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.

HEW, 45 CFR § 84.8

§ 39.139 General prohibitions against discrimination:

(a) 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 activity conducted by the agency.

(b)(1) The agency, 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 afforded others;

(iii) Provide a qualified handicapped person 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 aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person that opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(INSERT)

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

HEW, 45 CFR § 84.4(b)(v)
Govt-wide, 28 CFR § 41.51(b)(v)

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(INSERT)

licensing.

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(INSERT)

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

or (iii), that perpetuate the discrimination of another recipient agency.

Hew, 45 CFR 84.4(b)(4)

Gort-w.de, 28 CFR 41.57(b)(4)

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(OMIT)

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 39.131--139 [Reserved]

§ 39.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 39.141-39.149 [Reserved]

(INSERT)

§ 39.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

an agency's

General requirement concerning program accessibility.

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 conducted by a federal agency.

(HEW, 45 CFR 84.21
Govern-wide, 28 CFR 41.56)

(OMIT)

(b) *Methods.* The agency 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 any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified

handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within sixty days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency 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 agency's facilities that limit the accessibility of its programs or activities 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 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;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

§ 39.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act, 42 U.S.C. 4151-4157, as established in 41 CFR 101-19.600 to 101.607, apply to buildings covered by this section.

§§ 39.152-39.159 [Reserved]

§ 39.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

substitute

"for use or study of nonprogram material."

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) The agency shall take appropriate steps to provide handicapped persons with information regarding their section 504 rights under the agency's programs or activities.

(e) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

(OMIT)

§§ 39.161-39.169 [Reserved]

§ 39.170 Compliance procedures.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) *Employment complaints.* The agency shall process complaints alleging

violations of section 504 with respect to employment according to the procedures established in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Responsible Official.* The Responsible Official shall coordinate implementation of this section.

(d) *Filing a complaint.*

(1) *Who may file.*

(i) Any person who believes that he or she or any specific class of persons has been subjected to discrimination prohibited by this part may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR Part 542.

(2) *Confidentiality.* The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) *When to file.* Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR Part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

(4) *How to file.* Complaints may be delivered or mailed to the Attorney General, the Responsible Official, or agency officials. Complaints should be sent to the Director for Equal Employment Opportunity, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Room 1232, Washington, D.C. 20530. If any agency official other than the Official receives a complaint, he or she shall forward the complaint to the Official immediately.

(e) *Notification to the Architectural and Transportation Barriers Compliance Board.* The agency shall promptly send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not

readily accessible to and usable to handicapped persons. The agency shall delete the identity of the complainant from the copy of the complaint.

(f) Acceptance of complaint.

(1) The Official shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which the agency has jurisdiction. The Official shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Official receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Official shall dismiss the complaint without prejudice.

(3) If the Official receives a complaint over which the agency does not have jurisdiction, the Official shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(g) Investigation/Conciliation.

(1) Within 180 days of the receipt of a complete complaint, the Official shall complete the investigation of the complaint, attempt informal resolution, and, if no informal resolution is achieved, issue a letter of preliminary findings.

(2) The Official may require agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required by the Official to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) The Official shall furnish the complainant and the respondent a copy of the investigative report promptly after receiving it from the investigator and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(h) Preliminary findings. If an informal resolution of the complaint is not reached, the Official shall, within 180 days of receipt of the complete complaint, notify the complainant, the respondent, and the Complainant Adjudication Officer of the results of the

investigation in a letter sent by certified mail, return receipt requested, and containing—

- (1) Preliminary findings of fact and conclusions of law;
- (2) A description of a remedy for each violation found;
- (3) A notice of the right of the complainant and respondent to appeal to the Complaint Adjudication Officer; and
- (4) A notice of the right of the complainant and respondent to request a hearing.

(i) *Filing an appeal.*

(1) Notice of appeals to the Complainant Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section.

(2) If a timely appeal without a request for hearing is filed by a party—

(i) Any other party may file a written request for a hearing within the time limit specified in paragraph (i)(1) of this section or within 10 days of the date on which the first timely appeal without a request for hearing was filed, whichever is later.

(ii) If no party requests a hearing, the Responsible Official shall promptly transmit the notice of appeal and investigative record to the Complaint Adjudication Officer.

(3) If neither party files an appeal to the Complaint Adjudication Officer within the time prescribed in paragraph (i)(1) of this section, the letter of preliminary findings shall become the final agency decision on the complaint at the expiration of that time.

(j) *Acceptance of appeal.* The Complaint Adjudication Officer shall accept and process any timely appeal.

(k) *Hearing.*

(1) Upon a timely request for a hearing, the Responsible Official shall appoint an administrative law judge to conduct the hearing. The administrative law judge shall issue a notice to all parties specifying the date, time, and place of the scheduled hearing. The hearing shall be held no earlier than 15 days after the notice is issued and no later than 60 days after the request for a hearing is filed, unless all parties agree to a different date.

(2) The complainant and respondent shall be parties to the hearing. Any interested person or organization may petition to become a party or amicus curiae. The administrative law judge may, in his or her discretion, grant such a petition if, in his or her opinion, the petitioner has a legitimate interest in the

proceedings and the participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings.

(3) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554-557 (sections 5-8 of the Administrative Procedure Act) and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing; giving of notices subsequent to those provided for in paragraph (h) of this section; taking of testimony, exhibits, arguments, and briefs; requests for findings; and other related matters. The parties shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the administrative law judge.

(4) Technical rules of evidence shall not apply to hearings conducted pursuant to this paragraph, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination shall be applied by the administrative law judge whenever reasonably necessary. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record.

(5) The costs involved in the appearance of witnesses in the hearing shall be allocated as follows:

(i) Persons employed by the agency shall, upon request to the agency by the administrative law judge, be made available to participate in the hearing and shall be on official duty status for this purpose. They shall not receive witness fees.

(ii) Employees of other Federal agencies called to testify at a hearing shall, at the request of the administrative law judge and with the approval of the employing agency, be on official duty status during any period of absence from normal duties caused by their testimony, and shall not receive witness fees.

(iii) The fees and expenses of other persons called to testify at a hearing shall be paid by the party requesting their appearance.

(iv) The administrative law judge may require the agency to pay travel expenses necessary for the complainant to attend the hearing.

(v) The respondent shall pay the required fees for the administrative law judge and court reporter, and all other expenses except those specifically allocated to the complainant, an intervening party, or an amicus curiae.

(6) The administrative law judge shall submit in writing proposed findings of fact, conclusions of law, and remedies to the Complaint Adjudication Officer within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made.

(1) *Decision.*

(1) The Complaint Adjudication Officer shall make the decision of the agency based on information in the complaint file and, if a hearing is held,

on the hearing record. The decision shall be made within 60 days of receipt of the complaint file or hearing record. If the Complaint Adjudication Officer determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Complaint Adjudication Officer shall have 60 days from receipt of the additional information to make the decision on the appeal. The Complaint Adjudication Officer shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, remedial action required, and reasons for the decision. If the decision is based on a hearing record, it shall adopt, reject, or modify the decision that was recommended by the administrative law judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth in detail the specific reasons for the rejection or modification.

(2) Any respondent required to take action under the terms of the decision of the agency shall do so promptly. The Official or Complaint Adjudication Officer, as appropriate, may require periodic compliance reports specifying:

- (i) The manner in which compliance with the provisions of the decision has been achieved;
- (ii) The reasons any action required by the final decision has not yet been taken; and
- (iii) The steps being taken to ensure full compliance.

§§ 39.171-39.999 [Reserved]

William French Smith,
Attorney General.

January 30, 1984

EXPLANATION OF CHANGES IN DEPARTMENT OF JUSTICE'S
DECEMBER 16, 1983 NOTICE OF PROPOSED RULEMAKING

INTRODUCTION

The language for all of the changes to the Justice Department's proposed rule is taken from one of three sources: the Preamble to the proposed rule; the government-wide guidelines for the implementation of Section 504, federally-assisted programs (28 C.F.R. Part 41); and the HEW regulation for the implementation of Section 504, HEW-assisted programs (45 C.F.R. Part 84).

1. §39.103 Definitions--"Auxiliary Aids"

The Department of Justice rule discusses auxiliary aids in the context of communication only. Yet the Preamble to the rule states that auxiliary aids "may also be necessary to meet other requirements of the regulation." p.55996, col. 3. Since preambles are rarely, if ever, published in the Code of Federal Regulations, we have added the explanatory language to the regulation itself.

2. §39.103 Definitions--"Facility"

The proposed rule differs from the HEW federally-assisted rule and from the government-wide guideline by omitting the phrase "interest in such property" from the description of real and personal property. The deletion suggests that the Department of Justice intends to exclude

coverage of partially owned and leased facilities from the coverage of Section 504. Since the federal government makes extensive use of leased facilities, excluding them from coverage is both contrary to the mandate of §504, the Architectural Barriers Act, and good public policy.

3. §39.103 Definitions--"Physical or Mental Impairment"

The Department of Justice's proposed rule omits the listing of impairments that appears in the earlier §504 regulations. It is important for the listing to appear because it includes impairments that some have assumed are not covered by Section 504. For example, "hidden" disabilities, such as cancer and diabetes are listed, as are epilepsy and heart disease. When HEW (now the Department of Health and Human Services) published the first §504 regulation, it conducted lengthy and thoughtful discussions with the Department of Justice and the disability community about the listing. Therefore, to omit the listing in the proposed Department of Justice regulations would unnecessarily resurrect problems that have been successfully resolved.

4. §39.103 Definitions--"Qualified Handicapped Person"

The Department of Justice definition, Part 1, should be omitted, and, in its place, the definition that appears in previously published §504 regulations should be substituted. The Department of Justice's definition is unacceptable for a number of reasons.

The new definition of qualified handicapped person that the Department of Justice is proposing, will alter the way in which providers and courts have been evaluating the qualifications of disabled people and evaluating the types of accommodations that are required by the law.

Under the Hew definition, questions of accommodation do not arise until the disabled person is deemed to possess the ability to "perform the essential functions of the job in question ... with reasonable accommodation." The Justice Department proposes a new standard of "fundamental alteration in the nature ... of the program or activity." Thus the focus is shifted from the ability of the disabled person to do the job to the way in which the program or activity must change before the person can be hired. This shift reflects the traditional response to a disabled applicant--that is, how difficult and troublesome it will be to employ the disabled. This new standard will, perhaps unintentionally, encourage employers to focus on the difficulties of employing the disabled instead of the benefits.

Most importantly, the questions of "qualification" and "modification" should be separate inquiries. A disabled person should be deemed "qualified," if like any other applicant, s/he meets the essential eligibility requirements. At that point, inquiry can be made as to the type of accommodation, if any, which is needed in order for the person to participate in the program. These inquiries must be separated in order to ensure that the disabled applicants' qualifications are fairly evaluated. This two-step process is recognized in the Section 504 recipient regulations on employment. An applicant for employment can be given a physical examination only after an offer has been made. Without this protection, it would often be impossible for an applicant to show that his/her rejection was based on his/her disability. The same concerns hold true in other areas. Since only "qualified handicapped persons" are protected by Section 504, the person's disability and/or the question of accommodation should not be allowed to enter into this threshold determination.

5. §39.110 Self Evaluation

The self-evaluation mechanism that was published in the HEW rule represented a significant advance in civil rights enforcement. It reflected an understanding that, given the opportunity, all providers and employers prefer to change their policies and practices voluntarily, rather than in adversarial

contexts. The self-evaluation procedure, as published in the HEW rule, provided an education mechanism that has achieved laudable results, both in terms of enforcing the statute and in selecting cost-effective means of doing so.

While the Department of Justice rule has retained the self-evaluation concept, it has abbreviated the rule so drastically as to suggest that its implementation is not to be taken seriously. There is no reason to diminish the importance of self-evaluations, and doing so is contrary to the Administration's goals of deregulation, voluntary compliance, and cost-containment.

6. §39.111 Blank

The HEW regulation defines the provider's responsibilities to notify "participating beneficiaries, applicants, and employees" of its non-discrimination obligations. For no apparent reason, the Department of Justice has omitted this "notice" requirement. For all of the reasons discussed above, with regard to "self-evaluation," the same section ought to be added to the Department of Justice regulation.

7. §39.130 General Prohibitions Against Discrimination

Section 130 of the Justice Department rule omits certain provisions of the federal financial assistance regulations concerning aiding or perpetuating discrimination by assisting an agency, organization, or person that discriminates against handicapped persons. 28 C.F.R. §41.51(b)(1)(v) and (b)(3)(iii) (1982). The preamble does not mention this omission. There is

no apparent rationale for allowing government agencies to perpetuate discrimination by assisting discriminators when recipients of federal financial assistance are prohibited from doing so.

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

8. §39.150(a) Program Accessibility: Existing Facilities

The Department of Justice rule omits the language of the federal financial assistance regulations (28 C.F.R. §41.56) providing that no qualified handicapped person will be discriminated against because of a lack of program accessibility. It may appear that the same effect is accomplished by section 150(a) of the prototype, which requires programs or activities, when viewed in their entirety, to be "readily accessible to and

usable by handicapped persons" (this language is drawn from §41.57 of the federal financial assistance regulations). There is, however, a notable difference in the two formulations. The federal financial assistance provision makes it clear that each individual handicapped person is entitled to access to the program or activity. The prototype formulation can be interpreted as more of a general or group accessibility requirement. On its face, it does not clearly guarantee a right to each handicapped person to have access to a particular program or activity. Such an individual accessibility right should be clearly delineated.

9. §39.150(a)(2) Program Accessibility: Existing Facilities

Section 150(a)(3) incorporates very broad defenses of "undue financial and administrative burdens" and "fundamental alterations" to the obligation of making programs accessible. These limitations are not found in the program accessibility requirements of the federal financial assistance regulations.

The "undue administrative and financial burden" language is inconsistent with the recently reaffirmed 1978 Section 504 guidelines for recipients of federal financial assistance. For over 18 months Department of Justice reviewed the 1978 "recipient" guidelines. Every Department of Justice draft of revisions to those guidelines contained some formulation of the "undue burden" defense. This was the major rallying point for disabled people who objected strenuously to the incorporation of any undue burden language in the guidelines.

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

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

Vice-President Bush assured the disabled community that the:

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

Hence, the disability community believes that the incorporation of an undue burden defense in the guidelines has already been rejected by the Administration.

The Department of Justice states in the preamble that the "undue burden" language is in response to Davis v. Southeastern Community College. However, the Supreme Court in Davis did not invalidate the HEW regulations or require that they be modified. In fact, Department of Justice published its own recipient regulations which are identical to the 1977 HEW regulations one year after the Davis decision.

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

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

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

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

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

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

Finally, there is an unfortunate likelihood that inclusion of an "undue burden" defense in Section 504 regulations will diminish the availability of equal opportunity for the disabled and will therefore perpetuate discrimination against them. That is because no matter how carefully such a defense is worded, it will be abused. Agency administrators, pressured to conserve their administrative and financial resources, will rely on this defense to avoid the requirements of Section 504. The disabled, like all other applicants, must depend upon agency officials for the protection of their rights and the provision of needed services. Nonetheless, the agency official is less likely to provide the services and benefits if the non-discrimination regulations themselves warn the official against assuming "burdensome" responsibilities.

10. §39.160(1)(iii) Communications

The language in the Justice regulation is confusing, because it does not distinguish between accommodations necessary for employment or program-related activity and purely personal activities. Only a redraft of the language, as opposed to the concept, is required.

11. §39.160(e) Communications

This section reflects the use of the "undue financial and administrative burden" defense, as well as the "fundamental alteration" language. We have discussed the problems associated with these phrases above, in items 4 and 9.