

# **Helping State and Local Governments Comply with the ADA**

An Assessment of How the  
United States Department of Justice  
Is Enforcing Title II, Subpart A, of the  
Americans with Disabilities Act

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

## **U.S. Commission on Civil Rights**

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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# Letter of Transmittal

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

Sirs:

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

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

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

A general weakness of DOJ's Americans with Disabilities Act implementation and enforcement program is that it appears unresponsive to the concerns and priorities of its stakeholders, including individuals with disabilities, State and local government agencies, disability professionals, and disability experts. To ensure that all stakeholders have a voice in DOJ's decisionmaking related to the Americans with Disabilities Act, the Commission recommends that the Disability Rights Section, the office responsible for the Americans with Disabilities Act, institute formal mechanisms to obtain input from interested parties, such as an Americans with Disabilities Act Advisory Board comprised of persons representative of the broad range of DOJ stakeholders.

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

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

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

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

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

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

Respectfully,  
For the Commissioners,



MARY FRANCES BERRY  
*Chairperson*

## **Acknowledgments**

The administrative work, policy research, data analysis, onsite factfinding, and writing for this report were performed by the following Office of Civil Rights Evaluation staff: Frederick D. Isler, Assistant Staff Director; Nadja Zalokar, Supervisory Civil Rights Analyst; David Chambers, Senior Civil Rights Analyst; Rebecca Kraus, Senior Social Scientist; Wanda Johnson, Civil Rights Analyst; Margaret Butler, Civil Rights Analyst; Michelle Leigh Avery,\* Civil Rights Analyst; Marcia Tyler, Community Relations Manager; Andrea Baird, Social Scientist; Latrice Foshee, Civil Rights Assistant; and Ilona Turner, Equal Opportunity Assistant. The following unpaid student interns made substantial contributions to the research and writing of this report: Stephanie Celandine, George Mason University; Kristy McMorris, Howard University; Jade Brown, Howard University; Alex Merati, The Catholic University; Dion Symonette, Prince George's County Community College; Raphael Prober, Georgetown University; and Bonnie Schreiber, Georgetown University. The legal review was performed by Erik S. Brown, Attorney-Advisor. Editorial review was provided by James S. Cunningham, Assistant Staff Director for Congressional Affairs; Barbara J. Fontana, Librarian; Marc D. Pentino, Civil Rights Analyst; and Stella G. Youngblood, Civil Rights Analyst. The following unpaid student interns assisted in editing and conducting legal research for the report: Dorian Hamilton, Howard University School of Law; Nicholas Rathod, The American University Washington College of Law; Richard Bernstein, The Catholic University of America Columbus School of Law; and Ethan Susskind, The American University Washington College of Law. This report was developed under the direct supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation.

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\* No longer with the Commission.

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# 1 Introduction

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

The statement of findings for the ADA is compelling. Congress found that 43 million Americans had physical or mental disabilities and described in direct, powerful language the widespread discrimination faced by people with disabilities throughout our history.<sup>3</sup> Congress found that individuals with disabilities faced discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"<sup>4</sup> and that the discrimination took various forms, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules

and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."<sup>5</sup>

Congress noted that "historically, society has tended to isolate and segregate individuals with disabilities,"<sup>6</sup> that individuals with disabilities "occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally"<sup>7</sup> and finally that:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>8</sup>

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

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

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

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

<sup>3</sup> 42 U.S.C. § 12101(a) (1994).

<sup>4</sup> *Id.* § 12101(a)(3).

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<sup>5</sup> *Id.* § 12101(a)(5).

<sup>6</sup> *Id.* § 12101(a)(2).

<sup>7</sup> *Id.* § 12101(a)(6).

<sup>8</sup> *Id.* § 12101(a)(7).

<sup>9</sup> *Id.* § 12101(a)(4).

<sup>10</sup> *Id.* § 12101(a)(8).

against individuals with disabilities prevented the accomplishment of these goals:

[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.<sup>11</sup>

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

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

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

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

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>12</sup>

To meet the goal of a universal ban on discrimination against persons with disabilities, Congress created four separate titles in the act to prohibit the discrimination enumerated in the act's findings. Title I of the act bans discrimination against persons with disabilities in employment.<sup>13</sup> Title II prohibits discrimination by State and local governments and requires that they ensure all activities, programs, and public transportation services they provide are accessible to persons with disabilities.<sup>14</sup> Title III provides for nondiscrimination against persons with disabilities in public accommodations and certain public transportation services provided by private entities.<sup>15</sup> Title IV of the act bans dis-

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

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

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.<sup>18</sup>

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

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

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

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

Subtitle A defines "public entity" as:

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

<sup>11</sup> *Id.* § 12101(a)(9).

<sup>12</sup> *Id.* § 12101(b)(1)-(4).

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

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

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

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

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

<sup>18</sup> 42 U.S.C. § 12102(2)(a)-(c) (1994).

<sup>19</sup> *Id.* § 12132.

<sup>20</sup> *Id.* § 12131(2).

<sup>21</sup> *Id.* § 12131(1)(a)-(c).

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

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

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

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

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

ment of Justice issued its regulation implementing title II, subtitle A, on July 26, 1991.<sup>26</sup> This regulation designates eight Federal agencies (including DOJ) to address complaints of discrimination under title II, subchapter A, with DOJ assuming an oversight and coordination role. The regulations state:

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

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

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

<sup>22</sup> 42 U.S.C. §§ 12131-12161 (1994).

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

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

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

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

<sup>27</sup> 28 C.F.R. § 35.190(a) (1997).

<sup>28</sup> *Id.* § 35.190(b)(1)-(8) (1997).

<sup>29</sup> *Id.* §§ 35.170-178 (1997).

<sup>30</sup> *Id.* § 35.190(c) (1997).

<sup>31</sup> *Id.* § 35.174 (1997).

of the ADA.<sup>32</sup> A grantee of the National Institute on Disability and Rehabilitation Research (NIDRR) wrote, "The perception among people with disabilities and others in our region is that there is very little enforcement going on, yet we know that with the staffing available, there is a tremendous amount being accomplished. People are not seeing implementation at the community level."<sup>33</sup> Another NIDRR grantee wrote, "Basically, no federal agency with [ADA] enforcement responsibility is doing a great job."<sup>34</sup>

To date, the public debate over the impact and enforcement of the ADA has largely been carried out in the media. Sufficient time has elapsed, however, since passage of the ADA for a more dispassionate and careful study of the ADA. Therefore, under its mandate to evaluate Federal civil rights enforcement, the Commission turns its attention to the ADA implementation and enforcement activities of the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice. In this report, the Commission examines how well the U.S. Department of Justice is fulfilling its mandate to implement and enforce the ADA's nondiscrimination prohibitions in accessibility to State and local government services under title II, subtitle A, of the act.<sup>35</sup> A companion report evaluates the title I implementation and enforcement activities of the U.S. Equal Employment Opportunity Commission. The reports evaluate each agency's regulations and policy guidance, participation in litigation, processing of complaints, and provision of technical assistance.<sup>36</sup>

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

<sup>33</sup> NIDRR, ADA Project Directors' responses, p. 2.

<sup>34</sup> *Ibid.*, p. 5.

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

<sup>36</sup> The report does not assess the role of State and local fair employment practices agencies in the enforcement of title I. The report also does not address the seven other designated Federal agencies having title II responsibilities in areas such as transportation, agriculture, and education, nor does it evaluate the Department of Justice's oversight and coordination of the designated Federal agencies for title II.

Eight years after passage of the Americans with Disabilities Act, many basic issues, such as who the act protects and what employers or other covered entities are required to do under the act, remain unresolved. In large measure, these issues arise out of inherent ambiguities in the language of the law that have not been resolved through the regulations or by the Federal courts. In addition to these policy issues, concerns have arisen as to how effectively the agencies charged with enforcing the ADA have processed charges of discrimination, and whether their technical assistance, outreach, and education have been successful in informing covered entities, the disability community, and the public at large as to rights and responsibilities under the act.

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

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

## 2 Overview of Enforcement of Title II

Since 1973, State and local government programs and activities that receive Federal financial assistance have been prohibited from discriminating against individuals based on disability under section 504 of the Rehabilitation Act of 1973.<sup>1</sup> Title II, subtitle A, of the Americans with Disabilities Act (ADA)<sup>2</sup> and its implementing regulations<sup>3</sup> extend section 504's nondiscrimination mandate to all actions of State and local government entities, regardless of whether they receive Federal funding.<sup>4</sup> Thus, State and local government operations which do not receive Federal funds, such as courts, legislative bodies, and licensing activi-

ties, must meet the section 504 standards incorporated into title II.<sup>5</sup>

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

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

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

<sup>3</sup> 28 C.F.R. §§ 35.101-.190 (1997).

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

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

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

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

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

## Civil Rights Division Mission and Responsibilities

Established in 1957, the Civil Rights Division of the Department of Justice is responsible for enforcing civil and criminal statutes, the Constitution, and Executive orders.<sup>9</sup> Although CRD initially focused on voting and post-Civil War criminal statutes, the Civil Rights Act of 1964<sup>10</sup> expanded its authority.<sup>11</sup> Under that act, CRD receives, investigates, and litigates charges of discrimination in places of public accommodation, elementary through postsecondary schools, public facilities owned by State or local governments, programs or activities receiving Federal financial assistance, and employment.<sup>12</sup> In 1980, Executive Order 12250<sup>13</sup> expanded the authority of CRD. The order empowered CRD to: assist other Federal agencies in developing standards and procedures for civil rights enforcement; initiate cooperative programs among agencies, including the development of sample memoranda of understanding to improve the coordination of laws covered by the order; evaluate civil rights laws and regulations to improve their enforcement; and

develop guidelines for comprehensive employee training in civil rights enforcement.<sup>14</sup> During the 1980s, the Civil Rights Division's Coordination and Review Section was authorized by Executive Order 12250 of 1980<sup>15</sup> to coordinate the civil rights enforcement activities of other Federal agencies under title VI of the Civil Rights Act of 1964<sup>16</sup> and title IX of the Education Amendments of 1972.<sup>17</sup> The Coordination and Review Section (a) assisted the other agencies in developing guidelines and regulations for civil rights enforcement; (b) established procedures to govern agencies' recordkeeping, reporting, and exchange of information; (c) fostered cooperation among Federal, State, and local agencies; (d) evaluated

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

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

<sup>9</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 23.

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

<sup>11</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 23.

<sup>12</sup> *Ibid.*

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

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

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

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

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

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

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

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

CRD enforces title II and III<sup>22</sup> compliance by 80,000 State and local government entities and 6 million private enterprises, respectively, that are covered by these two titles.<sup>23</sup> The four offices

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

<sup>19</sup> 42 U.S.C. §§ 12101-12213 (Supp. 1994).

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

<sup>21</sup> USCCR, *Title VI Enforcement*, p. 62.

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

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

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

### Organization, Budget, and Staff

The Civil Rights Division is headed by the Assistant Attorney General for Civil Rights.<sup>28</sup>

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

<sup>24</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

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

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

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

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



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

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

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

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

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

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

<sup>29</sup> DOJ, CRD, Organization Chart (May 17, 1995).

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

<sup>31</sup> Appropriations and FTE (1989-1998).

<sup>32</sup> *Ibid.*

1997, Congress appropriated \$62.4 million to fund CRD's activities and programs.<sup>33</sup> Despite these additional financial resources, CRD has not received additional personnel since fiscal year 1996, and the FTE level remains at 579.<sup>34</sup>

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

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

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

<sup>34</sup> Appropriations and FTE (1989-1998).

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

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

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

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

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

### **Disability Rights Section Creation**

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

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

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

<sup>38</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 25.

<sup>39</sup> 42 U.S.C. §§ 2000b to 2000b-3 (1994).

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

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

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

<sup>43</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 33.

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

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

<sup>46</sup> Roseborough memorandum, p. 2.

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

<sup>48</sup> Roseborough memorandum, p. 2.

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

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

## Mission and Responsibilities

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

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

ment and title III technical assistance and enforcement.<sup>55</sup>

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

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

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

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

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

<sup>52</sup> *Ibid.*

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

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

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<sup>55</sup> DRS June 3, 1998, Response, p. 2.

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

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

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

<sup>59</sup> Mission, Function, Staffing and Budget, p. 3. *See* chap. 7 for an in-depth discussion of DOJ technical assistance activities.

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

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

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

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

### Organization, Budget, and Staff

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

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

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

<sup>61</sup> *Ibid.*, p. 3.

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

<sup>63</sup> CRD Performance Plan as Mandated by GPRA.

<sup>64</sup> Wodatch interview, p. 3.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

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

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

<sup>69</sup> Organization, Staffing, and Budget, p. 1.

<sup>70</sup> *Ibid.*, p. 2.

<sup>71</sup> *Ibid.*, pp. 2-6.

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

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

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

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

The Supervisory Attorney for Office Administration supervises those employees involved in

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

DRS has 23 staff attorneys, 19 of whom work in the Enforcement/Litigation Unit, and 15 investigators.<sup>79</sup> Investigators are expected to have strong investigative skills and a thorough understanding of the ADA.<sup>80</sup> DRS also has six architects who advise attorneys and investigators on technical matters and review State accessibility or building codes that have been submitted to DOJ for certification.<sup>81</sup> Other DRS personnel include 14 technical assistance staff, 7 certification and coordination staff, and several support staff.<sup>82</sup> In total, DRS is composed of more than 70 professional and support staff persons,<sup>83</sup> up from 22 in 1992 when the section was called the Public Access Section and had fewer responsibilities.<sup>84</sup> DRS anticipates a staff of 73 for fiscal year 1998.<sup>85</sup>

To fund DRS' activities and programs, Congress appropriated \$9.25 million in fiscal year 1997 and \$10 million in fiscal year 1998.<sup>86</sup> Attorney General Janet Reno has asked Congress for a 13.7 percent increase in funding for fiscal year 1999 to continue vigorous enforcement of the

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<sup>72</sup> *Ibid.*, p. 6.

<sup>73</sup> *Ibid.*, p. 3.

<sup>74</sup> *Ibid.* The Special Litigation Counsel currently serves as an Acting Deputy Chief. *Ibid.*

<sup>75</sup> Organization, Staffing, and Budget, pp. 2-3.

<sup>76</sup> *Ibid.*, p. 4.

<sup>77</sup> *Ibid.*, p. 5.

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<sup>78</sup> *Ibid.*, pp. 5-6.

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

<sup>80</sup> DOJ interview, Nov. 7, 1997, p. 4.

<sup>81</sup> Organization, Staffing, and Budget—Document 3, pp. 2-7.

<sup>82</sup> Organization, Staffing, and Budget, pp. 1-4.

<sup>83</sup> DOJ, DRS, Organizational Chart, Aug. 21, 1997.

<sup>84</sup> USCCR, *Federal Funding of Civil Rights Enforcement*, pp. 33-34.

<sup>85</sup> CRD Performance Plan as Mandated by GPRA.

<sup>86</sup> *Ibid.* The fiscal year 1998 budget figure is an estimate. *Ibid.*

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

### Use of Computer Technology

Information about the Disability Rights Section can be obtained from the DRS' ADA home page<sup>90</sup> or from the home page of the Civil Rights Division.<sup>91</sup> These Web sites provide helpful information about DRS, including DRS' address and phone numbers for voice and TDD. The purpose of the DRS and a listing of the Section's responsibilities are available. For instance, DRS informs Internet users that it engages in technical assistance activities to raise public awareness of the ADA. There also is an ADA toll-free information line for both voice and TDD which includes a fax-on-demand service allowing the public to have ADA publications faxed directly to their home or office 24 hours a day. According to DRS, the ADA home page on the Internet receives up to 70,000 hits per week.<sup>92</sup> A standard form for filing a complaint under title II is available by fax, and this fax number is listed on the Web site.

### Staff Training

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

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

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

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

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, p. 2.

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

<sup>91</sup> <<http://www.usdoj.gov/crt>>.

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

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

<sup>94</sup> *Ibid.*

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

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

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

<sup>98</sup> Whisonant interview, p. 2; Wolfson interview, p. 2.

<sup>99</sup> Whisonant interview, p. 2.

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

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

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

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

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

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

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

### Past Performance

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

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

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<sup>100</sup> Staff Training.

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

<sup>102</sup> Bowen interview, p. 2.

<sup>103</sup> Staff Training.

<sup>104</sup> Ibid.

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

<sup>106</sup> Staff Training.

<sup>107</sup> Novich interview, p. 2.

<sup>108</sup> Ibid.

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

<sup>110</sup> Ibid.

<sup>111</sup> See USCCR, *Title VI Enforcement*, pp. 62,134.

<sup>112</sup> See *ibid.*, pp. 62-63.

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

Due to insufficient resources and staff, the number of completed investigations has decreased since fiscal year 1994. In addition, the pending inventory rose from 980 in fiscal year 1993 (before DRS) to 1,850 in fiscal year 1994.<sup>115</sup> For fiscal year 1995, CRD requested an additional 10 full-time staff for DRS. However, the final appropriation reduced DRS staff by 12, leaving DRS with 46 full-time employees, 2 fewer than in fiscal year 1994.<sup>116</sup> The fiscal year 1996 budget did not request any additional staff for the Section.

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

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

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

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

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

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

<sup>115</sup> USCCR, *Funding Federal Civil Rights Enforcement*, p. 34.

<sup>116</sup> *Ibid.*, p. 35.

<sup>117</sup> *Ibid.*

<sup>118</sup> Wodatch interview, p. 5.

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

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

<sup>120</sup> *Ibid.*, p. 32.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, p. 31.

<sup>123</sup> Wodatch interview, p. 2.

<sup>124</sup> *Ibid.*



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

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

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

## Strategic Planning U.S. Department of Justice

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

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

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

- Investigating and prosecuting criminal offenses
- Assisting State and local governments
- Enforcing Federal laws (including civil rights statutes) and defending the Nation’s interests
- Administering immigration laws fairly and effectively
- Protecting society by confining detainees and prisoners in safe and secure environments
- Administering the judicial system at the Federal, State, and local levels
- Efficiently managing endeavors related to law enforcement, legal representation, and immigration<sup>132</sup>

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

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, pp. 2–3.

<sup>128</sup> DOJ, *Strategic Plan 1997–2002*, Message from the Attorney General and p. 1.

<sup>129</sup> *Ibid.*

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

<sup>131</sup> DOJ, *Strategic Plan 1997–2002*, Message from the Attorney General and p. 1.

<sup>132</sup> DOJ, *Strategic Plan 1997–2002*, pp. 7–25.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, p. 12.

<sup>135</sup> *Ibid.*

tiatives.<sup>136</sup> DOJ's Office of the Inspector General will assess performance.<sup>137</sup>

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

### Civil Rights Division

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

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

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

- Reduce police and other official criminal misconduct, and eliminate violent activity by private citizens
- Prevent or eliminate barriers to full participation in the electoral process
- Eliminate discrimination in employment, credit transactions, and housing and educational opportunities
- Protect the constitutional and statutory rights of institutionalized individuals
- Ensure that public services, programs, and activities are accessible to persons with disabilities
- Eliminate immigration-related discriminatory employment practices<sup>139</sup>

<sup>136</sup> Ibid., p. 30.

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

<sup>138</sup> CRD Performance Plan as Mandated by GPRA.

<sup>139</sup> Ibid.

### Disability Rights Section

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

- Ensure that new construction of public facilities covered under the ADA is in compliance with title II (as well as title III)<sup>142</sup>
- Challenge policies and eligibility criteria that exclude individuals with disabilities from programs and services
- Litigate basic issues related to reasonable accommodations
- Undertake an active *amicus* program to assist in defining key statutory terms, such as "individual with a disability," "undue hardship," and "fundamental alteration"
- Monitor Federal agencies' enforcement of ADA's title II and section 504
- Partner with Federal, State, and local agencies, as well as the general public, to ensure the broadest possible enforcement of laws that protect individuals with disabilities from discrimination<sup>143</sup>

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

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

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

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

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

<sup>143</sup> Disability Rights Section Strategic Plan.

<sup>144</sup> 42 U.S.C. § 12134(a) (1994).

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

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

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

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

<sup>146</sup> 28 C.F.R. §§ 35.101-103 (1997).

<sup>147</sup> *Id.* §§ 35.104-107.

<sup>148</sup> *Id.* §§ 35.130-135 (1997).

<sup>149</sup> *Id.* §§ 35.140 (1997).

<sup>150</sup> *Id.* §§ 35.149-151 (subpart D) (1997); *Id.* § 35.160-164 (1997).

<sup>151</sup> *Id.* §§ 35.170-178 (1997).

<sup>152</sup> *Id.* §§ 35.190 (1997).

<sup>153</sup> *Id.* § 35.102 & app. A § 35.102 (analysis of § 35.102) (1997).

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

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

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

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<sup>154</sup> *Id.* §§ 35.104, 35.130, 35.170 (1997).

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

<sup>156</sup> DRS Staff, DOJ, interview in Washington, DC, November 3, 1997, p. 4.

<sup>157</sup> See, e.g. 28 C.F.R. § 35.140 (1997).

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

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

### Policy

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

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

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

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

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

<sup>161</sup> Wodatch interview, p. 4.

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

### Coordinating and Monitoring Federal Agencies' Enforcement Efforts

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

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

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

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

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

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

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<sup>169</sup> 28 C.F.R. § 35.190 (1997).

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

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

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

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

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

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

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

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

<sup>173</sup> DRS June 3, 1998, Response, pp. 12-13.

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

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

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

<sup>177</sup> Wodatch interview, p. 6.

<sup>178</sup> *Ibid.*

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

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

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

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

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

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

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid., p. 7.

<sup>181</sup> Nichol interview, p. 4.

<sup>182</sup> Novich interview, p. 4.

<sup>183</sup> Wodatch interview, p. 7.

<sup>184</sup> Harland interview, p. 3.

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

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<sup>186</sup> Ibid., pp. 1-2.

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

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

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

<sup>190</sup> Ibid., p. 5.

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

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

### Certifying State and Local Building Codes

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

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

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

<sup>193</sup> Blizard interview, p. 2.

<sup>194</sup> DRS Staff, DOJ, interview in Washington, DC, Nov. 6, 1997 p. 2 (statement of Janet Blizard, Supervisory Attorney).

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

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

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

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

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

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

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

<sup>199</sup> CRD Performance Plan as Mandated by GPRA.

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

side" analysis of its building standards relative to those of the ADA, and indicated areas of minor discrepancy between Washington's codes and the ADA Standards for Accessible Design.<sup>201</sup> DOJ considered Washington's facility accessibility codes to be "very progressive" but not quite on par with the ADA.<sup>202</sup> In July 1994, DOJ informed the State of Washington that the Department's analysis revealed a few remaining areas in which the State's codes were not fully equivalent to the ADA standards.<sup>203</sup> DOJ stated that once the State corrected the gaps, the State of Washington would receive a preliminary certification of its building codes.<sup>204</sup> The State of Washington, in turn, notified DOJ that by November 1994, it expected to modify the facility standards in the areas identified by the Department.<sup>205</sup> On March 29, 1995, DOJ certified that the Washington State Regulations for Barrier Free Design met or exceeded the new construction and alteration requirements of the ADA.<sup>206</sup> Similarly, before granting certification to the Texas Accessibility Standards, DOJ issued a "preliminary determination" in May 1996, requesting public comment on this provisional certification, and scheduled a second hearing in August 1996.<sup>207</sup> After public hearings were held in Austin, Texas, and Washington, D.C., DOJ issued its second State building code certification and declared that Texas' Building Accessibility Standards met or exceeded ADA requirements.<sup>208</sup>

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

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

### Complaints Processing Procedures

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

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

<sup>201</sup> Ibid.

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

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

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

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

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

<sup>209</sup> DRS June 3, 1998, Response, pp. 13-14.

<sup>210</sup> CRD Performance Plan as Mandated by GPRA.

<sup>211</sup> Ibid.

<sup>212</sup> 28 C.F.R. §35.170(a)-(b) (1997).

<sup>213</sup> *Id.* § 35.170(b).

<sup>214</sup> *Id.* § 35.104.

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

<sup>216</sup> Whisonant interview, pp. 2-3.



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

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

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

forcement program has a mix of large and small impact cases.<sup>223</sup>

### Mail Process

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

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

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

<sup>218</sup> 28 C.F.R. § 35.171(c)(2) (1997).

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

<sup>220</sup> Wodatch interview, p. 5.

<sup>221</sup> *Ibid.*, p. 6.

<sup>222</sup> *Ibid.*, p. 5.

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<sup>223</sup> *Ibid.*, p. 5.

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

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

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

disability and business technical assistance centers (DBTACs) report that many individuals in their regions have complained about or even given up on DRS' complaint processing system.<sup>227</sup> Another advocate wrote the Commission that as of April 1998 his agency had not received a response from DOJ regarding a complaint filed in 1995.<sup>228</sup>

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

complaint processing procedures are summarized below.<sup>231</sup>

### **Intake Process**

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

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

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

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

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

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

<sup>229</sup> Wodatch interview, p. 5.

<sup>230</sup> Whisonant interview, p. 1; Wolfson interview, p. 1.

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<sup>231</sup> Complaints Processing—DRS Mail Procedure.

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

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

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

<sup>235</sup> Whisonant interview, p. 3.

<sup>236</sup> Wolfson interview, p. 2; Whisonant interview, p. 4.

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

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

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

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

<sup>238</sup> Whisonant interview, p. 2.

<sup>239</sup> Complaints Processing—DRS Mail Procedure, p. 3.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*, p. 4.

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

### ***Alternate Dispute Resolution/Mediation Process***

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

- Completion of an approved mediation training program
- 2 years experience mediating disputes
- Knowledge of the ADA
- Membership in a recognized (national or State) professional dispute resolution organization<sup>243</sup>

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

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

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<sup>242</sup> *Ibid.*

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

<sup>244</sup> Complaints Processing, p. 1.

<sup>245</sup> Hill interview, p. 4.

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

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

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

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

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

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

<sup>247</sup> Wodatch interview, pp. 5-6.

<sup>248</sup> Hill interview, p. 4.

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

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

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

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

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

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

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

<sup>256</sup> DOJ, "ADA Mediation Program," p. 1.

DRS expects to develop policies and procedures for alternative dispute resolution.<sup>257</sup>

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

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

### **Investigation Process**

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

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

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

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

<sup>257</sup> CRD Performance Plan as Mandated by GPRA.

<sup>258</sup> Complaints Processing, p. 2.

<sup>259</sup> Hill interview, p. 4.

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

<sup>261</sup> Suter letter, enclosure, p. 3.

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

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

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Whisonant interview, p. 3.

<sup>266</sup> Hill interview, p. 3.

<sup>267</sup> Whisonant interview, p. 3; Wolfson interview, p.2.

<sup>268</sup> Wolfson interview, p.2.

<sup>269</sup> Whisonant interview, p. 3.

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

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

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

### **Litigation Process**

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

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

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

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

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

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<sup>271</sup> Hill interview, p. 3.

<sup>272</sup> Complaints Processing—Steps in a DRS Investigation, p. 2.

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

<sup>274</sup> Complaints Processing—Steps in a DRS Investigation, p. 1.

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

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

<sup>277</sup> DOJ September interview (statement of Wodatch), p. 3.

<sup>278</sup> DOJ September interview (statement of Wodatch), p. 3.

<sup>279</sup> Wohlenhaus interview, p. 3; Novich interview, p. 3.

<sup>280</sup> Nichol interview, p. 3; Wohlenhaus interview, p. 3.

<sup>281</sup> DRS June 3, 1998, Response, p. 11.

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

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

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

<sup>285</sup> DRS June 3, 1998, Response, p. 12.

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

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

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

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

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

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

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<sup>286</sup> Hill interview, p. 2.

<sup>287</sup> Nichol interview, p. 2.

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

<sup>289</sup> Wodatch interview, pp. 5-6.

<sup>290</sup> DRS June 3, 1998, Response, p. 11 and attachments 5 and 7.

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

<sup>292</sup> Novich interview, p. 3; Breen interview, p. 2.

<sup>293</sup> Wodatch interview, p. 6.

<sup>294</sup> Breen interview, p. 4.

<sup>295</sup> *Ibid.*, pp. 3-4.

<sup>296</sup> *Ibid.*, p. 2.

<sup>297</sup> *Ibid.*, pp. 3-4.

### Analysis of Complaint Processing Data

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

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

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

According to data received from DRS, a total of 10,065 complaints was entered into DRS' CMS database between fiscal year 1992 and fiscal year 1997.<sup>302</sup> This figure is an aggregate of complaints received under titles I, II, and III.<sup>303</sup> Between fiscal year 1993 and fiscal year 1997, the

average number of title II complaints opened was 726. This number excludes complaints referred to other designated agencies. The average number of complaints referred to designated agencies was 590, and the average number of investigations completed, including disposition of referrals, was 503.<sup>304</sup>

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

**TABLE 2.1**  
**Top States from Which Complaints Are Filed**

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

Source: DOJ, DRS, Cordmain Data File.

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

<sup>298</sup> Searing interview, p. 3.

<sup>299</sup> Ibid., p. 2-3.

<sup>300</sup> DRS June 3, 1998, Response, p. 7.

<sup>301</sup> Searing interview, p. 2.

<sup>302</sup> DOJ, DRS, Cordmain Data File (hereafter cited as Cordmain data file).

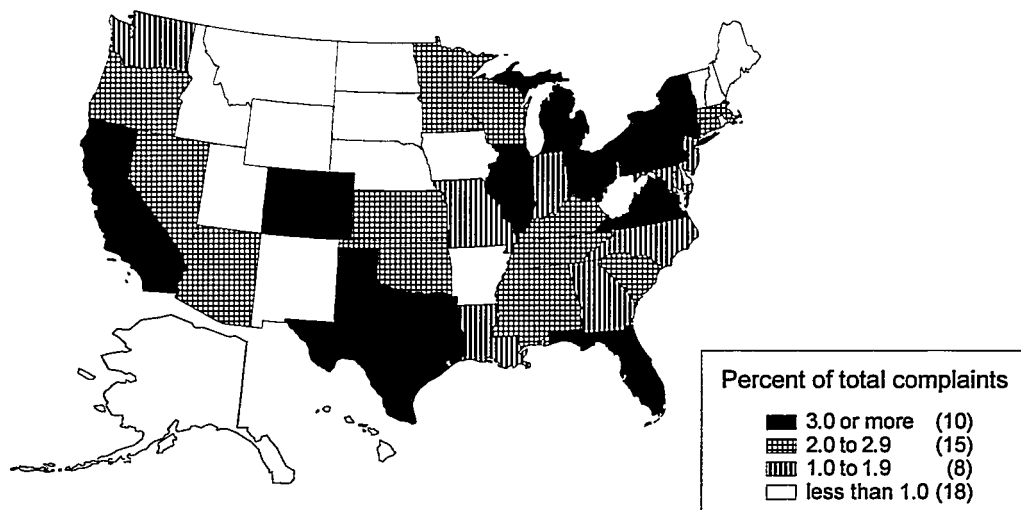
<sup>303</sup> The format of the data does not allow us to separate complaints by title.

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

<sup>305</sup> Shirley Hillgren, Contractor, CRD, DOJ, FAX, p. 1.



**FIGURE 2.1**  
**Complaints by State**



Source: DOJ, DRS, Cordmain Data File.

II, and III complaints entered into CMS between fiscal year 1992 and fiscal year 1997 (table 2.1). More than 10 percent of all DRS complaints came from California, which had a population of well over 31 million people in 1992.<sup>306</sup> California also has a history of active disability rights groups.<sup>307</sup> New York, Texas, Pennsylvania, and Florida also accounted for a high proportion of complaints (figure 2.1). All four of these States also had relatively large populations of 12 to 18 million people in 1992.<sup>308</sup> More complaints come from metropolitan areas, such as big cities like Chicago.<sup>309</sup> Communities with independent living

centers are more active in filing title II complaints.<sup>310</sup>

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

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

<sup>307</sup> Nichol interview, p. 2.

<sup>308</sup> *1994 County City Data Book*.

<sup>309</sup> Bowen interview, p. 2.

<sup>310</sup> Nichol interview, p. 2.

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

<sup>312</sup> Bowen interview, p. 2.

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

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

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

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

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

**TABLE 2.2**  
**Disability of Complainant**

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

Source: DOJ, DRS, Cordmain Data File.

<sup>313</sup> Cordmain data file.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

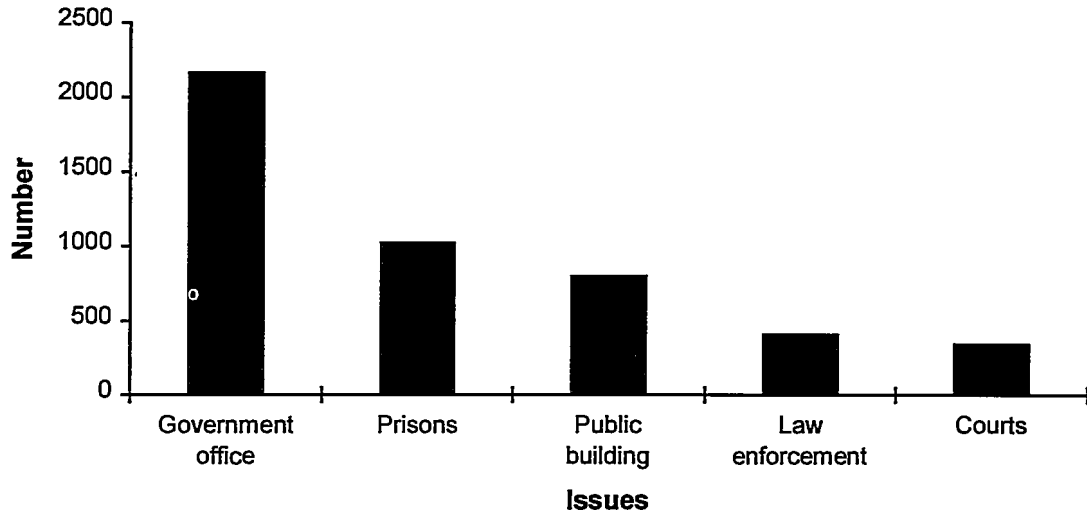
<sup>316</sup> Nichol interview, p. 3.

<sup>317</sup> Cordmain data file.

<sup>318</sup> Wodatch interview, p. 2.

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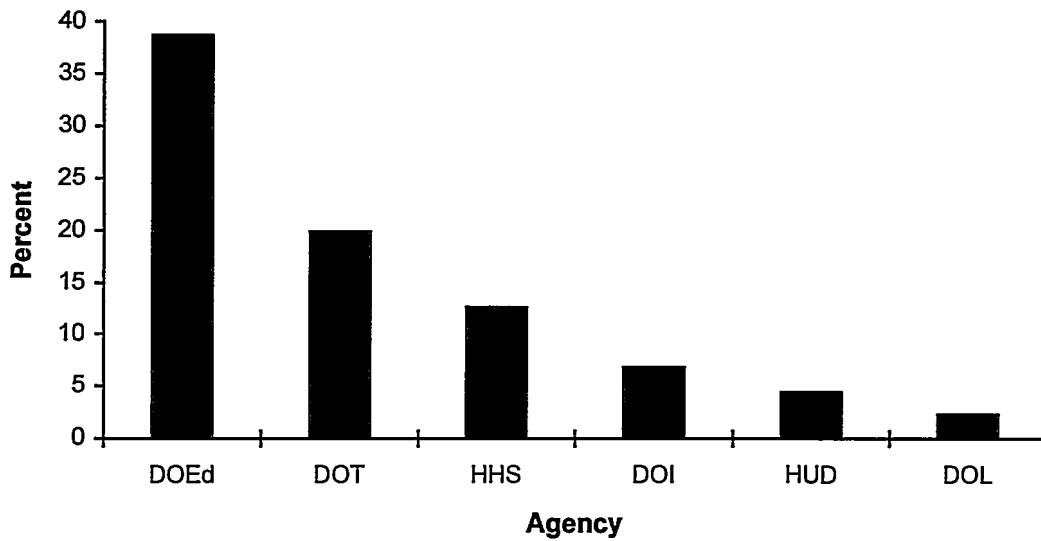
**FIGURE 2.2**  
**Issues Addressed in Complaints**



Source: DOJ, DRS, Cordmain Data File.

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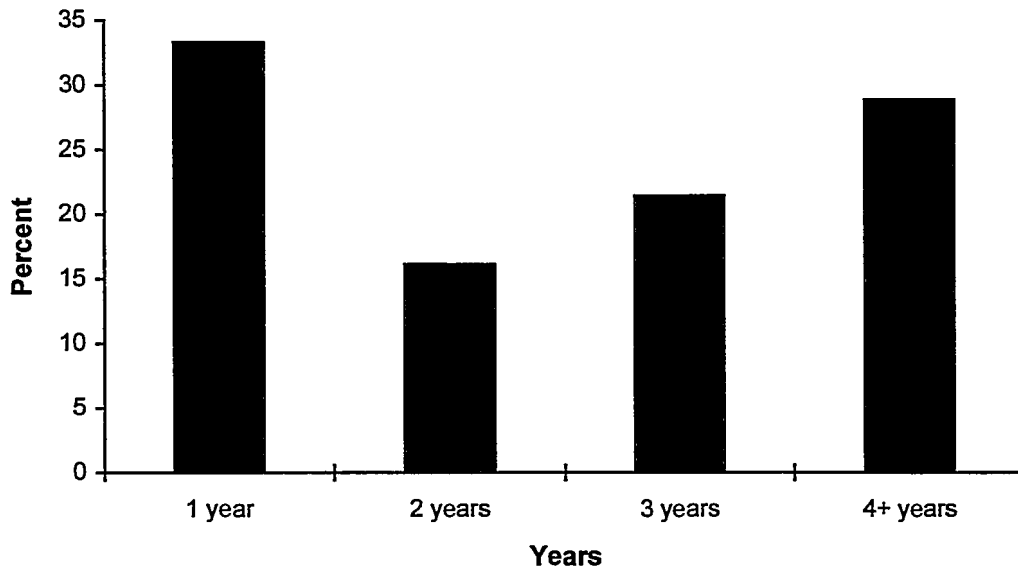
**FIGURE 2.3**  
**Agency to Which Complaints Were Referred**



Source: DOJ, DRS, Cordmain Data File.

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**FIGURE 2.4**  
**Length of Time Complaint Has Remained Open**



Source: DOJ, DRS, Cordmain Data File.

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

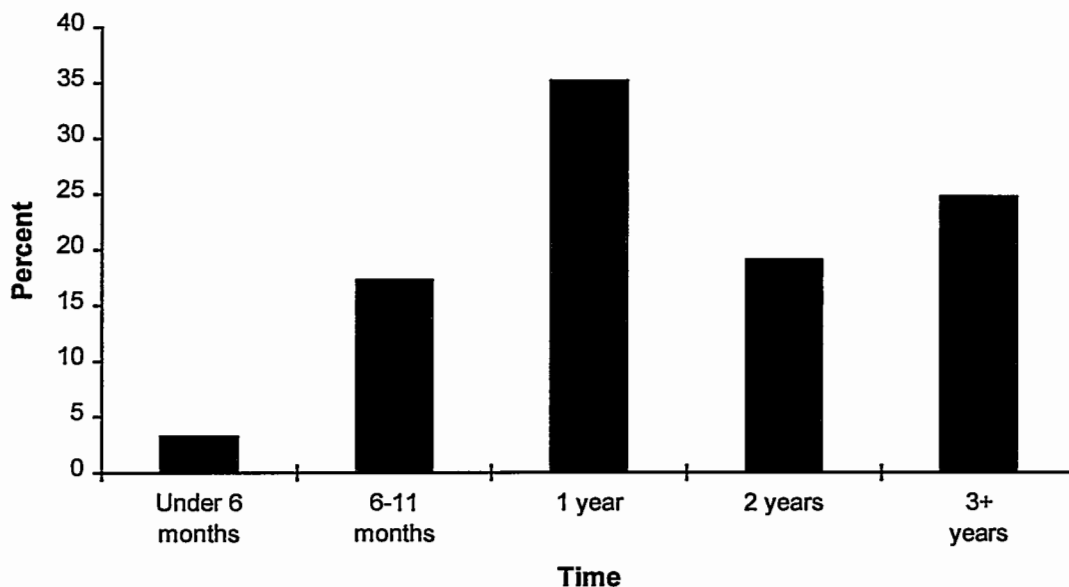
involve health-related schools, preschool and daycare programs, and other health care and social service providers and institutions. According to DRS' data base, the U.S. Department of Agriculture is the only designated agency to which it has not referred complaints.

There is concern that DRS does not open all complaints for investigation due to limited resources, including the short supply of investigative staff. The limited number of investigators also has had a negative effect on how long it takes for a complaint to be resolved. Of the 10,065 complaints entered into DRS' database between fiscal year 1992 and fiscal year 1997, more than 5,444 complaints, accounting for 54 percent of all complaints, were still open as of December 1997.<sup>320</sup> Of the 5,444 complaints

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

<sup>320</sup> Cordmain data file.

**FIGURE 2.5**  
**Length of Time to Close Complaints**



Source: DOJ, DRS, Cordmain Data File.

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

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

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

<sup>321</sup> Searing interview, p. 5.

<sup>322</sup> Searing interview, p. 5; Cordmain data file.

<sup>323</sup> Searing interview, p. 5.

<sup>324</sup> Ibid.

<sup>325</sup> Wolfson interview, p. 2; Whisonant interview, p. 4.

# 3 Assessment of Title II Policy Development and Enforcement

## Policy Development

The U.S. Department of Justice has developed title II policy through publication of its title II regulations, but has not issued formal policy guidance documents on title II or specific ADA issues. DOJ develops policy to address emerging title II issues primarily through its technical assistance and enforcement activities.<sup>1</sup> Specifically, DRS staff develops policy through litigation, including *amicus* briefs. DRS then disseminates this policy in the form of technical assistance, including letters responding to questions on policy issues; that is, in a format the general public can understand more easily.<sup>2</sup>

## Through Technical Assistance

Over the past several years, DRS has created a strong technical assistance program that has produced a substantial amount of material relating to title II. Much of DRS' policy guidance is expressed through these technical assistance materials, including its technical assistance

manuals, its responses to inquiries from the public, and a series of technical assistance documents, many in question and answer format, that explain particular aspects of title II for a general audience.

Shortly after the ADA went into effect, in 1992, DOJ published a technical assistance manual for title II. This manual exemplifies DRS' first policy guidance. The purpose of the manual is to "present the ADA's requirements for State and local governments in a format that will be useful to the widest possible audience."<sup>3</sup> The manual is divided into nine main subject headings that include qualified individuals with disabilities, title II general and administrative requirements, program accessibility, and new construction and alterations of buildings and facilities. Originally, DRS planned to update the *Title II Technical Assistance Manual* on a yearly basis, but as courts began to give the manual deference, DRS decided not to make changes to the manual and risk losing this deference.<sup>4</sup>

DRS also develops policy through written responses to ADA questions from Congress and the public at large. As of March 1998, DRS staff had written more than 900 technical letters on the ADA. DRS staff identify some technical letters to serve as "policy" letters because they address emerging issues or provide new information on

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<sup>1</sup> John Wodatch, Section Chief, Disability Rights Section (DRS), Civil Rights Division (CRD), U.S. Department of Justice (DOJ), interview in Washington, DC, Apr. 16, 1998, pp. 3-4 (hereafter cited as Wodatch interview).

<sup>2</sup> *Ibid.*, pp. 3-4. The title II and title III technical assistance manuals were initially published in 1992, before any enforcement actions. Other technical assistance is issued in response to inquiries received from Congress and members of the public. John L. Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), July 24, 1998, Comments of the U.S. Department of Justice, p. 1 (hereafter cited as DOJ Comments, July 24, 1998).

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<sup>3</sup> DOJ, *Title II Technical Assistance Manual* (Washington, DC: U.S. Government Printing Office, 1993).

<sup>4</sup> Wodatch interview, p. 4.

existing issues.<sup>5</sup> However, DRS staff now writes many fewer letters than in the past, since it tries to respond to questions more frequently by telephone.<sup>6</sup>

According to DRS staff, these letters are not legally binding on DOJ. Although DRS has an interest in providing consistent information, and attorneys typically will follow analyses outlined in previous letters, DRS must be able to change policy as needed, whether due to evolving technology or to the fact that ADA cases must be evaluated on a case-by-case basis. Thus, although policy letters are important for the reasons mentioned above, they do not have the same legal authority as the statute, regulations, and technical assistance manuals. To date, courts have not deferred to policy letters to the degree that they do to DOJ's title II regulations and the technical assistance manuals.<sup>7</sup> However, DRS policy letters are discussed in this chapter to the extent that they illuminate DOJ policy on specific ADA issues.

DRS also addresses policy issues through other technical assistance materials such as question and answer sheets, brochures, and booklets. These materials, which address areas such as law enforcement, health care, and child care, generally provide information about ADA requirements in a reader-friendly style appropriate for individuals, businesses, and agencies. DRS has produced such documents in conjunction with other agencies and Federal grant recipients.

### Through Enforcement

DOJ also develops policy through its enforcement activities. Settlement agreements,

letters of finding and *amicus curiae* and other briefs submitted in title II litigation all represent statements of DOJ policy.<sup>8</sup> According to DRS staff, it has won favorable rulings in most cases it has litigated under title II. DRS litigation has brought about positive changes in many areas: clarifying when curb cuts are required, ending unnecessary segregation of persons in institutions, ensuring accessibility to anonymous voting for persons with mobility and sight impairments, and eliminating improper mental health inquiries in professional licensing procedures.<sup>9</sup>

In deciding in which cases DRS will file *amicus* briefs, staff considers the following criteria: whether the case is on appeal because a lower court ruled unfavorably, whether jurisdiction issues are involved, whether there is a substantial violation of the law, and whether the case will make a significant impact or statement.<sup>10</sup> In deciding whether to intervene in a case, DRS staff consider whether the case is one DRS would have brought on its own initiative, since intervention in cases requires the same degree of resource commitment as other litigation. DRS staff consider whether a particular case is solid and the plaintiff's rights have been violated.<sup>11</sup> Decisions to litigate also take into account resource considerations.<sup>12</sup> DRS staff has indicated that they try to

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<sup>5</sup> Philip Breen, Special Legal Counsel, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, pp. 2-3 (hereafter cited as Breen interview). The letters referred to throughout this report as "policy" letters are those that are identified by the Civil Rights Division's Freedom of Information Act (FOIA) office as "core letters." They represent the letters in which a question was addressed for the first time. The letters referred to in this report as "technical" letters are those that are not "core" or "policy" letters. None of these letters represents a binding legal interpretation of the ADA. See John L. Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the U.S. Department of Justice, p. 2 (hereafter cited as DOJ Comments, July 17, 1998).

<sup>6</sup> Wodatch interview, p. 4.

<sup>7</sup> Breen interview, p. 3.

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<sup>8</sup> See John L. Wodatch, Director, DRS (formerly the Office on the Americans with Disabilities Act), CRD, DOJ, letter to James C. Hanna, Director, Department of Housing and Community Development, Crownsville, MD, February 1992, re: Accessibility, reprinted in 3 Nat'l Disability L. Rep. (LRP) ¶ 202 (hereafter cited as Hanna letter); John L. Wodatch, Director, DRS (formerly the Office on the Americans with Disabilities Act), CRD, DOJ, letter to Marty Keene, President, Able Handicapped Industries, Inc., Shelburne, VT, no date, re: Accessibility, reprinted in 5 Nat'l Disability L. Rep. (LRP) ¶ 193 (hereafter cited as Keene letter); Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Mark Hatfield, U.S. Senate, Washington, DC, May 16, 1995, re: Accessibility, reprinted in 8 Nat'l Disability L. Rep. (LRP) ¶ 33 (hereafter cited as Hatfield letter); James P. Turner, Acting Assistant Attorney General, CRD, DOJ, Policy letter to Harris Wofford, U.S. Senate, Washington, DC, Mar. 15, 1994 re: Accessibility, reprinted in 6 Nat'l Disability L. Rep. (LRP) ¶ 26 (hereafter cited as Wofford Policy letter).

<sup>9</sup> Breen interview, p. 4.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> John Wodatch, Section Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Mar. 19, 1998 (hereafter cited as Wodatch letter, Mar. 19, 1998), enclosure, "Preliminary Information Request for the

litigate a mix of cases, including those that primarily will help individuals and those that address a pattern or practice of discrimination.<sup>13</sup> It is also important that the private attorneys litigating the case want DRS to join as a colitigant through intervention. According to the Special Legal Counsel, in cases involving a constitutional question, the courts are required to notify DOJ and to permit DOJ to intervene.<sup>14</sup>

### Public Participation

DRS staff has acknowledged that the development of policy guidance through technical assistance and enforcement activities does not provide an opportunity for disability advocacy groups and other stakeholders to participate in policy development. If DRS drafted and published formal policy guidance documents (similar to those produced by the U.S. Equal Employment Opportunity Commission), the public could offer comment. However, DRS is primarily complaint responsive, partly because titles II and III cover a broad range of areas.<sup>15</sup> Also, DRS' work is much more centralized than that of EEOC. One DRS staff member stated that DRS does not need to issue formalized policy guidance similar to the guidance EEOC issues to guide its staff located around the country because the regulations provide sufficient guidance and all DRS staff are located in one office.<sup>16</sup>

Advocacy groups contend they have more access to and act in an informal advisory capacity to EEOC. Each of the three most recent Assistant Attorneys General for Civil Rights has met with advocacy groups, but such meetings do not occur at regular intervals.<sup>17</sup> A representative from one disability advocacy organization commented that policy guidance would be helpful in

explaining ADA requirements to lay persons.<sup>18</sup> He also noted that courts are not as likely to defer to informal policy guidance as to the law.<sup>19</sup>

Furthermore, several disability rights advocates have questioned the efficacy of DRS' ADA litigation program. For instance, advocates have stated that the litigation activities of the Disability Rights Section do not adequately respond to issues faced by persons with disabilities such as insurance concerns.<sup>20</sup> To remedy this, DRS should provide an opportunity for public input regarding both the resources DRS dedicates to litigation and the issues it litigates.<sup>21</sup> One disability advocate recommends that the Department of Justice establish a formal advisory board representative of persons with disabilities to decide collectively with DRS staff which cases to litigate.<sup>22</sup>

Another advocate has noted that DRS has not taken an active role, as litigants or *amicus*, in cases involving mental illness. She said that she could think of only one case where DOJ had filed an *amicus* brief on behalf of an ADA claimant with a mental disability, and she noted that it

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<sup>18</sup> Lawrence Berliner, General Counsel, Connecticut Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, p. 2 (hereafter cited as Berliner letter).

<sup>19</sup> *Ibid.* Informal policy guidance explains the law; however, it is not an independent source of legal authority. DOJ Comments, July 24, 1998, p. 1.

<sup>20</sup> Berliner letter, p. 3; Chai Feldblum, Professor of Law, Georgetown University Law Center, interview in Washington, DC, Feb. 2, 1998, p. 7.

<sup>21</sup> Berliner letter, p. 3.

<sup>22</sup> Paul G. Hearne, President, The Dole Foundation, interview in Washington, DC, Feb. 5, 1998, p. 2. The Civil Rights Division recognizes members of the disability community as ADA "stakeholders." Therefore, DRS is always willing to meet with representatives of the disability community to hear their concerns. However, as a Federal agency, DOJ is precluded from seeking policy advice from representatives of only one point of view. Any DOJ-initiated effort to seek assistance in developing policy would be subject to the requirements of the Federal Advisory Committee Act (FACA) which governs the establishment or utilization of non-Federal entities as policy advisors. DOJ Comments, July 24, 1998, p. 2. The FACA requires any advisory body established by the Federal Government to have a "balanced" representation of affected interests. See 5 U.S.C. app. 2 § 5(b)(2) (1994). In addition, the power to take action on any matters discussed by an advisory committee is reserved solely for the executive agency. DOJ Comments, July 24, 1998, p. 1. See 5 U.S.C. app. 2 §§ 2(b)(6); 9(b)(1994).

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Disability Rights Section, Subject: Complaints Processing, Response to Question No. 2," p. 1.

<sup>13</sup> Staff, DSR, CRD, DOJ, interview in Washington, DC, Nov. 6, 1997, p. 3 (hereafter cited as DRS Staff November 1997 interview).

<sup>14</sup> Breen interview, p. 4.

<sup>15</sup> Wodatch interview, p. 4.

<sup>16</sup> L. Irene Bowen, Deputy Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 16, 1998, p. 3; DOJ Comments, July 24, 1998, p. 1.

<sup>17</sup> Wodatch interview, p. 4.



took a long time to be done.<sup>23</sup> She also indicated that DOJ has been far less active in addressing issues relating to individuals with mental disabilities under title II of the ADA than the Equal Employment Opportunity Commission has been in addressing comparable issues under title I of the ADA.<sup>24</sup> DOJ, however, did provide funding to a mental health advocacy center for a report on title II of the ADA and persons with mental disabilities. With this funding, the center conducted an analysis of benefits offices in South Carolina to evaluate how accessible these offices were to persons with mental disabilities. According to the advocacy center, the project resulted in significant change to the South Carolina disability benefits system.<sup>25</sup>

## **Title II Compliance Requirements Administrative Requirements**

In 1991, DOJ published regulations that specify administrative procedures that public entities must follow to comply with title II, subpart A, of the ADA. These administrative requirements include providing notice to the public to ensure persons with disabilities are aware of their rights, conducting a self-evaluation of current policies and practices, establishing transition plans to comply with the ADA, and establishing ADA contact persons and grievance procedures.

### **Notice**

The regulations require public entities to make available to all interested persons information about the requirements of the ADA and the regulations.<sup>26</sup> The methods for making such information available are to be determined by the heads of public entities.<sup>27</sup>

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<sup>23</sup> Mary Giliberti, Attorney, Bazelon Center for Mental Health Law, interview in Washington, DC, Dec. 16, 1997, p. 6 (hereafter cited as Giliberti interview).

<sup>24</sup> *Ibid.*, p. 6. DRS stated that DOJ has asked the Bazelon Center for Mental Health Law to refer any potential complaints concerning mental disability to DOJ, but to date it has not received any such complaints. DOJ Comments, July 24, 1998, p. 2.

<sup>25</sup> Giliberti interview, p. 7.

<sup>26</sup> 28 C.F.R. § 35.106 (1997).

<sup>27</sup> *Id.* For title II purposes, a public entity is defined as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government. *Id.* § 35.103 (1997).

### **Self-Evaluation**

The regulations required all public entities to conduct self-evaluations of their policies and practices to identify any changes that should be made to comply with title II of the ADA.<sup>28</sup> Such evaluations were to be completed within 1 year of the effective date of the regulations.<sup>29</sup> Public entities that previously conducted self-evaluations required under section 504 of the Rehabilitation Act of 1973 were required to evaluate only those policies and practices not covered by section 504.<sup>30</sup> All public entities had to allow submission of public comments during the evaluation process,<sup>31</sup> and public entities with 50 or more employees had to keep 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.”<sup>32</sup>

Information submitted to the Commission from one advocacy group, however, indicates there are communities that have not complied with the ADA requirement to complete a self-evaluation of their programs and policies. According to the Paralyzed Veterans of America, the city of Princeton, Indiana had not conducted a self-evaluation as of late May 1998, more than 2½ years later than the ADA regulation states the self-evaluation should have been completed.<sup>33</sup>

### **Transition Plans**

The regulations required public entities with 50 or more employees to develop transition plans for any structural changes necessary to achieve program access<sup>34</sup> and to make a copy of the plan available for public review.<sup>35</sup> A public entity with authority over streets and walkways had to include in its transition plan a schedule for providing curb cuts or ramps, especially when

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<sup>28</sup> *Id.* § 35.105 (a).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 35.105 (d).

<sup>31</sup> *Id.* § 35.105 (b).

<sup>32</sup> *Id.* § 35.105 (c).

<sup>33</sup> Susan Prokop, Associate Advocacy Director, Paralyzed Veterans of America, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 2 (hereafter cited as Prokop letter).

<sup>34</sup> *Id.* § 35.150 (d)(1).

<sup>35</sup> *Id.*

walkways serve State and local government offices, facilities, and employers.<sup>36</sup> Transition plans had to contain at least the following information:

1. the name of the official responsible for implementing the plan,
2. a list of the physical obstacles that limit participation in programs and services by persons with disabilities,
3. a detailed description of the methods the public entity will use to make programs and services accessible, and
4. a schedule of the steps the entity will take to complete the transition.<sup>37</sup>

Similar to the requirements for self-evaluations, public entities that previously developed transition plans required under section 504 of the Rehabilitation Act of 1973 needed to evaluate only those policies and practices not covered in the section 504 transition plan.<sup>38</sup>

According to DRS staff, DRS spent a lot of effort to make sure State and local governments did self-evaluations and transition plans, particularly during the first 2 years when the Section set up its enforcement mechanism.<sup>39</sup> However, a representative of one regional disability business and technical assistance center (DBTAC) implied DOJ has not sufficiently addressed this area by suggesting that DOJ "should prepare examples of good transition and self-evaluation plans and make these examples available at nominal cost."<sup>40</sup>

In one privately litigated case, a person who uses a wheelchair alleged that the Johnson City, Tennessee, government violated title II and section 504 by failing to implement a transition plan,

failing to conduct a timely self-evaluation, and failing to implement changes that were required to enable access.<sup>41</sup> Johnson City did not develop a transition plan until 1994, almost 2 years after the deadline stated in the regulations. In addition, although structural changes in existing buildings were to be completed no later than January 25, 1996, as of the date of the trial (Oct. 10, 1995), some changes were not complete.<sup>42</sup> Although the court determined the city's transition plan was untimely and inadequate, and that some of the facilities' changes were incomplete, it nonetheless ruled in favor of the city and its manager. The court held that the plaintiff was not excluded from participation in or denied the benefits of the public entity's services, programs, or activities.<sup>43</sup> The court also ruled that although the transition plan was inadequate in many respects, the transition plan would not address any and all of the obstacles that the plaintiff must deal with on a day-to-day basis, because such a plan would be restricted to public facilities where structural changes are undertaken.<sup>44</sup>

#### **ADA Contact Persons and Grievance Procedures**

The title II regulations require public entities employing 50 or more persons to designate an employee or employees to coordinate and investigate the agency's ADA compliance efforts.<sup>45</sup> The regulations also obligate public entities with 50 or more employees to establish and publish grievance procedures for complaints alleging failure to comply with the ADA.<sup>46</sup> However, complainants are not required to exhaust these procedures before they file a complaint with the Federal Government, through DOJ or the designated agencies.<sup>47</sup>

Disability rights advocates have indicated to the Commission that many State and local gov-

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<sup>36</sup> *Id.* § 35.150 (d)(2).

<sup>37</sup> *Id.* § 35.150 (d)(3).

<sup>38</sup> *Id.* § 35.150 (d)(4).

<sup>39</sup> Daniel Searing, Supervisory Attorney for Office Administration, DRS, CRD, DOJ, interview in Washington, DC, Apr. 13, 1998, p. 1.

<sup>40</sup> Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by David Esquith, National Institute on Disability and Rehabilitation Research (OCR files), p. 5 (hereafter cited as NIDRR, ADA Project Directors' responses). DRS stated that it has asked the DBTACs to provide examples of such plans, but to date it has not received any examples. DOJ Comments, July 24, 1998, p. 2.

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<sup>41</sup> *Miller v. City of Johnson, Tennessee*, No. 2:94-CV-246, 1996 U.S. Dist. LEXIS 7360, at \*1-\*2 (E.D. Tenn 1996).

<sup>42</sup> *Id.* at \*7. The remaining intersections without curb ramps were scheduled to be modified between October 1995 and October 1996. *Id.* at \*16.

<sup>43</sup> *Id.* at \*19.

<sup>44</sup> *Id.* at \*18.

<sup>45</sup> 28 C.F.R. § 35.107(a) (1997).

<sup>46</sup> *Id.* § 35.107(b).

<sup>47</sup> *Id.* pt. 35, app. A § 35.170 (1997).

ernments are not complying with the ADA.<sup>48</sup> For example, the executive director of one State's disability law center (and protection and advocacy center) noted that courts in her State have not established grievance procedures and do not provide sign language interpreters, a violation of the ADA.<sup>49</sup> Repeated calls to major State agencies revealed that ADA coordinators still had not been clearly designated by those agencies.<sup>50</sup> Another advocate pointed out that State and local governments have not completed self-evaluations as required under the ADA.<sup>51</sup> Both of these advocates stated that DOJ should be more aggressive in enforcing title II.<sup>52</sup>

Disability rights organizations have suggested several ways DOJ could improve its enforcement of title II administrative requirements. For example, one organization's representative proposed that DOJ promote uniform policies and procedures for State courts by participating more actively in judicial conferences conducted by State supreme courts.<sup>53</sup> To ensure that more public entities designate ADA coordinators, groups suggest that local entities be required to report annually the names of their ADA coordinators to the State ADA coordinator and that DOJ determine the existence of ADA coordinators at all levels of government, perhaps

through collaboration with the Protection and Advocacy System.<sup>54</sup> Similarly, another advocate recommends that DOJ verify whether State and local agencies had completed self-evaluations and transition plans.<sup>55</sup> Finally, disability advocates also suggest that DOJ expand its litigation program to adequately respond to issues affecting persons with disabilities.<sup>56</sup>

### General Nondiscrimination

The ADA title II regulations provide for general nondiscrimination against individuals with disabilities by State and local governments in the areas of program accessibility, communication, and employment.<sup>57</sup> Questions regarding the applicability or coverage of title II arise in a number of contexts, since the scope of title II extends to entities such as law enforcement and emergency services, courthouses and other government buildings, public health care and State licensing activities. DOJ's enforcement and policy development activities in these areas are examined below.

The ADA and its implementing regulations specify that title II, subtitle A, prohibits all public entities from discriminating against qualified individuals on the basis of disability in the provision of services, programs or activities.<sup>58</sup> Public entities include State and local governments, and their departments, agencies, special purpose districts or other instrumentalities.<sup>59</sup>

"Disability" is defined by the ADA and DOJ's implementing regulations as a "physical or mental impairment that substantially limits one or more major life activities." Physical or mental impairment means: (a) a physiological disorder that affects the cardiovascular, digestive, neurological, musculoskeletal, and other systems; or (b) a mental or psychological disorder, such as

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<sup>48</sup> See, e.g., Amy Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, enclosure, p. 1 ("Our agency did a survey of Michigan's courthouses [to assess] whether or not they were physically and programmatically accessible. . . . What we found generally is that local municipalities are still in need of education about the requirements of the ADA. Many public entities never began or completed the self-evaluation plan or transition plan for addressing programmatic and physical access issues. . . . [W]e have had approximately 60 cases dealing with services offered by public entities.")

<sup>49</sup> Kayla Bower, Executive Director, Oklahoma Disability Law Center, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 6, 1998, enclosure, p. 2 (hereafter cited as Bower letter).

<sup>50</sup> *Ibid.*, enclosure, p. 3.

<sup>51</sup> See Prokop letter, p. 2.

<sup>52</sup> Kayla Bower, Executive Director, Oklahoma Disability Law Center, telephone interview, May 1, 1998, pp. 1-2 (hereafter cited as Bower interview); Prokop letter, p. 2. See also David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, June 4, 1998, p. 2.

<sup>53</sup> Bower letter, p. 4.

<sup>54</sup> *Ibid.* NIDRR, ADA Project Directors' responses, p. 5.

<sup>55</sup> Kathy Ertola, Assistant ADA Coordinator, California Department of Social Services, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 4.

<sup>56</sup> Berliner letter, p. 3; Bower interview, pp. 1-2; Michelle Martin, Staff Services Analyst, California Department of Rehabilitation, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, p. 12.

<sup>57</sup> 28 C.F.R. §§ 35.140-.164 (1997).

<sup>58</sup> 42 U.S.C. § 12132 (1994); 35 C.F.R. § 35.130 (1997).

<sup>59</sup> *Id.* § 12131 (1994); 28 C.F.R. § 35.104 (1997).

mental retardation, organic brain syndrome, specific learning disability, emotional or mental illness, and other disorders.<sup>60</sup> Major life activities include functions such as seeing, hearing, speaking, breathing, walking, learning, working, and caring for one's self. Individuals with a disability do not include those who are using illegal drugs. A "qualified individual with a disability" refers to an individual with a disability who, with or without the provision of auxiliary aids, removal of architectural, communication, or transportation barriers, or "reasonable" modifications to rules, policies, and practices meets the essential requirements for the receipt of services or participation in programs or activities provided by a public entity.<sup>61</sup>

Beyond this general nondiscrimination provision, the regulations address several concerns on which title II and DRS' enforcement of the statute have an important impact. The regulation contains general prohibitions on discrimination and specific prohibitions on discrimination that address three substantive areas: program accessibility, effective communication, and employment; and two procedural ones: compliance procedures and designation of enforcement agencies. Among the three substantive issue areas DOJ has addressed in policy as well as in its title II regulations, a number of important concerns is associated with each.

For example, the provisions on program accessibility detail title II requirements that the new or altered physical facilities of public entities be architecturally designed or remodeled so that the facilities are "readily accessible to and usable by individuals with disabilities."<sup>62</sup> For facilities constructed before the ADA, public entities are required to make each "service, program, or activity. . . readily accessible to and usable by individuals with disabilities." This does not necessarily require that each facility be accessible to individuals with disabilities.<sup>63</sup> With respect to communications, the regulations require that communication between the public entity and people with visual or hearing disabili-

ties be "as effective" as communications with people without disabilities.<sup>64</sup> Finally, under the regulatory provisions on employment, DOJ requires public entities to meet the standards set forth in title I of the act to ensure against discrimination on the basis of disability in public employment.<sup>65</sup> Among these three areas, title II seeks to ensure nondiscrimination for people with disabilities in virtually every facet of the services and facilities public entities provide. As such, these three areas and the emerging issues associated with them have become the main focus of DRS' efforts to carry out its mission on behalf of people with disabilities.

### Program Accessibility

Under title II, a public entity may not deny the benefits of its programs, activities, and services to qualified individuals with disabilities because the entity's facilities are physically inaccessible to individuals with disabilities.<sup>66</sup> A public entity is required to operate each service, program, or activity it provides so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities.<sup>67</sup> No provision waives the obligation of smaller public entities to provide program access.<sup>68</sup> For example, in response to an inquiry of whether a county with few persons with disabilities is exempt from the ADA, DOJ responded that a small number of residents with disabilities does not limit the obligation to provide program access.<sup>69</sup> However, for facilities built before the January 26, 1992, effective date of the ADA, no public entity, regardless of its size, is required to take any action that would result in a fundamental alteration of

<sup>60</sup> See *id.* § 12102(2); 28 C.F.R. § 35.104 (1997).

<sup>61</sup> 28 C.F.R. § 35.104 (1997).

<sup>62</sup> *Id.* § 35.150.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* §§ 35.160-164.

<sup>65</sup> *Id.* § 35.140.

<sup>66</sup> 28 C.F.R. § 35.149 (1997). See also Janet L. Blizard, Supervisory Attorney, DRS, CRD, DOJ, letter to unknown individual, Mar. 29, 1993, re: Accessibility, reprinted in 5 Nat'l Disability L. Rep. (LRP) ¶ 485 (hereafter cited as Blizard Unknown letter); John L. Wodatch, Chief, DRS, CRD, DOJ, letter to unnamed individual, Aug. 29, 1996, re: Accessibility, reprinted in 10 Nat'l Disability L. Rep. (LRP) ¶ 75 (hereafter cited as Wodatch Unknown #1 letter).

<sup>67</sup> 28 C.F.R. § 150 (a) (1997).

<sup>68</sup> Wodatch Unknown #1 letter.

<sup>69</sup> *Ibid.*

its program or in undue financial and administrative burdens.<sup>70</sup>

### General Requirements

If a public entity offers a program, service, or activity in an existing building, it must not deny the benefits of the program to persons with disabilities because its structural facilities are inaccessible.<sup>71</sup> According to the regulations, a public entity may comply through such means as redesign of equipment, reassignment of services to accessible buildings, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.<sup>72</sup> For example, DOJ has stated that title II requires State and local governments to ensure program access to State lottery programs. The State must ensure that the lottery program, but not necessarily each individual facility that sells lottery tickets, is physically accessible to persons with disabilities. Under the concept of program access, structural changes to facilities are only required when there is no available alternative (such as curbside service).<sup>73</sup>

For another example, State and local government fire stations must make their programs accessible to the general public. This may require making physical changes to existing buildings, acquiring or redesigning equipment, reassigning services to accessible buildings, and/or delivering services at alternate accessible sites.<sup>74</sup> Tours can be provided in existing facilities that are accessible, or audiovisual displays can be held in an accessible location on the ground floor.<sup>75</sup> Fire stations should be constructed to comply with Uniform Federal Accessibility Standards (UFAS) or

the ADA Standards for Accessible Design. Further, kitchens, dormitories, libraries, laundry rooms, meeting rooms, etc., are required to be accessible, particularly when such facilities are used by nonfirefighters.<sup>76</sup>

Program accessibility in public entities covers more than the residents or members of the entity. Although limiting participation in specified local government programs to local residents "does not appear" to be prohibited by title II, a local government might violate the ADA if it imposed such a limitation to avoid serving nonresidents with disabilities.<sup>77</sup> DOJ has stated that designating some programs as being open to the general public and others as being open only to local residents does not appear to violate title II. However, the ADA may be violated if most facilities of a recreation center (e.g., picnic areas, tennis courts, basketball courts) are open to the general public, but use of the swimming pool is limited to residents when it is known that there are no mobility impaired residents and the jurisdiction does not want to provide pool services for persons with disabilities.<sup>78</sup>

According to one DRS staff member, the biggest ADA technical assistance issue that DRS faces under title II is that a lot of public entities do not understand program accessibility, even though the concept has existed since the enactment of section 504 of the Rehabilitation Act of 1973. Funding for training was provided to localities under section 504, but when those funds ended, many small towns no longer kept up with 504 responsibilities. Since that time, many of the people in small towns who worked on section 504 issues have moved on, so there is a lack of knowledge and understanding. Also, in smaller towns, many title II entities do not have enough

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<sup>70</sup> 28 C.F.R. § 35.150 (a)(3) (1997).

<sup>71</sup> *Id.* § 35.150 (1997); Blizard Unknown letter.

<sup>72</sup> *Id.* § 35.150(b)(1) (1997).

<sup>73</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, Policy letter to Mark O. Hatfield, U.S. Senate, no date, re: Accessibility (hereafter cited as Hatfield Policy letter).

<sup>74</sup> L. Irene Bowen, Deputy Chief, DRS (formerly the Office on the Americans with Disabilities Act), CRD, DOJ, letter to Luther Field, Batt. Chief/Critical Issues, Austin, TX, Mar. 2, 1992, re: Accessibility, reprinted in Nat'l Disability L. Rep. (LRP) ¶ 409.

<sup>75</sup> *Ibid.*

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<sup>76</sup> John L. Wodatch, Chief, DRS (formerly the Public Access Section), CRD, DOJ, Policy letter to Craig Nishimura, Building Department, City and County of Honolulu, Honolulu, HI, re: Accessibility (hereafter cited as Nishimura Policy letter). For example, other employees, such as those responsible for cooking, cleaning, laundry, maintenance, and clerical tasks, must have access to areas and cannot be excluded or denied access because of a disability.

<sup>77</sup> L. Irene Bowen, Deputy Chief, DRS (formerly the Office on the Americans with Disabilities Act), CRD, DOJ, letter to Tria D. Vikesland, Adaptive Recreation Specialist, Eden Prairie, MN, Feb. 4, 1992, re: Accessibility, reprinted in 4 Nat'l Disability L. Rep. (LRP) ¶ 319.

<sup>78</sup> *Ibid.*

staff to work on these issues sufficiently to really learn and understand them. The ADA is designed to foster independence, but often officials in small towns instead try to "help" persons with disabilities. Sometimes officials (in any size local government) also try to excuse themselves from complying with the ADA by arguing there are no persons with disabilities in their community.<sup>79</sup> To try to address this lack of knowledge about program accessibility, DRS has developed several grants for State, county, and local government officials to learn how to implement the requirements of the ADA in their own communities. DRS also is going to produce something for small towns that is similar to the ADA guide for small businesses, to help small towns become aware of DRS and other resources.<sup>80</sup> However, at least one representative of a small town has criticized the draft document as too legalistic to be useful to small and rural governments. He indicated that his organization had received a grant to produce the document, but that DOJ had rewritten sections of the document using "language that only a lawyer could interpret."<sup>81</sup>

As stated above, title II does not require public entities to make architectural modifications to buildings and other facilities that existed before the ADA became law if program accessibility can be achieved in other ways. However, the title II regulations do require that new construction and alterations to existing facilities be done in such manner that the facilities are readily accessible to and usable by individuals with disabilities. The regulations provide that compliance with at least one of two sets of accessibility guidelines with specific architectural standards is deemed to comply with the accessibility requirements for new construction and alterations. These requirements are discussed below.

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<sup>79</sup> Jim Bostrom, Architect, DRS, DOJ, interview in Washington, DC, Apr. 16, 1998, p. 2 (hereafter cited as Bostrom interview).

<sup>80</sup> *Ibid.*

<sup>81</sup> Hamilton Brown, Director of Training and Technical Assistance, National Association of Towns and Townships, telephone interview, May 6, 1998, p. 4.

## Architectural Considerations

### Existing Facilities

Removal of architectural barriers is one method of providing access to programs in existing facilities. Other methods are permitted if they ensure that programs are available to individuals with disabilities. The title II regulations do not require a public entity to make physical alterations to existing facilities if other means of providing program accessibility are effective or if it demonstrates that the cost of making facilities accessible would result in undue financial and administrative burdens.<sup>82</sup> In lieu of structural or physical alterations, program access can be achieved by relocating services from inaccessible buildings to accessible ones, by assigning aides to program beneficiaries, by delivering services to alternate accessible sites, or by moving the service to the first floor so the service is accessible to individuals who are unable to climb steps.<sup>83</sup> Only when there is no other way to provide access must a State or local government undertake structural modifications to its existing buildings.<sup>84</sup> For example, although a school district is not necessarily required to make every existing building accessible, it may relocate vari-

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<sup>82</sup> 28 C.F.R. § 35.150(a)(3) (1997). The head of a public entity or his or her designee must file a written statement of the reasons for concluding that such undue burdens would result. The public entity is still required to "take any other action that would result in . . . such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity." *Id.* See also Merrily A. Friedlander, Acting Chief, Coordination and Review Section, CRD, DOJ, Policy letter to Robert W. Nakoneczny, Superintendent of Schools, Boyne City Public Schools, Boyne City, MI, no date, re: Accessibility (hereafter cited as Nakoneczny Policy letter).

<sup>83</sup> Wodatch Unknown #1 letter; James P. Turner, Acting Assistant Attorney General, CRD, DOJ, Policy letter to Don Young, U.S. House of Representatives, Washington, DC, May 26, 1993, re: Accessibility. In choosing methods of ensuring program access, a public entity is required "to give priority to methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate." 28 C.F.R. § 35.150(b)(1) (1997).

<sup>84</sup> 28 C.F.R. pt 35, app. A § 35.150 ("[s]tructural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible"); Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Unknown respondent, Jan. 29, 1995, re: Accessibility, reprinted in 9 Nat'l Disability L. Rep. (LRP) ¶ 84 (hereafter cited as Patrick Unknown letter).

ous services or programs if necessary to provide program accessibility.<sup>85</sup> If a school determined that making alterations to a gymnasium would pose undue financial burdens, the ADA does not require that the gym be closed, only that another location be used so that individuals with disabilities receive the same benefits and services as other members of the community.<sup>86</sup> Similarly, title II's program accessibility regulation does not require that every area of an existing public building be made structurally accessible.<sup>87</sup>

The title II regulations do not require a public entity to make structural changes to existing facilities when the entity can achieve compliance with the ADA by employing other cost-effective methods.<sup>88</sup> For example, in response to an inquiry about whether a county government must microfilm or computerize its records to accommodate individuals with disabilities, DOJ wrote that staff assistance (such as lifting and handling record books) could eliminate costly modifications and that additional measures or methods would not be required to avoid discrimination.<sup>89</sup> Thus, a public entity may use methods to accommodate individuals with disabilities that do not require additional expense, regardless if those methods are less efficient than a more costly alternative, as long as they achieve effective compliance.

Through a policy letter, DRS addressed whether public entities have ADA responsibilities in existing buildings. A person wrote that he<sup>90</sup> believed public entities in existing buildings

do not have ADA responsibilities unless such buildings undergo "substantial remodeling."<sup>91</sup> In its guidance to the writer, the Department responded that specific title II provisions affect existing public facilities,<sup>92</sup> and pointed out when they apply to altered facilities. The act and the implementing regulations do not require that each existing facility be accessible. However, alterations affecting usability should be done so as to make the altered area accessible to the maximum extent feasible.<sup>93</sup>

For example, with respect to existing facilities, title II of the ADA does not include any specific requirements for the number of restrooms that must be made accessible to persons with disabilities.<sup>94</sup> In a letter, DOJ addressed the issue of grab bars in toilet stalls. The Department wrote that a State's building code may provide less accessibility than the ADA standards. However, the effort to make facilities accessible, in this case the State configuration for grab bars, can differ from the standards if it provides access and usability substantially equivalent to the configuration in the standards. In any ADA enforcement action, the covered entity would bear the burden of proving the equivalency of any alternate design.<sup>95</sup>

### Leased Facilities

Under title II, a State or local agency is not required to make each existing building that it leases from a private landlord accessible, but State or local programs or activities that are conducted within the buildings are subject to the program access requirement.<sup>96</sup> In addition, if the

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<sup>85</sup> James P. Turner, Acting Assistant Attorney General, CRD, DOJ, Policy letter to Daniel Patrick Moynihan, U.S. Senate, Washington, DC, Jan. 6, 1994, re: Accessibility (hereafter cited as Moynihan Policy letter); Nakoneczny Policy letter.

<sup>86</sup> Nakoneczny Policy letter.

<sup>87</sup> John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Doug Bereuter, U.S. House of Representatives, Washington, DC, re: Accessibility, *reprinted in* 4 Nat'l Disability L. Rep. (LRP) ¶ 385 (hereafter cited as Bereuter # 1 letter). It is required however, that each service program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible and usable by individuals with disabilities. 28 C.F.R. § 35.150(a) (1997).

<sup>88</sup> 28 C.F.R. § 35.150(b)(1) (1997).

<sup>89</sup> McNett letter.

<sup>90</sup> John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Lane Evans, U.S. House of Representatives, Galesburg, IL, Nov. 14, 1993, re: Accessibility, *reprinted in* 4 Nat'l

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Disabilities L. Rep. (LRP) ¶ 265 (hereafter cited as Evans letter).

<sup>91</sup> *Ibid.*

<sup>92</sup> 28 C.F.R. § 35.150 (1997).

<sup>93</sup> *Id.* § 35.151(b) (1997); *see also* Evans letter.

<sup>94</sup> James P. Turner, Acting Assistant Attorney General, CRD, DOJ, letter to Wally Herger, U.S. House of Representatives, Washington, DC, Oct. 28, 1992, re: Accessibility, *reprinted in* 5 Nat'l Disability L. Rep. (LRP) ¶ 285 (hereafter cited as Herger letter).

<sup>95</sup> John L. Wodatch, Chief, DRS (formerly the Public Access Section), CRD, DOJ, Policy letter to Curt Wiehle, Accessibility Specialist, Minnesota State Council on Disability, St. Paul, MN, May 4, 1994, re: Accessibility (hereafter cited as Wiehle Policy letter).

<sup>96</sup> 28 C.F.R. pt. 35, app. A § 35.151 (1997). To the extent that leased buildings are newly constructed or altered, they must

State's landlord is not "agreeable" to making the necessary changes, the State is still responsible for complying with title II. Further, if the landlord refuses to pay for or allow the public entity to make the modifications needed for compliance, the public entity retains an independent obligation to provide program access by some other method.<sup>97</sup>

### Historic Facilities

The ADA, 42 U.S.C. § 12204(c), and the title II regulations apply to historic facilities and require accessibility in existing facilities, although a public entity is not required to "take any action that would threaten or destroy the historic significance of an historic property."<sup>98</sup> Therefore, physical modifications to historic buildings are not required if the program can be made accessible through other means. The regulations also state that public entities involved in historic preservation programs must first try to provide physical access for individuals with disabilities. However, if a physical alteration to a historical facility would "threaten or destroy the historic significance" of the facility, would cause a fundamental alteration in the facility, or would cause undue financial or administrative burdens, an entity may attempt to provide program access through other means. These include audiovisual presentations of inaccessible portions of a facility and assigning guides to individuals with disabilities or adopting other innovative methods.<sup>99</sup>

Alterations to qualified historic facilities must comply with the UFAS or ADA Standards

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also meet the construction and alteration requirements of § 35.151. Public entities are also "encouraged to look for the most accessible space to lease and to attempt to comply with [the] minimum Federal requirements" for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published by the Architectural and Transportation Barriers Compliance Board at 36 C.F.R. § 1190.34, even though they apply only to Federal Government leases. *Id.*

<sup>97</sup> Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, Policy letter to Barry M. Vuletich, Manager of Consumer Affairs, Division of Rehabilitation Services, Little Rock, AK, Jan. 27, 1994, re: Accessibility. Also reprinted in 5 Nat'l Disability L. Rep. (LRP) ¶ 325 (hereafter cited as Vuletich Policy letter).

<sup>98</sup> 28 C.F.R. § 35.150 (a)(2) (1997).

<sup>99</sup> *Id.* § 35.150 (b)(2).

for Accessible Design to the maximum extent feasible. If it is not feasible to provide physical access that will not threaten or destroy the historic significance of the building or facility, then alternate methods of access shall be provided.<sup>100</sup>

### Educational Facilities

Although the Department of Justice has written policy letters in response to inquiries involving schools, complaints alleging violations of title II in public schools are handled primarily by the U.S. Department of Education. Private schools are subject to title III of the ADA; public schools are subject to title II. The title II program accessibility requirement became effective for public schools on January 26, 1992. Districts with at least 50 employees were to have developed a transition plan by July 26, 1992, and districts must comply with requirements relating to self-evaluations.<sup>101</sup> Public schools are still held responsible for meeting their obligations, even if a program or activity is held at a private or religious school.<sup>102</sup> To illustrate, if a public school competes against a private school that does not have accessible facilities and refuses to make the facilities accessible, the public school, in certain circumstances, may not be allowed to participate in the interscholastic program.<sup>103</sup>

The concept of program accessibility applies to public facilities even if the ADA design standards do not specifically address all of the elements of the facility. For example, while there are no specific design standards for school playgrounds, the regulation does include provisions that may apply to equipment and establishes requirements for an accessible route.<sup>104</sup> In the case of playgrounds, firm paths and surfacing

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<sup>100</sup> *Id.* § 35.151(d).

<sup>101</sup> *Id.* §§ 35.150(c)-(d), 35.105; John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Doug Bereuter, U.S. House of Representatives, August 21, 1992 (hereafter cited as Bereuter #2 letter).

<sup>102</sup> Bereuter #2 letter.

<sup>103</sup> *Ibid.*

<sup>104</sup> Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, Policy letter to unknown respondent, no date, re: Accessibility (hereafter cited as Oneglia letter to unknown respondent). Public entities can choose to design, construct, or alter facilities either in accordance with the ADAAG or the UFAS. This is deemed to comply with the requirements of title II. 28 C.F.R. § 35.151(c) (1997)



should be provided to allow playground facilities to be used by persons with limited mobility.<sup>105</sup> Schools must be accessible not only to students, but also to parents, visitors, and the general public.<sup>106</sup>

If a public school has an inaccessible auditorium in an existing facility, it must make the auditorium accessible or move the event to a location that is accessible.<sup>107</sup> DOJ has determined that in situations where a school has an inaccessible auditorium, the school district is required to implement one of the two alternatives to be in compliance. If making the auditorium accessible would result in a fundamental change in the events or would constitute an undue financial or administrative burden, the school would be required to move the events to an accessible location.<sup>108</sup>

Many accessibility complaints fall under the jurisdiction of the designated Federal agencies. For example, DRS refers school building complaints to the Department of Education and complaints dealing with public parks to the Department of Interior. However, the Department of Education does not have architects on its staff and it is so entrenched in section 504 compliance issues that architectural facilities issues are not a priority. One DRS architect said she is not aware of any instances when the Department of Education or any of the other designated agencies have consulted with DRS architects for advice or assistance regarding building accessibility complaints.<sup>109</sup>

## Courts

Existing State and local courthouses and courtrooms also are covered by title II and are subject to accessibility requirements. The applicable standard of accessibility is either the UFAS or the ADAAG, and applies to jury boxes, witness stands, judges' benches, clerks' stands, reporters'

stands, etc. DOJ has issued several policy letters to provide guidance on the applicability of title II to State and local courts. These letters clarify that an accessible route to public areas must be provided.<sup>110</sup> To be considered accessible, a jury box or witness stand must be reachable by an accessible route, must contain at least one accessible wheelchair space (a removable seat may be installed in the space when it is not needed to accommodate a wheelchair), and must be served by an unobstructed turning space. Any fixed counters or operating mechanisms in a jury box or witness stand must be accessible.<sup>111</sup>

The ADAAG requires surfaces along accessible routes to be stable, firm, and slip resistant. There are no requirements on slip resistance in these areas.<sup>112</sup> If the accessible juror or witness seating is not raised, an accessible route consists simply of a level route with adequate width and head room. If the accessible seating is raised, a ramp that complies with the UFAS must be provided.<sup>113</sup> Although the requirement that some juror and witness seats be level or ramped may alter traditional courtroom design, DOJ advised that such alterations are necessary to ensure that individuals with disabilities have the same opportunities to participate fully in their communities that nondisabled individuals have, including opportunities for jury service and for participation as witnesses in legal proceedings.<sup>114</sup> Judges' benches and clerks' and reporters' stands must also be accessible, so as not to pose obstacles to employment of individuals with

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<sup>105</sup> *Ibid.*

<sup>106</sup> Bereuter #1 letter.

<sup>107</sup> Patrick Unknown letter.

<sup>108</sup> *Ibid.*

<sup>109</sup> Harland interview, p. 3. DRS notes that on several occasions the Department of Education has consulted with DRS about the application of the ADA Standards for Accessible Design to schools and has recently requested staff training on architectural accessibility. DOJ Comments, July 24, 1998, p. 3.

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<sup>110</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Curt Weldon, U.S. House of Representatives, Upper Darby, PA, Oct. 18, 1995, re: Accessibility, *reprinted in* 9 Nat'l Disability L. Rep. (LRP) 153 (hereafter cited as Weldon letter); *see also* Deval L. Patrick, Assistant Attorney General, CRD, DOJ, Policy letter to The Honorable Rick Santorum, U.S. Senate, Philadelphia, PA, no date, re: Accessibility (hereafter cited as Santorum Policy letter).

<sup>111</sup> Weldon letter; Santorum Policy letter.

<sup>112</sup> 28 C.F.R. pt. 36, app. A §§ 4.3.6 & 4.5.1. (1997); *see also* John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Ernest F. Hollings, U.S. Senate, Washington, DC, re: Accessibility, *reprinted in* 4 Nat'l Disabilities L. Rep. (LRP) ¶ 184.

<sup>113</sup> *See* John L. Wodatch, Chief, DRS (formerly the Public Access Section), CRD, DOJ, Policy letter to J. Keith Ausbrook, Counsel to the Municipal Castings, Fair Trade Council, Washington, DC, Aug. 30, 1994, re: Accessibility.

<sup>114</sup> Weldon letter.

disabilities. In 1996, DOJ issued proposed standards for courtrooms that would require judges' benches and clerks' stations to be either fully accessible or adaptable, at the discretion of the builder. An adaptable bench or station would be designed to contain necessary maneuvering clearances and other spaces so full accessibility can easily be achieved when required. An adaptable judges' bench would not need a ramp if it were designed so that a ramp or lift could be easily installed at a later date.<sup>115</sup>

In spite of the guidance DOJ has provided regarding court accessibility, disability rights advocates have informed the Commission that they continue to receive complaints about courts that are not accessible to persons with disabilities.<sup>116</sup> The Michigan Protection and Advocacy Service (MPAS) attempted to assess ADA compliance in all courts throughout the State of Michigan by sending a survey that asked courts to identify their ADA coordinators and submit copies of their self-evaluations and transition plans. The low number of responses received and the poor quality of such responses led MPAS staff to conclude that court personnel in Michigan need further education about the ADA and its requirements.<sup>117</sup> A Georgia disability organization wrote about a "metropolitan courthouse which had inaccessible restrooms among other improper features."<sup>118</sup>

### Sidewalks, Curbs, and Ramps

The title II regulations also provide for accessible curbs, roads, ramps, and sidewalks. The regulations state that "[n]ewly constructed or altered streets, roads, and 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."<sup>119</sup> Further, "newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways."<sup>120</sup>

The Department of Justice has provided a substantial amount of guidance regarding sidewalk curbs and ramps through its policy letters. For example, the Department has indicated the ADA does not require installation of curb ramps at every intersection. However, if a locality constructs a new street or alters an existing street or intersection, it should provide accessible curb ramps or ramps where elevated or curbed pedestrian walkways intersect with the new or altered street or intersection.<sup>121</sup> In some cases, cities should install curb ramps to provide access to existing pedestrian walkways—even those that are not being otherwise altered—to provide access to the "program" of using streets and walkways.<sup>122</sup> Title II further requires that public entities maintain in operable working condition those features, including sidewalks and streets, that are required to be readily accessible to and usable by individuals with disabilities.<sup>123</sup>

In 1993 the Department of Justice submitted an *amicus curiae* brief to the Third Circuit Court of Appeals for a case involving the installation of curb ramps. In *Kinney v. Yerusalim*, the Department of Justice argued the court should affirm a lower court decision that the Pennsylvania Department of Transportation's resurfacing of a city street constitutes an "alteration" within the meaning of the title II regulations, thus requiring the public entity make the altered portion of the road readily accessible to individuals with disabilities by installing curb ramps.<sup>124</sup> The Department also argued the court should affirm

<sup>115</sup> *Ibid.*

<sup>116</sup> See Lawrence Berliner, General Counsel, Connecticut Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, enclosure, p. 4; David Eichenuer, Access to Independence and Mobility, fax to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, June 4, 1998, p. 3; Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, p. 6.

<sup>117</sup> Amy Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, enclosure, p. 2.

<sup>118</sup> Ringer letter, enclosure, p. 4.

<sup>119</sup> 28 C.F.R. § 35.151(e)(1)(2).

<sup>120</sup> *Id.* § 35.151(e)(2).

<sup>121</sup> *Id.* § 35.151(e)(1) (1997); Walker Policy letter; see also Daniels Policy letter.

<sup>122</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Frank D. Lucas, U.S. House of Representatives, Enid, OK, Aug. 2, 1995, re: Accessibility, reprinted in 8 Nat'l Disability L. Rep. (LRP) ¶ 348 (hereafter cited as Lucas letter).

<sup>123</sup> *Ibid.*

<sup>124</sup> Brief for the United States as *Amicus Curiae*, *Kinney v. Yerusalim*, at 12, 812 F. Supp. 547 (1993), *aff'd*, 9 F.3d 1067 (3d. Cir. 1993), *cert. denied sub nom. Hoskins v. Kinney*, 511 U.S. 1033 (1994).

the lower court ruling that 28 C.F.R. § 35.151 covering new construction and alterations does not allow an “undue burden” defense.<sup>125</sup> The court of appeals upheld the lower court ruling, and the Supreme Court declined to accept the case on appeal.<sup>126</sup>

In early 1998, residents of Scranton, Pennsylvania, filed a suit against local officials, alleging that for several years the city had “willfully refused” to install ramps or curb cuts whenever it resurfaced streets in violation of title II and the *Kinney* ruling.<sup>127</sup> In addition to compensatory and punitive damages, the residents are seeking declaratory and injunctive relief enjoining any future expenditures from the city’s capital budget until it installs curb cuts at each corner of every street resurfaced since the ADA’s effective date of January 26, 1992, or since the Third Circuit’s decision in 1993.<sup>128</sup>

In another case, two individuals who use ambulatory devices for mobility filed suit against Carlsbad, California, alleging denial of access to the city’s facilities and violation of the State law prohibiting discrimination in public accommodations.<sup>129</sup> The plaintiffs alleged that the defendant city failed to develop an appropriate transition plan on the installation of curb ramps, to make existing facilities accessible, and to install curb ramps to existing sidewalks, and improperly modified existing curb ramps such that they did not comply with the ADA access guidelines for buildings. The city of Carlsbad provided evidence to show that it conducted a self-evaluation, initiated an ADA task force that received input from interested parties, and compiled information to develop the transition plan. The court found the city had provided accessibility to the facilities in question and provided curb ramps where necessary to provide access

along highly trafficked routes. The court granted summary judgment for the defendant on all plaintiffs’ claims.<sup>130</sup>

In Maryland, an individual with a permanent spinal injury sued the Montgomery County government under the ADA to prevent the installation of speed bumps on the street on which he lives, claiming the speed bumps would interfere with his use of the road because of the pain the speed bumps would cause.<sup>131</sup> The court found the individual was unable to state a claim under title II, since the speed bumps did not deny him meaningful access to the road. Although the court recognized that the speed bumps present difficulty, the bumps did not totally bar his use of the road or leave him entirely unable to benefit meaningfully from the streets. Further, the court noted that neither title II nor the technical assistance manual promulgated by the Department of Justice contains provisions on speed bumps.<sup>132</sup>

Although the Department of Justice has taken steps to enforce ADA requirements on sidewalks, curbs, and ramps, at least one advocacy group has informed the Commission there are communities that have yet to comply. Further, this same advocacy group maintains the Department of Justice delays too long (from 14 to 36 weeks) in responding to complaints about such State and local governments, often only to tell complainants it will not investigate.<sup>133</sup>

### Public Parking

Title II’s program accessibility regulations<sup>134</sup> also require State and local government entities to make their public parking programs accessible to individuals with disabilities. Therefore, if a State or local government provides parking at a facility, it must provide an appropriate number of accessible parking spaces for individuals with disabilities.<sup>135</sup> Further, title II prohibits a public

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<sup>125</sup> *Id.* at 19.

<sup>126</sup> *Kinney v. Yerusalim*, 9 F.3d 1067 (3rd Cir. 1993), *cert. denied sub nom. mem.*, *Hoskins v. Kinney*, 511 U.S. 1033 (1994).

<sup>127</sup> ADAPT of Scranton v. City of Scranton, No. 98-1003, 11 Nat’l Disabilities L. Rep. (LRP) ¶ 10 (M.D.Pa. Jan. 22, 1998). Filing the lawsuit on the plaintiffs’ behalf was ADAPT of Scranton, an organization of Scranton residents with ambulatory disabilities. DOJ was not a party to this lawsuit.

<sup>128</sup> *Id.*

<sup>129</sup> *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1331 (S.D. Cal. 1997). DOJ was not a party to this lawsuit.

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<sup>130</sup> *Id.* at 1335-42.

<sup>131</sup> *Slager v. Duncan*, No. AW-97-1598, 1997 U.S. Dist. LEXIS 12963, at \*1 (D. Md. Aug. 8, 1997). DOJ was not a party to this lawsuit.

<sup>132</sup> *Id.* at \*2.

<sup>133</sup> Susan Prokop, Associate Advocacy Director, Paralyzed Veterans of America, letter to Nadja Zalokar, Director, Americans with Disabilities Project, USCCR, May 26, 1998, p. 2.

<sup>134</sup> 28 C.F.R. §§ 35.149-.151 (1997).

<sup>135</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, Policy letter to Bill Young, U.S. House of Representatives,

entity from imposing a surcharge on an individual with a disability for any measure that is necessary to ensure nondiscriminatory treatment required by the ADA.<sup>136</sup> According to a policy letter, the State of Florida requires users of parking spaces for individuals with disabilities to display a permit costing \$15 or special license plates, which cost no more than regular plates.<sup>137</sup> However, individuals with disabilities that limit their ability to walk significant distances, but who do not use wheelchairs, do not have the option of obtaining the special license plates. Instead, they must obtain the \$15 special parking permit. Failure to provide a cost-free option for use of required accessible parking spaces is a violation of title II.<sup>138</sup>

### Voting

Title II protects qualified individuals with disabilities from discrimination in the State or local electoral process. Polling places or voting locations must be accessible. When polling places are located in existing facilities, the public entity must ensure that the voting "program," when viewed in its entirety, is accessible to individuals with disabilities. However, localities may initiate methods or alternatives (to structural or physical accessibility) that provide access. Sample alternatives include the absentee ballot, mobile voting units, and accessible areas at shopping malls to carry out some of the voting procedures to comply with the act.<sup>139</sup> DOJ reviews the alleged failures to ensure the participation of persons with disabilities in the electoral process on a case-by-case basis and on the issue in question.

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Washington, DC, no date, re: Accessibility (hereafter cited as Young Policy letter).

<sup>136</sup> 28 C.F.R. § 35.130 (f) (1997); Young Policy letter.

<sup>137</sup> Young Policy letter.

<sup>138</sup> *Ibid.*

<sup>139</sup> Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, Policy letter to Unknown respondent, Colorado Springs, CO, Feb. 5, 1993, re: Accessibility (hereafter cited as Oneglia Colorado Springs Policy letter); Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, Policy letter to Brenda K. Jacobs, Clark County Election Department, Las Vegas, NV, Aug. 19, 1993, re: Accessibility (hereafter cited as Jacobs Policy letter); Deval L. Patrick, Assistant Attorney General, CRD, DOJ, Policy letter to Strom Thurmond, U.S. Senate, Washington, DC, no date, re: Accessibility (hereafter cited as Thurmond Policy letter); See also Hatfield Policy letter.

In one situation, a county election department failed to provide access to the polling site at a high school auditorium. As a result, an individual with a mobility impairment had to vote in the hallway.<sup>140</sup> DOJ determined that the county's use of the curbside voting procedure did not violate title II, noting that existing polling places are not required to be accessible, provided that alternative methods are effective in enabling individuals with disabilities to cast a ballot on the day of the election.<sup>141</sup>

In another setting, an individual claimed he could not participate as a candidate in the State's nomination process because of his disability, alleging discrimination in the petition process because unlike other nondisabled candidates, he could not walk door to door to collect signatures due to his mobility impairment.<sup>142</sup> In its analysis, DOJ concluded the State law is not discriminatory because the State provides 5 months to collect signatures and that individuals who seek nomination through the petition process are not required to collect the signatures in person. For example, nominees may collect signatures at public parks, public buildings, shopping malls, or other areas.<sup>143</sup>

In a case filed by a nonprofit organization, the Philadelphia County (Pennsylvania) Board of Elections was charged with violating the ADA and the Voting Rights Act by prohibiting voters with disabilities from receiving assistance in picking up and returning absentee ballot packages.<sup>144</sup> In addition to depositing ballots in a mailbox or personally delivering them to the board of elections, voters could have another person mail their ballots for them or give them directly to a mail carrier. The board of commissioners also could authorize an agent to deliver or pick up the ballots. The court held that these alternatives allowed individuals with disabilities

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<sup>140</sup> Jacobs Policy letter.

<sup>141</sup> *Ibid.*

<sup>142</sup> Oneglia Orlando Policy letter.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Jacobs v. Philadelphia County Bd. of Elections*, No. CIV.A. 94-6666, 1995 U.S. Dist. LEXIS 16013, at \*2-\*4, (E.D. Pa. Oct. 30, 1995). These measures were mandated by the district court in an earlier voting fraud case and changed the prior practice allowing an agent designated by the voter to obtain and return the absentee ballot. *Id.* DOJ was not a party to this lawsuit.

the opportunity to participate in the electoral process, and therefore the elections procedures did not violate the statutory standards of the ADA or the Voting Rights Act.<sup>145</sup>

DOJ has indicated that State and local governments are not required to provide Braille ballots or electronic voting to enable individuals with vision impairments to vote without assistance. Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot, and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers.<sup>146</sup>

### ***New Construction and Alterations***

The title II regulations require all facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity to be readily accessible to and usable by individuals with disabilities, if the construction or alteration began after January 26, 1992.<sup>147</sup> When making alterations to an existing building or constructing a new building or facility, a public entity must meet the requirements set forth in either the Uniform Federal Accessibility Standards (UFAS) or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG).<sup>148</sup> The UFAS and the ADAAG specify the elements and spaces that must be accessible, as well as the technical requirements for meeting building accessibility

requirements.<sup>149</sup> (An elevator exception for newly constructed "small buildings" applies only to privately owned buildings, not State and local government facilities.<sup>150</sup>)

One DRS architect has found the interaction of civil rights and building codes is often a difficult concept for both architects and lawyers to grasp. Cross training is, therefore, necessary, and DRS architects provide training related to the ADA standards and how they are applied. DRS architects also work in technical assistance and certification.<sup>151</sup>

DRS staff has indicated that the building industry expresses confusion about who should be held accountable for ensuring compliance with ADA accessibility regulations. DRS' position, expressed in a September 1995 policy letter, is that since architects draw plans and design buildings, they should do so with accessibility in mind.<sup>152</sup> However, architects believe that building owners should be held accountable and liable when compliance is not met, because owners often do not allow them to design accessible buildings and will take their business elsewhere if architects do not follow their instructions.<sup>153</sup>

As architects become more aware of the ADA, the questions they ask have become more advanced. The total number of written technical assistance requests that DRS receives has remained the same, but the number of phone calls for technical assistance has increased.<sup>154</sup>

DRS is now trying to promote uniformity in the regulations with which builders must comply. DRS staff believes standards should not be made more stringent than they are because they were not designed to accommodate all persons with disabilities. It contends accessibility and cost

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<sup>145</sup> *Id.* at \*5-6. But see *Dipietrae v. City of Philadelphia*, 666 A.2d 1132, 1135-36 (Pa. Commw. Ct. 1995) (Pa. Election Code allows disabled voter to appoint agent of choice to obtain absentee ballot and deliver it to election board), *aff'd per curiam*, 673 A.2d 905 (1996). The federal court in *Jacobs* rejected the 1995 *Dipietrae* decision, noting that while Federal courts are "bound to 'give due consideration to the decisional law of inferior state courts' [they are] not required to give those decisions binding effect." *Jacobs*, 1995 U.S. Dist. LEXIS 16013, at \*7-8 (citing *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 435 n.11 (3rd Cir. 1992)). DOJ was not a party to this lawsuit.

<sup>146</sup> Oneglia Pinellas County, FL, Policy letter; Ruggles Policy letter.

<sup>147</sup> 28 C.F.R. §§ 35.151 (a)-(b) (1997).

<sup>148</sup> *Id.* § 35.151(c). Departures from the particular requirements of either standard are permitted "when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided." *Id.* See also James P. Turner, Acting Assistant Attorney General, CRD, DOJ, letter to J. James Exon, U.S. Senate, Washington, DC 20510, Apr. 26, 1993, re: Accessibility, reprinted in 5 Nat'l Disability L. Rep. (LRP) ¶ 250.

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<sup>149</sup> 28 C.F.R. pt. 36, app. A (1997) (ADAAG); 41 C.F.R. subpt. 101-19.6, app. A (1997) (UFAS).

<sup>150</sup> Moynihan Policy letter.

<sup>151</sup> Ellen Harland, Architect, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 2 (hereafter cited as Harland interview).

<sup>152</sup> Deval Patrick, Assistant Attorney General, CRD, DOJ, letter to Donald A. Manzullo, U.S. House of Representatives, re Liability of Architects and Contractors, Sept. 11, 1995, reprinted in 8 Nat'l Disability Law Rep. ¶ 282. The letter clarifies that architects are liable under title III, but does not address title II liability.

<sup>153</sup> Harland interview, p. 3.

<sup>154</sup> *Ibid.*

should be balanced. One DRS architect voiced her support for the standards for new construction, saying they are very clear and easy to comply with. The standards for alteration recognize that constraints in an existing structure may limit possible accessibility modifications. Most compliance problems and difficulties arise in existing structures. A number of complaints dealing with new construction is being filed under title II.<sup>155</sup>

### **Certification**

Certification is a title III issue because the certification procedure was established in the enforcement mechanism of title III, which applies only to privately owned facilities. State and local governments are not required to obtain building permits.<sup>156</sup> However, because some State and local governments may own privately used facilities, or may occupy or lease privately owned facilities, certification issues may also fall under title II.

Although States benefit from certification in that they better serve their citizens, architects and builders would benefit most from certification.<sup>157</sup> Local building inspectors could then raise the comfort level of individuals who obtain permits by notifying them they will be in compliance with ADA by complying with local codes. There is no plan review or building inspection process at the Federal level.<sup>158</sup> If a State's building code and the ADA requirements are almost identical, then there is no conflict. Thus, for all intents and purposes, States can achieve the equivalent to certification by amending their codes to follow the ADA closely.<sup>159</sup> However, public accommodations and commercial facilities that are involved in ADA lawsuits will not be able to claim the evidentiary advantage provided by certification.<sup>160</sup>

When the certification process was first written into the title III regulation, no consideration was given to the number of building codes in exist-

tence,<sup>161</sup> about 450 in the United States. The certification process has proved to be a daunting responsibility. DOJ does not certify the individual plans of builders. In a certified State, builders can ask for waivers from their local building boards.<sup>162</sup>

State and local governments may, but are not required to, apply for certification by DOJ that indicates a State or local building code meets or exceeds minimum ADA title III requirements for accessibility and usability of places of public accommodation and commercial facilities.<sup>163</sup> The ADA does not require State and local governments to apply to the agency for certification, and since State and local officials have no jurisdiction to enforce the ADA, they are not obligated to ensure compliance with the standards for commercial or noncommercial facilities.<sup>164</sup>

### **Equally Effective Communication**

Title II requires State and local governments to ensure their communications with program participants and members of the public with disabilities are as effective as their communications with other participants, unless doing so would result in a fundamental alteration to the program or create undue financial and administrative burdens.<sup>165</sup> Public entities may be required to provide interpreters, visual aids, and other mechanisms that enable individuals with disabilities to have full access to public programs.<sup>166</sup> The regulations state that in deciding "what type of auxiliary aid and services is necessary, a pub-

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<sup>161</sup> The certification process was enacted by Congress in title III of the ADA. It is not a concept created by the DOJ regulations. DRS has no information that would enable it to know whether Congress considered the number of codes or code jurisdictions in this country. DOJ Comments, July 24, 1998, p. 3.

<sup>162</sup> Harland interview, p. 4. States do not have the authority to waive ADA requirements. State or local building officials may advise builders about possible applications of certain limitations that are included in the ADA Standards, but State officials' approval of modifications of the standards are not binding in ADA enforcement proceedings. DOJ Comments, July 24, 1998, p. 3.

<sup>163</sup> 28 C.F.R. § 36.602 (1997); Hatfield letter.

<sup>164</sup> See Hatfield letter.

<sup>165</sup> 28 C.F.R. §§ 35.160-.164 (1997); John L. Wodatch, Chief, DRS, CRD, DOJ, Unknown letter, July 23, 1996, re: Accessibility, reprinted in 8 Nat'l Disability L. Rep. (LRP) ¶ 394 (hereafter cited as Wodatch Unknown #2 letter).

<sup>166</sup> Wodatch Unknown #2 letter.

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<sup>155</sup> Ibid., p. 4.

<sup>156</sup> Ibid., pp. 3-4.

<sup>157</sup> Janet Blizard, Supervisory Attorney for Coordination and Certification, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p. 3 (hereafter cited as Blizard interview).

<sup>158</sup> Harland interview, p. 4.

<sup>159</sup> Blizard interview, p. 3.

<sup>160</sup> DOJ Comments, July 24, 1998, p. 3.

lic entity shall give primary consideration to the requests of the individual with disabilities.”<sup>167</sup>

The regulations also specify that public entities should ensure that they provide effective communication for people who use telecommunications devices for the deaf (TDDs), direct access to telephone emergency services for people who use TDDs or computer modems, and information and signage about the locations of accessible services and facilities for persons with disabilities.<sup>168</sup> For example, to comply with the regulation on information and signage, a public entity shall (a) “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”; and (b) “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.” Public entities also should display the international symbol for accessibility at each accessible entrance of a facility.<sup>169</sup>

### General Requirements

“Communication” encompasses many different forms of conveying information in diverse settings. The ADA does not require public entities to provide auxiliary aids and services in every situation, and questions sometimes arise as to when such assistance must be provided. For instance, one issue concerns when interpreters become necessary in the contexts of health care, law enforcement, and the courts. Another question is how an entity should determine whether the interpreter is qualified, once it has been determined that an interpreter is required. The Ninth Circuit considered this question in *Duffy v. Riveland*. The court relied on the plain language of the regulations<sup>170</sup> to find that an interpreter did not necessarily have to be certi-

fied by the National Registry of Interpreters for the Deaf to be considered qualified.<sup>171</sup>

DOJ has written several policy letters to provide guidance on equally effective communication in varied contexts. For example, State or local governments that provide tornado and other emergency warnings must ensure that the warnings are accessible to persons with disabilities, unless this would result in a fundamental alteration or undue burden. State and local governments may consider flashing lights as a possible means of ensuring effective communication, although the regulations do not dictate use of any particular method or device to meet effective communication requirements.<sup>172</sup> In terms of educational institutions, universities and colleges are responsible for providing qualified interpreters where necessary to ensure effective communication for persons with disabilities, and are not excused from this responsibility even if they do not receive outside funds to cover the cost of the services.<sup>173</sup> Courts must ensure effective communication through appropriate auxiliary aids, including sign language interpreters.<sup>174</sup> Theaters owned and operated by State or local governments must meet title II program accessibility requirements. However, although theaters may provide tickets and programs in Braille to persons with visual impairments, they are not required to do so. For example, if a theater provides an usher to guide persons with visual impairments to their seats, in most instances effective communication has been provided. Ef-

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<sup>167</sup> 28 C.F.R. § 35.160(b)(2)(1997).

<sup>168</sup> *Id.* §§ 35.161–163.

<sup>169</sup> *Id.* § 35.163(a),(b).

<sup>170</sup> *Id.* § 104 (1997) defines “qualified interpreter” as “an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.”

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<sup>171</sup> *Duffy v. Riveland*, 98 F.3d 447, 455–56 (9th Cir. 1996). The plaintiff, a deaf Washington State prisoner, sought a certified interpreter for disciplinary and classification hearings he was involved in. *Id.* at 450. The interpreter provided had no training in sign language. Rather, she was a correctional mental health officer who learned to sign from her parents. The court noted that these facts raised questions regarding her accuracy and impartiality, both of which are material to the definition of “qualified interpreter” in the ADA regulations. It, therefore, reversed the district court’s grant of summary judgment for the State on the plaintiff’s ADA claims and remanded the case for trial. *Id.* at 456, 458.

<sup>172</sup> Wodatch Unknown #2 letter.

<sup>173</sup> Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, Policy Unknown letter, Minneapolis, MN, no date, re: Accessibility (hereafter cited Oneglia Unknown MN policy letter).

<sup>174</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, Policy letter to Trent Lott, U.S. Senate, Washington, DC, no date, re: Accessibility (hereafter cited as Lott Policy letter).

fective communication also may be provided by making available tape-recorded versions of the program, or by making available persons who can read programs to individuals with visual impairments.<sup>175</sup>

## Forms of Communication

### Interpreters

It appears that public entities often fail to provide sign language interpreters for persons with hearing disabilities as required under title II of the ADA.<sup>176</sup> One advocate recounted the following anecdote:

Our technical assistance hot line received a call in 1995 from a court in California with the question, "Were we wrong?" Apparently, a defendant who was deaf was arrested. When he arrived in court, he wrote a note to the judge asking for the reasonable accommodation of an interpreter. The judge, aware that the county had just purchased an assistive listening device system, ordered the clerk to provide the device to the defendant.

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<sup>175</sup> John R. Dunne, Assistant Attorney General, CRD, DOJ, Policy letter to Alan Wheat, U.S. House of Representatives, Washington, DC, no date, re: Accessibility (hereafter cited as Wheat policy letter).

<sup>176</sup> See Eichenauer letter, p. 3 ("Dental, as well as large medical providers, have been hesitant to provide sign language interpreters. . . . Many places state that they have only enough money to pay for two interpreters a year."); Martin letter, enclosure, p. 19 ("One of the most common problems is the refusal of colleges and universities to provide auxiliary aids such as readers, note-takers or sign language interpreters."); Bower letter, enclosure, p. 5 ("The largest county court in Oklahoma refused to provide sign interpreters for a civil wedding ceremony. . . . Since then another outlying district court has been reported to charge interpreters fees as costs to persons with disabilities in civil actions. . . . Another metropolitan district court refused to provide effective accommodation to a man who could not hear the civil court proceedings."); Ringer letter, p. 6 ("[A]mong locations where our office has intervened through advocacy include. . . several courts in south and north Georgia which were not providing sign language interpreters. . . [and] several law enforcement agencies. . . to provide sign language interpreters in questioning a suspect."); Berliner letter, p. 5 ("The elimination of communication barriers continues to be an area of on-going concern. This is especially critical with public schools, which often elect to avoid providing any interpreter services for persons with hearing impairments. . . . The agency [also] has received complaints that the police and other emergency response personnel do not provide sign language interpreters for persons with hearing impairments."); Maes letter, enclosure, p. 8 ("We have had a handful of cases regarding the lack of an interpreter for an individual who is deaf in an emergency room situation, in court, or in police custody.").

The device was provided. The defendant did not make use of the device and wrote back to the judge, "still need interpreter." The judge did not inquire why the defendant felt that he still needed an interpreter, and proceeded with the trial, feeling. . . that they had made reasonable attempt to provide an accommodation, and that the final choice as to what accommodation would be provided resided with the governmental agency. [The defendant could not use the assistive listening device because of the severity of his hearing loss. The defendant was found guilty.]<sup>177</sup>

Advocacy groups are attempting to educate public entities about their obligation under title II of the ADA to provide auxiliary aids such as interpreters.<sup>178</sup> It appears, however, that this is an area in which additional outreach and enforcement efforts by the Department of Justice would be beneficial.

### TDD Services

For most public facilities the ADA standards only require the provision of a public TDD when the facility provides four or more public pay telephones.<sup>179</sup> Pay telephones installed on city property constitute a service provided by the city. Thus, the city, not the telephone company, is responsible for the cost of any required accessibility changes, such as replacing standard telephones with amplified models or coin-operated TDD. However, the city could negotiate with the telephone company to perform TDD installations.<sup>180</sup>

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<sup>177</sup> Martin letter, enclosure, p. 20.

<sup>178</sup> Ibid., enclosure, p. 19; Bower letter, enclosure, p. 5; Ringer letter, p. 6; Berliner letter, p. 5; Maes letter, enclosure, p. 8.

<sup>179</sup> Deval L. Patrick, Assistant General, CRD, DOJ, letter to Kay Bailey Hutchinson, U.S. Senate, Dallas, TX, Dec. 28, 1996, re: Accessibility, reprinted in 10 Nat'l Disability L. Rep. (LRP) ¶ 200 (hereafter cited as Hutchinson letter).

<sup>180</sup> John L. Wodatch, Chief, DRS (formerly Public Access Section), CRD, DOJ, Policy letter to Camille Jones, Culver City Human Resources Department, Culver City, CA, Nov. 19, 1993, re: Accessibility (hereafter cited as Jones policy letter). The requirements for TDDs that are contained in the ADA Standards for Accessible Design are applicable only when the public entity chooses to provide public telephones in new construction or alterations, or as "program accessibility" if the public entity uses public telephones as part of its programs. There is no "effective communication" requirement to provide TDD-equipped public telephones. DOJ Comments, July 24, 1998, p. 4.



### **Signage and Auxiliary Aids**

The ADA also covers signs and other visual aids to assist persons with disabilities. The ADA Accessibility Guidelines for Buildings and Facilities are specific about the dimensions of signs and how written descriptions should be placed.<sup>181</sup> In one policy letter, DOJ explained that the standards require each fixed seat in an assembly area be identified by a sign or marker. In addition, facilities that must be identified as accessible under the standards must use the international symbol of accessibility.<sup>182</sup>

DOJ has stated that interpreters are not required for all situations, and other auxiliary aids may be adequate. DOJ wrote to one individual:

In determining what constitutes an effective auxiliary aid or service, covered entities must consider, among other things, the length and complexity of the communication involved. A note pad and written materials may be sufficient means for short, uncomplicated communications. Where, however, the information to be conveyed is lengthy or complex, the use of an interpreter may be the only effective form of communication. Use of interpreter services is not necessarily limited to the most extreme situations.<sup>183</sup>

Despite this policy guidance, some disability rights advocates have said that DOJ needs to provide clearer and more comprehensive guidelines for effective communication requirements.<sup>184</sup> According to one State disability rights advocate, State and local courts have refused to provide sign language interpreters for persons

with hearing impairments or have charged fees for interpreters' services.<sup>185</sup> For instance:

The largest county court in Oklahoma refused to provide sign interpreters for a civil wedding ceremony. Our office filed a writ of mandamus at the Oklahoma Supreme Court to obtain compliance. Since then another outlying district court has been reported to charge interpreters' fees as costs to persons with disabilities in civil actions. . . . Another metropolitan district court refused to provide effective accommodation to a man who could not hear the civil court proceedings. He had been participating through several hearings at the point he contacted our office. Our office intervened through negotiation and obtained a Real Time reporter so that he could hear the proceedings.<sup>186</sup>

This same advocate notes that although DOJ officials have been responsive when she has sought assistance in title III cases, DOJ personnel do not seem interested in taking on title II cases.<sup>187</sup> Since DOJ participation in title III cases has led to quick compliance by commercial entities, she believes similar Federal attention in title II cases would help reduce instances of non-compliance, such as those mentioned above.<sup>188</sup>

### **911 Emergency Telephone Services**

The title II regulations expressly require public entities to provide individuals who use TDDs direct access to emergency phone services such as 911.<sup>189</sup> The title II regulations also specify that public entities must afford to TDD users an opportunity to benefit from their services that

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<sup>181</sup> 28 C.F.R. pt. 36, app. A § 4.30 (1997). See also John R. Dunne, Assistant Attorney General, CRD, DOJ, Policy letter to Scott Klug, U.S. House of Representatives, Madison, WI, Sept. 29, 1992, re: Accessibility.

<sup>182</sup> Janet L. Blizard, Supervisory Attorney, DRS, CRD, DOJ, letter to Mario Pimenta, Product Manager, Auditorium/Theater Seating, Quakertown, PA, re: Accessibility, reprinted in 6 Nat'l Disability L. Rep. (LRP) ¶ 26 (hereafter cited as Pimenta letter); 28 C.F.R. pt. 36, appendix A, §§ 4.1.2(7), 4.30.7 (1997). According to DRS, the seats that must be marked are aisle seats with removable armrests. DOJ Comments, July 24, 1998, p. 4.

<sup>183</sup> Lott policy letter.

<sup>184</sup> NIDRR, ADA Project Directors' responses ("The whole issue of "effective communications" for Title II and Title III entities needs more attention, guidance materials, and enforcement.").

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<sup>185</sup> Bower letter, p. 5.

<sup>186</sup> Bower letter, p. 5. See also Lawrence Berliner, General Counsel, Connecticut Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, pp. 4-5. ("The elimination of communication barriers continues to be an area of ongoing concern. This is especially critical with public schools, which often elect to avoid providing any interpreter services for persons with hearing impairments.") According to DRS, DOJ did not receive any complaints alleging the described matters. DOJ Comments, July 24, 1998, p. 4.

<sup>187</sup> Kayla Bower, Executive Director, Oklahoma Disability Law Center, telephone interview, Apr. 27, 1998 (hereafter cited as Bower interview).

<sup>188</sup> Ibid.

<sup>189</sup> 28 C.F.R. § 35.162 (1997). 28 C.F.R. § 35.161 provides that where "a public entity communicates by telephone with all applicants and beneficiaries, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech."

is equal to the opportunity afforded to others. In September 1996, DRS began a special project in conjunction with U.S. attorneys' offices nationwide to review the accessibility of 911 services. U.S. attorneys' offices were directed to initiate compliance reviews of and investigate complaints regarding 911 providers in their districts. DRS trained staff from each U.S. attorney's office and monitors all of their investigations. A DRS trial attorney coordinates the project and supervises the work of the U.S. attorney staff. As a result of this project, the accessibility of more than 500 911 providers has been reviewed, and non-ADA-complaint providers have been brought into compliance through settlement agreements and letter agreements.<sup>190</sup>

Through policy letters, DOJ has indicated that a State may use a 911 system that directs all emergency TDD calls through the 911 system, as long as the system receives and processes nonvoice calls as effectively as voice calls; nonvoice callers who are directed through the enhanced system receive attention as quickly as voice callers who dial local seven-digit numbers rather than 911; and any emergency services provided by a State or local government entity that are not connected to the enhanced system are directly accessible to nonvoice callers.<sup>191</sup>

In addition, several public safety agencies of the same municipality may share a TDD for non-emergency calls, as long as this system works at least as effectively for persons using the TDD system as for those using seven-digit non-emergency calls.<sup>192</sup> However, any emergency service provided by the State or local government entity that is not tied to the 911 system would have to provide direct access to nonvoice callers.<sup>193</sup> If, for

example, the State offers emergency poison control information that cannot be accessed through 911, the telephone emergency service would have to be equipped with a TDD to provide direct access for nonvoice callers.<sup>194</sup>

In 1995, DOJ reached a formal agreement with the City of Chicago to provide 911 emergency services to individuals with hearing or speech impairments. The agreement resolved three complaints filed independently with DOJ by deaf individuals who were unable to obtain urgent medical assistance by calling 911.<sup>195</sup> The City of Chicago was directed to install TDD devices in its 911 emergency center and train dispatchers in handling emergency calls from TDD users.<sup>196</sup>

The Civil Rights Division and the U.S. Attorney's Office for the District of Arizona have filed *amicus curiae* briefs at the district and appellate court levels in a case alleging that the 911 system in Phoenix violated the ADA.<sup>197</sup> In this case, three deaf individuals alleged that the city required 911 callers using a TDD to activate an audible tone (by pressing the space bar on the TDD) to indicate to the 911 operator that the incoming call was a TDD call. The court found that this requirement violated the ADA because it did not provide direct or equally effective access to callers using TDDs because not all TDDs generate tones, and it would be unfamiliar, and many times impossible, for a caller to press a key repeatedly until recognized.<sup>198</sup>

DOJ regulations require that telephone emergency services provide direct access to individuals

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modems. "Direct access" means that emergency telephone services can directly receive calls from TDD and computer modem users without relying on outside relay services or third party services. Where 911 service is available, direct access must be provided to individuals who use TDDs and computer modems. The requirement for direct access disallows the use of a separate seven-digit number for person with hearing impairments where 911 service is available.

<sup>194</sup> Husted-Jensen letter.

<sup>195</sup> DOJ, CRD, *Enforcing the ADA: A Special Status Report from the Department of Justice* (1995), p. 3.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ferguson v. City of Phoenix*, 931 F. Supp. 688 (1996); DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice (October 1995-March 1996)* (hereafter cited as DOJ/CRD, *ADA Quarterly Status Report (October 1995-March 1996)*), p. 5.

<sup>198</sup> *Ferguson*, 931 F. Supp. at 691-93; DOJ Comments, July 24, 1998, p. 5.

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<sup>190</sup> Wodatch letter, Mar. 19, 1998, enclosure, "Preliminary Information Request for the Disability Rights Section, Subject: Staff Training," Response to Question No. 1, p. 2; Staff, DRS, CRD, DOJ, interview in Washington, Sept. 3, 1997, p. 4 (hereafter cited as DRS Staff September 1997 interview); DOJ Comments, July 24, 1998, p. 4.

<sup>191</sup> John L. Wodatch, Chief, DRS (formerly the Public Access System), CRD, DOJ, letter to Nancy Husted-Jensen, Chairperson and State ADA Coordinator, Providence, RI, re: Accessibility, reprinted in 5 NDLE ¶ 222 (hereafter cited as Husted-Jensen letter).

<sup>192</sup> Husted-Jensen letter.

<sup>193</sup> 28 C.F.R. § 35.162 (1997). See also Husted-Jensen letter. The regulation states that emergency services shall provide direct access to individuals who use TDDs and computer

who use TDDs and computer modems.<sup>199</sup> The *Title II Technical Assistance Manual* interprets and elaborates on the regulations, stating that space bar or additional dialing requirements are not permissible.<sup>200</sup> The city contended that since the 911 system provided TDD callers “direct access” to the system, the “no space bar” requirement of the regulations was “arbitrary and capricious.”<sup>201</sup> The U.S. district court upheld DOJ’s “no space bar” interpretation, finding that it “reflects a reasonable reading of the statute,” and denied the city’s motion for summary judgment.<sup>202</sup> Although the plaintiffs had requested punitive damages, the court determined that there was insufficient evidence at this time to establish that the city intentionally violated the ADA and the Rehabilitation Act.<sup>203</sup> The court, therefore, denied the request, but noted that plaintiffs had not yet had their opportunity for discovery.

In another privately litigated case, individuals with hearing impairments alleged that New York City violated title II of the ADA, the Rehabilitation Act, and the equal protection clause of the Constitution by planning to replace two-button street alarm boxes with one-button boxes to be used in conjunction with a protocol for tapping on a speaker by hearing-impaired individuals to indicate the type of emergency.<sup>204</sup> The city also planned to install fewer new alarm boxes than had existed before.<sup>205</sup> The court ruled that the reduction in the number of alarm boxes did not

violate the ADA, since it would not constitute a complete elimination of boxes. A significant number of alarm boxes would remain on the street, and thus, the system would be “readily accessible,” even if less accessible than previously.

In this case, the court ruled that the conversion to new alarm boxes constituted an “alteration” of the public “facility” for reporting emergencies from the street. Based on the evidence presented, the court found that the new boxes did not provide adequate access for the deaf and hearing impaired.<sup>206</sup> In tests conducted by the defendants, the majority of calls using the new boxes received no response (an 82 percent failure rate). Based on this failure rate, the court held the new alarm box system was inaccessible to and unusable by the hearing impaired and thus violated the ADA.<sup>207</sup> The U.S. District Court for the Southern District of New York required the defendants to convert all one-button emergency alarm boxes to two-button boxes but did not require the restoration of boxes that had been removed.<sup>208</sup>

In 1997, DOJ intervened in *Miller v. District of Columbia*, a suit alleging that the District of Columbia 911 provider failed to respond to 911 calls made by TDD users. This case was settled by consent decree.<sup>209</sup> In 1997 and 1998, DRS and U.S. attorneys’ offices have signed numerous settlement agreements with 911 providers requiring them to install additional TDD equipment, implement appropriate policies for recognition and handling of TDD calls, train personnel in these polices, and implement testing programs for equipment and personnel. These

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<sup>199</sup> 28 C.F.R. § 35.162 (1997).

<sup>200</sup> Ferguson, 931 F. Supp. at 694.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 695–96 (quoting Republican National Committee v. Federal Elec. Comm’n, 76 F.3d 400, 405 (D.C. Cir. 1996)).

<sup>203</sup> *Id.* at 690. In this case, for the plaintiffs to receive compensatory damages, they had to demonstrate that the city engaged in intentional discrimination or deliberately disregarded the plaintiffs’ rights. The court ruled that the plaintiffs had not proved intentional discrimination. *Id.* at 697.

<sup>204</sup> Civic Ass’n of the Deaf of N.Y.C. v. Giuliani, 970 F. Supp. 352, 354 (S.D.N.Y. 1997). DOJ was not a party to this lawsuit.

<sup>205</sup> *Id.* at 355–57. The two-button boxes contained a red button to be used in case of fire and a blue button to summon the police. Both the one- and two-button boxes had speakers through which users could communicate the nature of the emergency. The protocol developed for hearing-impaired individuals provided that a single tap on the mouthpiece of an Emergency Response System box signified a request for the police, while a double tap indicated a request for fire services. *Id.* at 356.

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<sup>206</sup> *Id.* at 359–62.

<sup>207</sup> *Id.* at 359–60.

<sup>208</sup> *Id.* at 363. Replacing all of the removed boxes would have cost the city approximately \$5.4 million. *Id.* at 362. The court permitted plaintiffs to reapply for further relief if evidence arose that hearing impaired individuals had not been appraised of the E-911 tapping protocol within 3 months or that dispatchers were not responding appropriately to tapping calls. *Id.* at 363.

<sup>209</sup> Wodatch letter, Feb. 6, 1998, enclosure, “Preliminary Information Request for the Disability Rights Section, Subject: Complaints Processing, Response to Question No. 3.” On April 14, 1998 the court issued a consent order in which the defendant will pay \$15,000 in compensatory damages to each of the two plaintiffs. DOJ Comments, July 24, 1998, p. 5.

agreements are the results of both complaint investigations and complaint reviews.<sup>210</sup>

DRS recently issued a new technical assistance document, "ADA Access for 9-1-1 and Telephone Emergency Services," which provides specific guidance on how 911 providers must comply with the ADA. Through this new guidance, DOJ has indicated that telephone emergency services must provide service that is as effective for callers who use TDDs as it is for callers who use voice telephones, in terms of response time and quality.<sup>211</sup>

Despite DOJ's efforts, disability rights advocates have indicated that 911 operators continue to hang up on phone calls from persons using TDDs.<sup>212</sup> This could be avoided with further education of 911 operators to recognize TDD calls.

### Public Employment

Employment discrimination under title II is a very important area of ADA law and policy in large part because of the numerous people working for State or local governments and the many facilities and services they provide. To date, DOJ has addressed the issues surrounding title II's prohibition against discrimination in public employment various ways. In its title II regulations, DOJ included a provision expressly banning discrimination in public employment.<sup>213</sup>

<sup>210</sup> DOJ Comments, July 24, 1998, p. 5.

<sup>211</sup> *Ibid.*

<sup>212</sup> David Eichenauer, Access to Independence and Mobility, letter to Nadja Zalokar, Director, Americans with Disabilities Project, USCCR, June 4, 1998, p. 4; Michelle Martin, Staff Services Analyst, California Department of Rehabilitation, letter to Nadja Zalokar, Director, Americans with Disabilities Project, USCCR, May 11, 1998, p. 21.

<sup>213</sup> 28 C.F.R. § 35.140 (a) (1997). The regulation provides that "[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." *Id.* In employment, a "qualified individual with a disability" is an employee or job applicant who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks. The person must also be able to perform the "essential" (as opposed to marginal or incidental) functions of the position either with or without reasonable accommodation. Job requirements that screen out or tend to screen out people with disabilities are legitimate only if they are job-related and consistent with business necessity. *See* DOJ, CRD, DRS, "Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers," (hereafter cited as DOJ/CRD, "The ADA and Hiring Police Officers"); *see also*

DOJ also has responded to inquiries on this issue with policy letters. In addition, DOJ has issued technical assistance materials, such as its *Title II Technical Assistance Manual*. Finally, and perhaps most important in terms of potential effect, DOJ has filed *amicus* briefs in cases addressing title II and its availability as a cause of action for public employment discrimination.<sup>214</sup> However, DOJ has not issued a formal policy guidance that would benefit legal, investigative, and administrative staff in DRS, nor has it taken a consistent, active role in litigation on this issue.

### Relationship Between Titles I and II in Public Employment

DOJ's earliest attempt to address the issue of public employment under title II was the drafting of its ADA regulations. The proposed regulations for implementing the public employment provision of title II indicated that these regulations would be coextensive with EEOC's title I regulations for private employment and labor unions. This would have meant that DOJ would use the title I regulatory provision that limited coverage to public entities with more than 25, and later 15 employees. In addition, DOJ would have had to follow the same effective dates as title I, which went into effect on July 26, 1992, for employers with 25 or more employees and on January 26, 1994, for employers with 15 to 24 employees. However, DOJ received comments in response to its proposed rule objecting to this approach. Commentators in favor of broader coverage under title II found that the proposed rule failed to recognize that Congress intended to establish non-discrimination requirements in employment for *all* public entities, regardless of the number of employees. They also stated that Congress intended the employment requirements of title II to become effective at the same time that the other

28 C.F.R. § 35.104 (1997) (definition of "qualified individual with a disability").

<sup>214</sup> The *Title II Technical Assistance Manual* and the *amicus* briefs provide policy guidance on employment. Between fiscal year 1992 and the end of fiscal year 1997 (Oct. 1, 1991 through Sept. 30, 1997), DRS has been involved in 20 cases concerning employment issues. DOJ Comments, July 24, 1998, p. 5.

requirements of the title II regulations became effective, i.e., January 26, 1992.<sup>215</sup>

DOJ's final title II regulations prohibit employment discrimination within all activities of public entities and obligate State and local entities to institute nondiscriminatory employment practices for persons with disabilities.<sup>216</sup> The regulations also provide that the requirements of title I apply if the public entity is also subject to title I.<sup>217</sup> If the public entity is not also subject to title I—because it employs fewer than 15 employees—the requirements of section 504 of the Rehabilitation Act of 1973 apply to employment discrimination claims.<sup>218</sup> EEOC has litigation authority for all private employers under title I. However, with respect to employment with a State or local government, DOJ is the only Federal agency that can litigate on behalf of the Federal Government.<sup>219</sup> EEOC, therefore, plays a different role in the public employment setting, much like the one assumed by the other designated agencies under title II, in that it must refer such cases to DOJ for litigation.

EEOC, like other designated agencies under title II, investigates a charge of discrimination. If a violation is found, EEOC attempts to obtain a negotiated settlement. Thus, some public employment cases are settled before DOJ gets involved. If EEOC cannot obtain voluntary compliance in a case against a public employer, it can refer the case to DOJ to litigate.<sup>220</sup> DRS estimates it receives about 75 referrals from EEOC

each year. Of these, DRS litigates only about 5 percent, resolving the others before litigation.<sup>221</sup>

A deficiency in DOJ's approach to issues regarding public employment is a lack of clear guidance. For example, the applicability of title II to employment and its incorporation of the title I employment standards caused confusion in the early stages of implementation of the ADA. In a request for information, a State government questioned the effective date of the ADA's coverage of public employers. In response to this inquiry, DOJ prepared a policy letter which clearly stated that title II applies to employment practices and activities of State and local governments, that the provisions of title II went into effect on January 26, 1992, and that the title II regulations incorporate the standards for employment practices under title I. However, title I did not go into effect until July 26, 1992 for employers of 25 or more employees, and January 26, 1994 for employers of 15 to 24 employees. Thus, the DOJ policy letter stated that "until title I becomes effective for an employer, the standards for employment practices under title II will be the same as those under section 504 of the Rehabilitation Act."<sup>222</sup>

DOJ's *Title II Technical Assistance Manual* also states clearly that title II "prohibits all public entities, regardless of size of workforce, from discriminating in their employment practices against qualified individuals with disabilities."<sup>223</sup> However, guidance provided jointly by EEOC and DOJ does not clearly explain the distinction between title I and title II. In their technical assistance document, "Americans with Disabilities Act: Questions and Answers," EEOC and DOJ provide the following question and answer:

Q: What employers are covered by title I of the ADA, and when is the coverage effective?

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<sup>215</sup> 28 C.F.R. pt. 35, app. A § 35.140 (1997); U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice, *Americans with Disabilities Act Handbook*, (undated) p. II-54 (hereafter cited as EEOC and DOJ, *ADA Handbook*).

<sup>216</sup> 28 C.F.R. § 35.140 (a) (1997).

<sup>217</sup> *Id.* § 35.140(b)(1). Title I applies to public, as well as private, employers who have 15 or more employees for 20 or more calendar weeks in the current or preceding year. See 42 U.S.C. § 1211(2),(5) (1997).

<sup>218</sup> 28 C.F.R. § 35.140(b)(2) (1997).

<sup>219</sup> See Wodatch letter, Mar. 19, 1998, enclosure, "Subject: Mission, Function, Responsibilities, Planning, Organization, Staffing and Budget, Disability Rights Section Response to Request for Documents No. 1," pp. 1-2.

<sup>220</sup> DRS Staff November 1997 interview, p. 3 (statement of John Wodatch).

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<sup>221</sup> John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, OCRE, USCCR, June 3, 1998, DRS Response to Commission's Information Request, p. 10.

<sup>222</sup> Joan A. Magagna, Deputy Director, Office on the Americans with Disabilities Act, DOJ, letter to James D. Harris, Deputy Attorney General, Department of Law and Public Safety, Office of the Attorney General, Legal Affairs, Trenton, NJ, June 4, 1992, *reprinted in* 8 Nat'l Disability L. Rep. (LRP) ¶ 374.

<sup>223</sup> DOJ, *Title II Technical Assistance Manual*, p. 19.

A: The Title I employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees were covered as of July 26, 1992. Employers with 15 or more employees were covered two years later, beginning July 26, 1994.<sup>224</sup>

Nowhere in this statement do the agencies say that State and local government employment practices are subject to title II as well as title I. Further, in the section of the document that provides information on State and local governments, no mention is made of the employment provisions of title II.<sup>225</sup> Similarly, DOJ's technical assistance document on hiring police officers mentions neither title I nor title II.<sup>226</sup>

In addition, the section-by-section analysis of the title I regulations in the *Americans with Disabilities Act Handbook* is not clear on the applicability of title I to State and local governments. The document states, "all State and local governments are covered by title II of the ADA whether or not they are also covered by [title I]."<sup>227</sup> This part of the handbook does not discuss under what circumstances, if any, public employment falls under title I. The section by section analysis of title II states: "If a covered entity is not covered by title I, or until it is covered by title I, subparagraph (b)(2) [of the regulations] cross-references section 504 standards for what constitutes employment discrimination."<sup>228</sup> From this it may be inferred that the employment practices of State and local governments are covered by both title I and title II, yet it is not clearly explained. Further, in the resource list attached to the handbook, readers are referred to EEOC (not DOJ) for questions regarding em-

ployment; public employment is not mentioned in the resource list.<sup>229</sup>

## Title II as a Basis for Public Employment Discrimination Cases

A 1998 news article, which summarizes the Eleventh Circuit's recent decision on whether title II allows an action for employment discrimination,<sup>230</sup> states that "while Title I of the ADA expressly prohibits employment discrimination on the basis of disability, Title II of the act provides that a qualified individual with a disability should not be excluded from participation in or denied the benefits of services, programs, or activities of a public entity."<sup>231</sup> The article infers that title II should cover employment discrimination, although it states that it is "troubling" that Congress did not specifically mention "discrimination in employment" in title II itself.<sup>232</sup>

However, another news article states that even without explicit language regarding employment discrimination in title II, there is enough support from the ADA statute, DOJ's implementing regulations, and caselaw to allow a cause of action for employment discrimination under title II. The article took issue with a district court's ruling<sup>233</sup> that no employment cause of action exists under title II. The article maintained, for example, that "civil rights statutes like the ADA are to be liberally construed, and there is nothing in the text barring employment claims under title II."<sup>234</sup>

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<sup>224</sup> U.S. Equal Employment Opportunity Commission and U.S. Department of Justice, Civil Rights Division, "Americans with Disabilities Act: Questions and Answers," (1995) (hereafter cited as EEOC and DOJ, *ADA: Questions and Answers*).

<sup>225</sup> See *ibid.*

<sup>226</sup> See DOJ, CRD, DRS, "Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers," Mar. 25, 1997.

<sup>227</sup> EEOC and DOJ, *ADA Handbook*, p. I-23 (emphasis added).

<sup>228</sup> *Ibid.*, p. II-55.

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<sup>229</sup> *Ibid.*, "Resource List," p. 1. Pursuant to Executive Order 12067, EEOC is responsible for developing regulations and policy guidance, and providing technical assistance with respect to all of the Federal civil rights statutes that apply to employment. Therefore, DOJ defers to EEOC for technical assistance on employment policy. DOJ Comments, July 24, 1998, p. 5; Exec. Order No. 12067, 3 C.F.R. 206 (1978).

<sup>230</sup> *Bledsoe v. Palm Beach City Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998).

<sup>231</sup> "Title II Covers Employment, Court Says," *Americans with Disabilities Act Manual (BNA)*, vol. 7, no. 3 (Feb. 12, 1998), pp. 1, 14.

<sup>232</sup> *Ibid.*, p. 14.

<sup>233</sup> *Bledsoe v. Palm Beach City Soil & Water Conservation Dist.*, 942 F.Supp. 1439 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998).

<sup>234</sup> "No Employment Cause of Action Under ADA Title II, Court Says," *Disability Compliance Manual (LRP)*, vol. 8, iss. 14 (Jan. 6, 1997), p. 9.

The main issue in title II employment litigation has been whether or not title II even covers employment discrimination. Other issues also have emerged in the courts. These include the intent of Congress in creating title II, DOJ's interpretation of congressional intent in its title II implementing regulations, and whether the employment practices of State and local entities fall exclusively under title I of the ADA, which specifically prohibits employment discrimination, or also under title II of the ADA, which provides that all programs, services, and activities of public entities are prohibited from any kind of discrimination against persons with disabilities, including employment discrimination. There also is debate over when and how each title should be applied in employment discrimination cases.

In a 1993 case, *Petersen v. University of Wisconsin Board of Regents*,<sup>235</sup> the U.S. District Court for the Western District of Wisconsin held that a former faculty member could bring an employment discrimination action under title II of the ADA without first exhausting administrative remedies that apply to title I claims. The defendant alleged that the claim must be filed first with the EEOC. The court relied on DOJ regulations interpreting title II, which specifically provide that although Federal agencies are available to hear claims under the ADA, title II litigants are not required to file first with these agencies before bringing suit.<sup>236</sup>

In the suit, the plaintiff alleged that the defendant terminated his employment in violation of the ADA "when it refused to renew his employment contract, refused to give him a merit raise, refused to restore certain employment duties, and created a hostile work environment because his physical disability required an accommodation of an 80 percent appointment."<sup>237</sup> Although the plaintiff could have brought his claim under title I of the ADA, he chose to bring his claim under title II.<sup>238</sup> The defendant contended that whether the

plaintiff brought his claim under title I or title II of the ADA, he must comply with the requirement that individuals exhaust their administrative remedies before going to court.<sup>239</sup>

The court noted that subpart F of the regulation governing title II of the act explains in detail the jurisdiction over claims under the ADA of both EEOC and the Department of Justice.<sup>240</sup> In holding that a public employee does not have to exhaust administrative remedies (with EEOC or any other Federal agency) before bringing a claim of employment discrimination under title II of the ADA in Federal court, the court relied on DOJ's section-by-section analysis of its regulations, which states clearly that "available administrative channels under title II of the Act are optional and that plaintiffs may proceed directly to Federal court if they choose to do so."<sup>241</sup>

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(Congress intended to cover the employment practices of all public entities, regardless of number of employees).

<sup>239</sup> The court noted that it was unclear from defendant's briefs whether it contended that plaintiff was precluded from bringing a claim under title II, because his claim also fell under title I. The court disregarded this line of argument, because the defendant provided no support for the position and "because there is no language in the statute or regulations that would sustain such a position." The court stated that "the core of defendant's argument is that whether plaintiff brings his claim under Title I or Title II, he must comply with the administrative requirements of Title I." Therefore it addressed only "whether plaintiff must exhaust his administrative remedies" before bringing suit under title II. 818 F.Supp. at 1278. Title I adopts the procedures set forth in title VII of the Civil Rights Act of 1964 requiring exhaustion of administrative remedies by filing charges with the EEOC. 42 U.S.C. § 12117(a) (1994). Title II adopts the remedies, rights, and procedures of section 504 of the Rehabilitation Act of 1973, which does not require the exhaustion of administrative remedies and allows a plaintiff to file a claim directly with a Federal court. 42 U.S.C. § 12133 (1994). The defendant nevertheless cited a DOJ regulation implementing title II as authority for imposing the procedural requirements of title I on all plaintiffs attempting to bring a title II claim against a public entity that is also subject to the requirements of title I. 818 F.Supp. at 1280. The court noted that 28 C.F.R. § 35.140(b)(1) provides: "For the 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 C.F.R. 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." *Id.* (quoting 28 C.F.R. § 35.140(b)(1)).

<sup>240</sup> 818 F. Supp. at 1279 (citing 28 C.F.R. §§ 35.170--178).

<sup>241</sup> *Id.* at 1279-80 (citing 28 C.F.R. pt. 35, app. A, , Subpart F & § 35.172; H.R. Rep. No. 485(II), 101st Cong., 2d Sess., at 98

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<sup>235</sup> 818 F. Supp. 1276 (W.D. Wis. 1993).

<sup>236</sup> *Id.* at 1279-80.

<sup>237</sup> *Id.* at 1276.

<sup>238</sup> *Id.* at 1276-78. Title I covers private and public employers who have 15 or more employees for 20 or more calendar weeks in the current or preceding year. See 42 U.S.C. §§ 12111(2), (5) (1994). Title II covers all public entities, regardless of the number of employees. See *id.* §§ 12131(1), 12132 (1994); 28 C.F.R. pt. 35, app. A § 35.140 (1997)

Thus, the defendant's motion to dismiss the plaintiff's complaint was denied.

One of the most noted cases filed under title II with respect to employment is *Bledsoe v. Palm Beach Soil and Water Conservation District*.<sup>242</sup> In this case, a Federal district court in Florida ruled that title II did not provide a cause of action for employment discrimination. However, the U.S. Court of Appeals for the Eleventh Circuit decided that the employee could sue his municipal employer for employment discrimination under title II and reversed the district court's grant of summary judgment for the defendant.<sup>243</sup>

Bledsoe filed suit against the Palm Beach Soil and Water Conservation District and Palm Beach County, alleging that both of these entities were his "employer" within the meaning of title I of the ADA and the Rehabilitation Act and had violated his rights protected by the acts. The plaintiff alleged that he had a disability within the meaning of the law, that the defendants had failed to accommodate his disability, and that the defendants discharged him as a result of the disability. The court determined that Palm Beach County was not the plaintiff's employer and granted summary judgment for the county on all claims. Because the Palm Beach Soil and Water Conservation District did not have the number of employees to effect coverage under title I of the ADA,<sup>244</sup> Bledsoe sought to amend the complaint to bring his complaint under title II, and the Soil and Water Conservation District filed a motion for summary judgment, arguing that title II of the ADA does not apply to discrimination in employment.<sup>245</sup>

The district court entered summary judgment for the Palm Beach Soil and Water Conservation District on Bledsoe's claims under both the ADA and the Rehabilitation Act. Bledsoe appealed the decision. In its review of the case, the Court of

Appeals for the Eleventh Circuit held that the district court "improperly found that title II does not encompass employment discrimination."<sup>246</sup> The court based its holding on the statutory language of title II, the legislative history of the ADA, DOJ's title II regulations, and a review of court decisions from across the country. The court stated:

The statutory language used by Congress in the creation of Title II is brief. Extensive legislative commentary regarding the applicability of Title II to employment discrimination, however is so pervasive as to belie any contention that Title II does not apply to employment actions. . . . Accordingly, employment coverage is clear from the language and structure of Title II.<sup>247</sup>

The court also noted that while coverage under title II may not be explicit, Congress "specifically provided" that DOJ should write regulations implementing title II's prohibition against discrimination,<sup>248</sup> and that the Attorney General should issue regulations "setting forth the forms of discrimination prohibited."<sup>249</sup>

A significant body of caselaw, as well as DOJ's interpretation of the statute, is in accord with the *Bledsoe* court's holding that title II covers employment discrimination.<sup>250</sup> For example, in *Holbrook v. City of Alpharetta*, the complain-

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(1990); S. Rep. No. 116, 101st Cong., 1st Sess. at 57-58 (1989); DOJ, CRD, *Title II Technical Assistance Manual*, p. 48).

<sup>242</sup> 942 F.Supp. 1439 (S.D. Fla. 1996), rev'd, 133 F.3d 816 (11th Cir. 1998).

<sup>243</sup> *Id.*

<sup>244</sup> The term employer under title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current preceding calendar year. . . ." 42 U.S.C. § 12111(5) (1994)).

<sup>245</sup> *Bledsoe*, 133 F.3d at 818.

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<sup>246</sup> *Id.* at 819.

<sup>247</sup> *Id.* at 821-22.

<sup>248</sup> *Id.* at 822 (citing 42 U.S.C. § 12134).

<sup>249</sup> *Id.* at 822 (citing H.R. Report No. 101-485 (III), 101st Cong. 2d Sess., at 52 (1990), reprinted in 1990 U.S.C.A.N. 445, 473). In citing the title II regulations, the court noted that 28 C.F.R. § 35.140 (a) specifically addresses employment discrimination by public entities. It also stated that Congress had not modified the regulations promulgated by the Attorney General. The court noted that Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning. *Bledsoe*, 133 F.3d at 822 (quoting *Florida Nat'l Guard v. Federal Labor Relations Auth.*, 699 F.2d 1082, 1087 (11th Cir. 1983)).

<sup>250</sup> The *Bledsoe* opinion is the only circuit court decision to date directly on point. As the *Bledsoe* court noted, two prior decisions implied, but did not hold, that title II creates a cause of action for employment discrimination. 118 F.3d at 820 (citing *Holbrook v. City of Alpharetta, Ga.*, 113 F.3d, 1522, 1528-29 (11th Cir. 1997); *McNely v. Ocala Star-Banner, Corp.* 99 F.3d 1068, 1073 (11th Cir. 1996), *cert denied*, 117 S.Ct. 1819 (1997)). For an extensive list of district court decisions holding that title II encompasses employment discrimination, see *Bledsoe*, 133 F.3d at 820 n. 4.



ant, a police detective who suffered from diabetes and a lack of visual function in one eye, alleged discrimination on the basis of disability by the police department's refusal to assign him full duties and failure to accommodate his disability. He filed under title II of the ADA. The district court dismissed the title II claim.<sup>251</sup> However, the Eleventh Circuit Court of Appeals strongly implied that title II does prohibit employment discrimination against individuals with disabilities and incorporates the same prohibitions contained under title I regulations. The court held, however, that because the plaintiff alleged claims that occurred before July 26, 1992, the effective date for title II, his title II claims must be analyzed under the Rehabilitation Act.<sup>252</sup>

Similarly, in *Baxter Ethridge v. State of Alabama*,<sup>253</sup> the plaintiff, who was a police officer, alleged that the Southwest Alabama Police Academy disqualified him on the ground that he was unable to perform the minimal qualification exercises because of a disability in his right hand. The plaintiff did not specify in his complaint under which title he was proceeding. The defendant filed a motion for summary judgment arguing, in part, that the City of Slocumb Police Department was not subject to the ADA because it had fewer than the 25 employees required by title I.<sup>254</sup> The plaintiff's brief opposing summary judgment argued that he had a valid cause of action under title II. The district court denied the defendant's motion for summary judgment, finding that although a "plain reading of [the relevant provision in title II] does not reveal whether it covers employment discrimination," the legislative history, DOJ regulations interpreting title II, and the decisions of other courts make clear that title II prohibits employment discrimination by public entities on the basis of disability.<sup>255</sup> In another case, *Hernandez v. City*

*of Hartford*, the court ruled that although a "plain reading" of title II does not reveal whether title II covers employment discrimination, the regulations and the legislative history make it clear that title II prohibits employment discrimination by public entities.<sup>256</sup>

DOJ also has interpreted title II as covering employment discrimination. A complaint filed by a patrol officer alleged that the Denver Police Department terminated him because of his disability and failed to reassign him to a vacant position for which he was qualified. DOJ found the employer, the City and County of Denver, violated title II by its failure to provide a reassignment or transfer as a reasonable accommodation and by terminating him from the police department.<sup>257</sup> In its analysis, DOJ concluded that under title II of the ADA, reassignment to a vacant position is a right of qualified individuals with disabilities and is permitted as a form of reasonable accommodation. DOJ concluded the city's failure to consider a reassignment or transfer option for the police officer violated title II of the ADA.<sup>258</sup> Based on the information provided by the city, DOJ also concluded the policies and procedures implemented with regard to police officers with disabilities no longer able to "carry out forcible arrest" discriminate against such officers and, thus, violate title II.<sup>259</sup>

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<sup>251</sup> 112 F. 3d 1522, 1528–29 (11th Cir. 1997).

<sup>252</sup> *Id.* at 1522, 1528–29.

<sup>253</sup> 847 F. Supp. 903, 904–05 (M.D. Ala. 1993).

<sup>254</sup> *Ethridge* at 904–05 (citing 42 U.S.C. § 12115(A) defining "employer" under title I of the act).

<sup>255</sup> *Ethridge*, 847 F. Supp. 903, 905–06, 908, *summ. judgment granted defendant*, 860 F.Supp. 808 (M.D. Ala. 1994) (plaintiff unable to perform "essential function of job and thus not a "qualified individual with a disability").

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<sup>256</sup> 959 F. Supp. 125, 132–33 (D. Conn. 1997) (citing *Ethridge v. Alabama*, 847 F.Supp. 903, 905–06 (M.D. Ala. 1993)).

<sup>257</sup> Merrily A. Friedlander, Acting Chief, Coordination and Review Section, CRD, DOJ, letter to Wellington E. Webb, Mayor of the City and County of Denver, Colorado, Aug. 22, 1994 (hereafter cited as Friedlander letter).

<sup>258</sup> The Department of Justice adopts this legal standard from EEOC's interpretive guidance on title I of the ADA, 29 C.F.R. pt. 1630, app. A, § 1630.2(o) discussing reasonable accommodation and the Senate Labor and Human Resources Committee Report on the Americans with Disabilities Act of 1990, which states: "[I]f an employee, because of disability, can no longer perform the essential functions of the job that he or she has held, a transfer to another job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker." Friedlander letter (citing S. Rep. No. 116, 101st Cong., 1st Sess., at 129–130 (1989)).

<sup>259</sup> Friedlander letter.

## 4 Title II Policy and Enforcement in Specific Contexts

As discussed in the previous chapter, DOJ develops title II policy primarily through its enforcement and technical assistance activities. The general provisions of title II, subtitle A, of the Americans with Disabilities Act are applied in many contexts. In the area of law enforcement, for example, compliance with title II affects how officers interact with the general public as well as how law enforcement agencies treat current and potential employees. Courts must accommodate those with disabilities who enter them, whether as officers of the court, witnesses, defendants or members of the observing public. Title II also influences the investigative procedures State licensing agencies use to certify new professionals. These and other activities are discussed below.

### Law Enforcement and Emergency Services

Law enforcement and emergency services typically are operated by State and local governments and therefore fall within the ambit of title II, subtitle A. Title II of the ADA prohibits discrimination against individuals with disabilities by public entities, including State and local governments, their agencies, offices, departments, and all other State or locally run or funded entities.<sup>1</sup> The statute 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 en-

tity, or be subjected to discrimination by any such entity.”<sup>2</sup> DOJ’s implementing regulations elaborate upon this nondiscrimination requirement, stating that a public entity may not “[a]fford a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”<sup>3</sup> DOJ further stated that “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 different, despite the existence of permissibly separate or different programs or activities.”<sup>4</sup>

Because they are both employers and service agencies, law enforcement and emergency services operations have two major concerns in complying with the ADA: employment policies and practices (including hiring and termination) and customer service. How these agencies carry out their responsibilities under title II depends on several factors, including staff knowledge of and training on the ADA, specifically title II; DOJ efforts to disseminate information about title II; access to DOJ information sources such as toll-free numbers, responses to information requests, and Internet access to information about DOJ and the ADA; and written guidance provided by DOJ to State and local government agencies.

Disability professionals informed the Commission of a number of instances where law enforce-

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<sup>1</sup> See 42 U.S.C. § 12131(1) (1994).

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<sup>2</sup> *Id.* § 12132 (1994).

<sup>3</sup> 28 C.F.R. § 35.130(b)(1)(ii) (1997).

<sup>4</sup> *Id.* § 35.130(b)(2) (1997).

ment agencies were not in compliance with title II. One disability professional indicated that her office has dealt with a "handful of cases regarding the lack of an interpreter for an individual who is deaf in an emergency room situation, in court, or in police custody."<sup>5</sup> Another wrote of a number of violations of title II by law enforcement agencies. The agency intervened in several instances to ensure that law enforcement agencies "had policies and procedures to provide sign language interpreters in questioning a suspect who uses sign language."<sup>6</sup> Her agency also was called upon to educate several law enforcement agencies about the right of persons with disabilities to enter restaurants with service dogs.<sup>7</sup> Another disability professional wrote about a law enforcement agency that failed to afford police protection to a residential care facility housing individuals with mental illness.<sup>8</sup> The Commission also received information that law enforcement agencies continue to use blanket requirements that exclude individuals with hearing or vision problems from law enforcement jobs. The California Department of Rehabilitation reported:

We receive many calls from individuals who are precluded from participation in the law enforcement selection process because of hearing and vision standards that seem arbitrary, at best. As far as we can ascertain, there are no discernible safety issues to justify the widespread use of these exclusions. While some of the criteria used in determining an individual's fitness for duty as a law enforcement officer makes sense and certainly takes into consideration safety issues, other criteria seem based on nothing more than stereotype and prejudice. Rather than blanket exemptions, a case by case determination of eligibility should be instituted for all law enforcement agencies.<sup>9</sup>

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<sup>5</sup> Amy Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), Apr. 30, 1998, attachment, p. 8 (hereafter cited as Maes letter).

<sup>6</sup> Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, OCRE, USCCR, Apr. 1, 1998, attachment, p. 5 (hereafter cited as Ringer letter).

<sup>7</sup> *Ibid.*

<sup>8</sup> Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 6, 1998, attachment, p. 4.

<sup>9</sup> Michelle Martin, Staff Services Assistant, Department of Rehabilitation, State of California Health and Welfare

## Law Enforcement

### *Discrimination by Law Enforcement Personnel*

DOJ has produced a significant amount of technical assistance materials on discrimination by law enforcement personnel but has not litigated many title II cases in this area. However, a review of the caselaw on title II and law enforcement agencies reveals that DOJ has been involved either as an *amicus curiae* or as a plaintiff in cases dealing with crucial law enforcement issues such as effective communication and accessibility, particularly in the context of arrest and transport to jail.

One case that illustrates problems in effective communication between law enforcement officials and individuals with disabilities involved the arrest of a deaf man in Maryland. In the case of *Rosen v. Montgomery County, Maryland*,<sup>10</sup> county police arrested a deaf man for drunk driving. He alleged in his ADA claim that he was unable to communicate effectively at the time of his arrest because the police officers did not provide him with a qualified sign language interpreter.<sup>11</sup> In 1997, the Fourth Circuit Court of Appeals upheld the lower court's finding that Rosen's claims under the ADA were not viable. The court, referring to the language of the statute, found first that:

calling a drunk driving arrest a "program or activity" of the County, the "essential eligibility requirements" of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent.<sup>12</sup>

Moreover, the court stated that:

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Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, p. 4 (hereafter cited as Martin letter).

<sup>10</sup> 151 F.3d 154 (4th Cir. 1997).

<sup>11</sup> *Id.* at 156.

<sup>12</sup> *Id.* at 157 (citing *Gorman v. Barch*, 925 F. Supp. 653, 655 (W.D.Mo. 1996)). In *Gorman*, the court stated: "It strains the statute to talk about the Plaintiffs' 'eligibility' to be arrested and taken to jail or to participate in being arrested. . . ." 925 F.Supp. at 655; *cf.* *Torcasio v. Murray*, 57 F. 3d 1340, 1347 (4th Cir. 1995) (the "terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will."), *cert. denied subnom.*, *Torcasio v. Angelone*, 516 U.S. 1071 (1996).

Rosen was in no way "denied the benefits of" his arrest. As far as the police officers were concerned, Rosen adequately participated in the various tests for intoxication, and the officers obtained the information they needed to complete the booking process. Rosen was simply not "discriminated against" just because he could not follow everything the officers were telling him.<sup>13</sup>

The *Rosen* case is instructive because it shows how court rulings have helped to shape standards and requirements for State and local agencies' responsibilities under title II on specific issues. The *Rosen* court noted, for example, that:

If we assume that the police were required to provide auxiliary aids at some point in the process, that point certainly cannot be placed before the arrival at the stationhouse. The police do not have to get an interpreter before they can stop and shackle a fleeing bank robber, and they do not have to do so to stop a suspected drunk driver, conduct a field sobriety test, and make an arrest.<sup>14</sup>

This observation makes logical sense and provides a specific answer to a question not addressed in title II or its regulations.

### Title II Litigation

A review of caselaw relating to charges of discrimination against law enforcement agencies shows that although DOJ has submitted *amicus* briefs and has joined in existing litigation, it has not initiated litigation against a law enforcement agency under title II. However, judicial decisions are playing a key role in shaping title II law. For example, several courts have confronted the issue of whether the arrest and custody of people with disabilities can be construed as a "benefit, service, program, or activity" as these terms were envisioned by Congress in drafting title II. If so, some courts have reasoned, then people with disabilities are entitled to accommodation by State and local law enforcement agencies during the arrest process.

<sup>13</sup> *Rosen*, 151 F. 3d at 158.

<sup>14</sup> *Id.* The court stated: "Rosen does not assert that better communication would have changed events one iota, and, in the end, he is forced to fall back on his claim that he was 'humiliated and embarrassed.' But these are emotions experienced by almost every person stopped and arrested for drunk driving. . .we cannot find an injury that would suffice to invoke the ADA's protections." *Id.*

For example, in *Gorman v. Barch*,<sup>15</sup> a paraplegic who uses a wheelchair claimed that after he was arrested outside a Kansas City, Missouri, bar, he was not provided with suitable transportation for someone with mobility impairments. He had been taken from his wheelchair and tied to a mesh panel behind the bench on which he was placed, and fell and was injured during the ride to the police station. In this case, the plaintiff relied on the nondiscrimination provision of title II, which states: "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."<sup>16</sup> At trial, the court found, like the Fourth Circuit in *Rosen*, that transporting validly arrested individuals did not constitute a program or activity under title II as it was envisioned by Congress.<sup>17</sup> The court observed:

to be protected [under title II], Plaintiff had to be a "qualified individual with a disability," not simply a person with a disability. The term was specifically defined by Congress to describe a person who meets eligibility requirements for the receipt of services or participation in programs. It strains the statute to talk about Plaintiff's "eligibility" to be arrested and taken to jail or to "participate" in being arrested. . .had Plaintiff been arrested *because* he was handicapped, his arguments would more clearly satisfy the statutory requirements. . .a person who has been arrested "is not normally thought of as one who would have occasion 'to. . .meet the essential eligibility requirements' for receipt of or participation in the services, programs or activities of a public entity. The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind [criminal suspects] who are being held against their will." . . .these terms are ill-fitting, at best, in the context of arrested

<sup>15</sup> 925 F. Supp. 653, 654 (W.D. Mo. 1996), *appeal dismissed without prejudice*, 23 F. 3d 1126 (8th Cir. 1997). See also *Torcasio v. Murray*, 57 F. 3d 1340, 1347 (4th Cir. 1995) ("The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the State; they do not bring to mind prisoners who are being held against their will."), *cert. denied*, 516 U.S. 1071, 133 L. Ed. 2d 724, 116 S. Ct. 772 (1996).

<sup>16</sup> 42 U.S.C. § 12132 (1994).

<sup>17</sup> 925 F. Supp. at 658.

individuals, leading to the further conclusion that the ADA does not apply to the case at bar.<sup>18</sup>

*Gorman* and *Rosen* take the position that being arrested and taken into custody are not services, programs, or activities within the meaning of title II. However, in addressing one of the plaintiff's arguments, the *Gorman* court cited a DOJ guideline published in 1980 which stated that when arresting a deaf or hearing-impaired person:

the arresting officer's *Miranda* warning should be communicated to the arrestee on a printed form. . . where [there] is no qualified interpreter immediately available and communication is otherwise inadequate. The form should also advise the arrestee that the law enforcement agency has an obligation under Federal law to offer an interpreter to the arrestee without cost and that the agency will defer interrogation pending the arrival of an interpreter.<sup>19</sup>

DOJ, in its *amicus* brief in the *Gorman* case,<sup>20</sup> argued that: (1) title II's broad application is sufficient in itself to encompass arrests by State and local law enforcement officers; (2) the legislative history of title II and the preamble to DOJ's title II regulations specifically address arrests as one of the activities of public entities covered by title II; and (3) the legislative history and the preamble make clear that "Title II is intended to require police departments to make reasonable modifications to their policies, practices, and procedures, and to provide training to officers that will avoid discriminatory arrests of individuals with disabilities."<sup>21</sup> DOJ's brief was not sufficient to persuade the *Gorman* court, even though it appears that the brief displays a far better understanding of the purposes and goals of title II than the *Gorman* court's decision.<sup>22</sup>

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<sup>18</sup> *Id.* at 655-656 (emphasis added, citations omitted).

<sup>19</sup> *Id.* at 657 (citing 45 Fed. Reg. 37,620, 37,630 (1980) (DOJ final regulations under Rehabilitation Act)).

<sup>20</sup> See Memorandum of the United States as *Amicus Curiae*, *Gorman v. Bartch*, 925 F.Supp. 653 (W.D. Mo. 1996) (hereafter cited as DOJ *Amicus* Brief).

<sup>21</sup> *Id.* at 3, *Gorman*.

<sup>22</sup> DOJ also reminded the *Gorman* court that the preamble to its title II regulation states simply that "title II applies to anything a public entity does," *Id.* at 5 (citing 28 C.F.R. pt. 35, app. A § 35.102) (emphasis added).

In a more recent case involving the arrest of a person with a disability, the court came to the opposite conclusion. In *Hanson v. Sangamon County Sheriff's Department*, the plaintiff, a deaf man arrested for possession of illegal drugs, fared much better than the plaintiffs in *Rosen* and *Gorman*. The court addressed the issue of whether a county sheriff's department violated title II when it "failed to provide Plaintiff with any means with which to communicate with friends and/or relatives in order to post bond."<sup>23</sup> The court observed that:

In spite of his inability to use a conventional telephone and his requests for alternative assistance, the Sangamon County Sheriff's Department failed to provide Hanson with access to an interpreter, to a text telephone device ("TDD"), or to a TDD directory. Throughout the night, Hanson attempted to notify the officers of his need for alternative assistance in contacting friends and/or relatives, but it was to no avail.<sup>24</sup>

The court found further that the sheriff's office violated DOJ's regulations requiring communication for people with disabilities that is as effective as communication for those without disabilities.<sup>25</sup> In addition, the court found that the sheriff's office took no steps to provide auxiliary aids and other services such as TDDs and qualified interpreters.<sup>26</sup>

The issue of arrest and custody procedures involving people with disabilities appears to be a controversial one. Interestingly, the *Gorman* court attempted to evaluate carefully the meaning of such words as "program" and "activity," while the *Hanson* court simply took it for granted that such activities were included under the broad coverage of the statute with respect to the actions of public entities. Regardless, DOJ, like EEOC with controversial title I issues, has been consistent in defending its position on this issue. Based on this overview of DOJ's efforts relating to title II's effect on law enforcement activities, it appears that the *Gorman* case is perhaps the only case involving title II and law enforcement policies and procedures in which

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<sup>23</sup> *Hanson v. Sangamon County Sheriff's Department*, 991 F.Supp.1059, 1061 (C.D. Ill. 1998).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1063 (citing 28 C.F.R. § 35.160(a) (1997)).

<sup>26</sup> *Id.* (citing 28 C.F.R. § 35.160(b) (1997)).

DOJ has intervened or filed an *amicus* brief. Thus, this is an area where DOJ has done too little litigation. Nonetheless, to DOJ's credit, the *Gorman amicus curiae* brief displays a more thoughtful and deeper understanding of title II, as it relates to law enforcement, than the court reviewing the case.

### Settlement Agreements

DOJ has also successfully resolved law enforcement cases under title II by negotiating formal settlements. In a 1995 settlement agreement, the Alexandria, Louisiana, Police Department agreed to adopt a policy to provide appropriate auxiliary aids to persons with hearing impairments to provide effective communication during arrest and other situations.<sup>27</sup> Similarly, a settlement agreement reached in 1996 with the City of Ferris, Texas, provided for effective communication in all interactions with the police department.<sup>28</sup> In another complaint about effective communication, DOJ negotiated a settlement agreement with the Wisconsin State Patrol, which allegedly had handled a traffic stop of a deaf individual improperly. The settlement agreement required the State patrol to develop policy and procedures for effective communication, to train its officers on the policy and procedures, and to publicize the new policy.<sup>29</sup>

### Technical Assistance Materials

DOJ is the Federal agency designated to enforce the ADA in the context of law enforcement, and DOJ has sought to improve understanding of title II as it relates to law enforcement agencies through development and dissemination of technical assistance materials. The types of ADA violations in the law enforcement context addressed by DRS vary. For example, although DRS does not get many complaints about accessibility issues in the context of law enforcement, complaints about lack of effective communica-

tion during arrests are among the most frequent law enforcement complaints that DRS receives. DRS and its grantees have produced much technical assistance to try to educate law enforcement personnel and eliminate such violations.<sup>30</sup>

DOJ's most comprehensive technical assistance document specifically on law enforcement is 13 pages long and is presented in a question and answer format. It is written in direct, clear language that conveys effectively the terms it defines and the issues it addresses. The document begins by asking the question, "What is the ADA?" and proceeds to discuss how the law affects "virtually everything that officers and deputies do," including: receiving citizen complaints; interrogating witnesses; arresting, booking, and holding suspects; operating telephone ("911") emergency centers; providing emergency medical services; and enforcing laws.<sup>31</sup>

This technical assistance document defines the term "disability" under the ADA, and explains that someone stigmatized because of their association with a person who has a disability is also protected by the ADA. The document uses as an example a woman who calls for help from emergency services because she believes someone may have broken into her home. However, the police discover that her residence is on a list of addresses known to be the homes of people with AIDS. The woman's name is on the list because her son has AIDS. The police refuse to respond to the call because they fear becoming infected with the virus.<sup>32</sup> This is an excellent example of how the ADA can play a role in the everyday work of police officers and why it is important for law enforcement professionals to understand the law fully, their rights and responsibilities under it, and how the law is designed to change the interaction between people with disabilities and those without.

This technical assistance document also addresses common problems faced by law enforcement officers in their daily work, such as instances in which they could misconstrue the actions of individuals. The document includes the

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<sup>27</sup> U.S. Department of Justice (DOJ), Civil Rights Division (CRD), Disability Rights Section (DRS), *Enforcing the ADA: A Status Report Update from the Department of Justice*, January-March 1995, p. 5.

<sup>28</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice*, October-December 1996, p. 5.

<sup>29</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice*, April-June 1997, pp. 6-7.

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<sup>30</sup> Philip Breen, Special Legal Counsel, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p. 5.

<sup>31</sup> DOJ/CRD, "Commonly Asked Questions About the ADA and Law Enforcement," p. 1.

<sup>32</sup> *Ibid.*, p. 2.

following examples: (1) a mobility impaired driver who reaches behind her seat to get her assistive device for walking when an officer asks her to step out of the car, which leads the officer to believe she may be reaching for a weapon; (2) individuals who are deaf, are hard of hearing, or have speech disabilities, whom officers erroneously believe are being uncooperative; (3) a deaf individual who continues to run when an officer yells "freeze"; and (4) a driver with a neurological difficulty that is causing him to slur his speech or stagger when he walks is assumed to be drunk by a police officer. The document provides specific means for ensuring that these incidents are avoided, such as the use of hand signals as an effective way to get the attention of a deaf individual.<sup>33</sup>

The document provides other valuable information for law enforcement professionals such as what procedures to follow in arresting and transporting an individual who uses a wheelchair, steps officers can take to communicate more effectively with someone who is blind or visually impaired, and instructions for providing emergency medical services to people infected with HIV. The document also describes law enforcement officers' duties with respect to knowing when a sign language interpreter is required for a deaf person, how to find sign language interpreters, what a TDD is and how to use one, and when an officer would use assistive listening as a communication aid.<sup>34</sup>

Other issues addressed include architectural and program accessibility.<sup>35</sup> This section of the document provides information on the extent to which police stations, jails, and holding cells must be accessible to persons with mobility disabilities. The document notes that for public entities that cannot afford to make all of the alterations needed to make public buildings fully accessible, "undue burden" is an acceptable defense. However, the document shows through examples that, even for towns or cities with limited resources, it is possible to comply with title II by being creative. For instance, the document gives the example of a small town police station

that is inaccessible to individuals with mobility problems. Since the police department cannot afford to alter all areas of the station because of insufficient funds, to comply with title II it alters its lobby and restrooms so that areas of public use are accessible. In addition, it takes measures to ensure that some of its daily functions, such as witness and victim interviews with individuals who have disabilities, are done at other accessible buildings.<sup>36</sup>

The technical assistance document on title II and law enforcement also discusses the modifications of law enforcement policies, practices, and procedures required by the statute. It provides examples such as a department modifying a rule that prisoners cannot eat in their cells to accommodate a diabetic who needs access to carbohydrates and sugar to keep blood sugar at an appropriate level, or instead of handcuffing arrestees behind their backs, handcuffing them in front so they can still write or sign.<sup>37</sup>

In sum, DOJ has addressed a number of important issues related to law enforcement in its regulations, *amicus* briefs, and technical assistance materials. In the technical assistance documents it has prepared to date, DOJ has provided useful information that can benefit and expand the knowledge of DOJ legal and investigative staff, and State and local government officials, including police forces, schools, and other agencies. However, whether or not these documents are adequate to address real problems existing between law enforcement officers and people with disabilities in the communities they serve remains unclear. Comprehensive policy guidance on specific title II issues (similar to EEOC's title I guidance) would be an effective means of conveying important information relating to title II to DOJ investigative staff, State and local governments and their contractors, and the general public.

#### ***Discrimination Against Law Enforcement Personnel in Employment***

For law enforcement professionals with disabilities, title II of the ADA has meant new protection in their jobs and greater flexibility to do their jobs. DOJ has recognized the importance of

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<sup>33</sup> *Ibid.*, p. 3.

<sup>34</sup> *Ibid.*, pp. 6-9.

<sup>35</sup> *Ibid.*

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<sup>36</sup> *Ibid.*, p. 10.

<sup>37</sup> *Ibid.*, pp. 11-12.

ensuring that law enforcement personnel and those seeking employment with law enforcement agencies have access to information about how title II of the ADA can affect them, their coworkers, and their supervisors. As with other areas of title II implementation and enforcement, DOJ has addressed this issue in litigation, *amicus curiae*, investigation, letters of finding, and technical assistance materials.

### Title II Litigation

DOJ recently won a title II case against the City of Denver in which a former police officer was awarded \$300,000 in damages.<sup>38</sup> The police department was alleged to have discriminated against a police officer who suffered from a spinal disc injury. The officer claimed that he did not receive reasonable accommodation for his disability and was later fired. He argued that the city violated his rights under title II of the ADA by not providing a reassignment or transfer. According to the *Disability Compliance Bulletin*, DOJ originally sent the mayor of a 6-page letter recommending that the city enter into settlement negotiations because its "failure to reassign [the officer] as a reasonable accommodation. . . and its termination of him based on his disability constitute violations of title II of the ADA."<sup>39</sup>

Despite DOJ's request, the case went to trial. DOJ first filed an *amicus curiae* brief on behalf of the police officer. It later intervened in the case as a colitigant.<sup>40</sup> At trial, the city argued that for the police officer to be a qualified individual with a disability under the ADA, "he should be capable of performing the essential functions of the job of police person *with an accommodation*, to that disability."<sup>41</sup> DOJ argued that, under the ADA:

when an accommodation in an employee's present position is not possible, reassignment to another position must be considered. . . the fact that the complainant may not meet the essential functions of a patrol officer's job does not mean that the City's obligations under the ADA have been met. The statutory obligation to "reassign" would have no meaning if it only applied to those individuals who met the essential functions of the job they were occupying.<sup>42</sup>

The judge in this case decided in favor of the plaintiff, ruling that the city could not force the injured police officer to take disability retirement. The court held that the City and County of Denver's policy or practice barring the reassignment of police officers with disabilities to vacant positions for which they are qualified discriminates against qualified individuals with disabilities. Under the ADA, the city is required to assign the police officer to a different job as a reasonable accommodation, provided that this would not be an undue hardship.<sup>43</sup>

### Technical Assistance Materials

DOJ's technical assistance materials address the topic of the ADA and employment of law enforcement personnel. For example, the *Title II Technical Assistance Manual* states that "title II prohibits public entities, regardless of size of workforce, from discriminating in their employment practices against qualified individuals with disabilities."<sup>44</sup> This includes all aspects of employment, including recruitment, hiring, promotion, demotion, layoff, compensation, fringe benefits, training, etc. The manual further states that title II of the ADA adopts the employment standards of title I of the ADA.<sup>45</sup>

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<sup>38</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice*, October-December 1996, p. 2

<sup>39</sup> "City Must Reassign Injured Officer to Vacant Position, Jury Says," *Disability Compliance Bulletin (LRP)*, vol. 8, iss. 13 (Dec. 19, 1996), p. 4 (hereafter cited as "City Must Reassign Injured Officer").

<sup>40</sup> See *United States v. City and County of Denver*, 927 F. Supp. 1396, 1397 (D. Colo. 1996) (U.S. authorized to initiate enforcement action against employer under ADA after individual filed independent action).

<sup>41</sup> "City Must Reassign Injured Officer," p. 4.

<sup>42</sup> *Ibid.*, pp. 4-5.

<sup>43</sup> *United States v. City and County of Denver*, 943 F.Supp. 1304, 1310-14 (D.Colo. 1996) (granting summary judgment in part, denying summary judgment in part), *injunction denied sub nom.*, 955 F. Supp. 110 (1997) (injunctive relief denied because court had not yet identified class of individuals affected by discriminatory policy), *request for evidentiary hearing denied*, 968 F. Supp. 549 (1997) (backpay with prejudgment interest and front pay for 2-year period awarded in lieu of reinstatement).

<sup>44</sup> DOJ, CRD, DRS, *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993), § II-4.1000 (hereafter cited as DOJ, *Title II Technical Assistance Manual*).

<sup>45</sup> *Id.* § II-4.3100.



DOJ also has prepared a technical assistance document on the issue of public employment that includes hiring practices for law enforcement personnel and the effects of title II. It is written in question and answer format and provides information on such issues as who is a qualified individual with a disability, the rationale behind the ADA prohibition against medical examinations before a conditional offer of employment, and illegal drug use.<sup>46</sup>

A few questions deal specifically with law enforcement hiring. For example, the document explains that under the ADA, police departments are able to require job applicants to obtain medical certifications to perform physical fitness and agility exams. The document explains that, as long as the medical certification is limited only to indicating whether an individual can safely perform the job and does not contain any medical information or explanations, it is permissible under the ADA.<sup>47</sup>

In addition to this document, DOJ has published and disseminated information in the form of brochures, booklets, videotapes, and trainers' guides. Some of these documents are intended for police departments in their hiring of law enforcement personnel.<sup>48</sup> Others are designed specifically to inform police officers about recognizing disabilities and the appropriate response when encountering individuals with disabilities in law enforcement situations.<sup>49</sup>

### Investigations and Policy Letters

DOJ also has investigated complaints about employment of law enforcement personnel. One investigation involved a police officer who injured

his back, was on sick leave, and subsequently was removed from his post as a patrol officer. DOJ's response to the complainant was that the employer, a county sheriff's office, was not in violation of the ADA. DOJ's letter explains that the police officer's injury was a temporary impairment from which the officer had recovered and thus no longer presented an impairment of a major life activity. For this reason, the complainant did not have a disability under the ADA.<sup>50</sup>

In addition, DOJ has addressed the issue of law enforcement personnel in its policy letters. For example, in response to a letter from Sen. Tom Harkin requesting clarification on several issues, DOJ states:

Under title II of the ADA, a State or local government must operate its programs and activities so that, when viewed in their entirety, such programs and activities are readily accessible to and usable by individuals with disabilities. The concept of "program access" is discussed in sections 35.149 and 35.150 of this Department's title II regulation, 28 C.F.R. Part 35, and on pages 19-22 of the title II Technical Assistance Manual (copies enclosed). As stated in section 35.150 (a) (3) of the title II regulation, a title II entity is not required to take any actions that it can demonstrate would result in a fundamental alteration of its services, programs, or activities, or in undue financial and administrative burdens.<sup>51</sup>

In this letter, DOJ also addresses the specific issue of using basement space for meetings and training of police department employees. DOJ states that the employment provisions of title II of the ADA apply to this issue and that such provisions defer to the title I regulations published by the Equal Employment Opportunity Commission. DOJ notes that in this case the public entity would be required to provide a reasonable accommodation to qualified individuals with disabilities, which is to be decided on a case-by-case basis. One reasonable accommodation would be to relocate the training class to a

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<sup>46</sup> See DOJ, CRD, DRS, "Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers," Mar. 25, 1997 (hereafter cited as DOJ/CRD, "Questions and Answers: The ADA and Hiring Police Officers").

<sup>47</sup> *Ibid.*, p. 2.

<sup>48</sup> *Ibid.*

<sup>49</sup> See DOJ/CRD, "Commonly Asked Questions About the ADA and Law Enforcement," DOJ/CRD, "Questions and Answers: ADA and Hiring Police Officers; Police Executive Research Forum, *The Police Response to People with Mental Illnesses: Including Information on the Americans with Disabilities Act Requirements and Community Policing Approaches*, prepared under a grant from the U.S. Department of Justice (Washington, DC: 1997) (hereafter cited as Police Executive Research Forum, *The Police Response to People with Mental Illnesses*).

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<sup>50</sup> Steward B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, letter to complainant, July 28, 1993.

<sup>51</sup> W. Lee Rawls, Assistant Attorney General, DOJ, letter to Tom Harkin, Chairman, Subcommittee on Disability Policy, Committee on Labor and Human Resources, U.S. Senate, Feb. 17, 1993, p. 1 (hereafter cited as Rawls letter).

location that is accessible to employees with mobility impairments.<sup>52</sup>

In *Valle v. City of Chicago* (1997),<sup>53</sup> the court was consistent with DOJ's determination that the EEOC title I regulations be followed in cases involving public employees. In this instance, the court found that the plaintiff's case demonstrated sufficient merit to proceed to trial. Salvador Valle, a candidate for the position of police officer, argued that his condition, rhabdomyolysis, in which heavy physical exertion causes a breakdown of muscle tissue, substantially limited him in the major life activity of working. Valle was hired as a probationary police officer but was terminated after failing to complete the threshold requirement that officers be able to run 1.5 miles within a specified time.<sup>54</sup> In denying the employer's motion to dismiss the case, the court relied on EEOC's regulations to determine that the employee's impairment substantially limited him in the major life activity of working and that the city's running requirement was not an "essential function" of the job for purposes of determining whether the plaintiff was a "qualified individual with a disability." The court concluded that having adequately stated a claim under the ADA, the issue was whether the specific running requirements of the training program were job related and consistent with business necessity.<sup>55</sup>

## Emergency Services

### Discrimination by Emergency Services Personnel

#### Title II Litigation

Title II of the ADA also applies to emergency services, where courts have generally supported the plaintiffs. DOJ has had relatively little involvement in litigation in this area. As discussed in the previous chapter, DOJ has participated in cases involving equally effective communication in emergency services. For example, in *The Civic Association of the Deaf of New York City, Inc. v. Giuliani*, individuals with hearing impairments alleged that a plan to replace city alarm boxes with a telephone emergency reporting system

that was not accessible to the hearing impaired violated title II of the ADA.<sup>56</sup> The district court agreed that the city was in violation of the ADA, but did not require the city to restore boxes that had already been removed as part of a pilot program in those areas where accessible reporting alternatives were available.<sup>57</sup>

Similarly, a group of citizens alleged in *Ferguson v. City of Phoenix* that the city's 911 system violated the ADA because it required callers to activate an audible tone to notify the 911 operator that the call was a TDD call and should be transferred to the system's TDD device.<sup>58</sup> However, not all TDDs have the ability to generate such a tone. The court denied the city's request for summary judgment stating that the city's 911 system denied access to individuals whose TDDs were incompatible with the system.<sup>59</sup> In this case, DOJ had filed an *amicus* brief in the District Court requesting mandatory changes to the city's 911 system to ensure effective communication. DOJ subsequently filed an *amicus* brief in the Court of Appeals arguing that compensatory damages may be awarded under title II without showing that the city intentionally discriminated against TDD users.<sup>60</sup> In 1997, DOJ also intervened in a lawsuit against the District of Columbia which alleged that the District violated title II by failing to respond to 911 calls made by TDD users.<sup>61</sup>

<sup>52</sup> *Ibid.*, p. 2.

<sup>53</sup> 982 F. Supp. 560 (N.D., Ill. 1997).

<sup>54</sup> *Id.* at 562.

<sup>55</sup> *Id.* at 563-67 (denying motion to dismiss).

<sup>56</sup> 915 F. Supp. 622 (S.D.N.Y. 1996).

<sup>57</sup> *Id.* at 639. In a subsequent proceeding, the city was enjoined to convert all one-button emergency alarm boxes to two-button boxes that were accessible to hearing impaired individuals, but the court again refused to enjoin the city to restore all alarm boxes that were removed. 970 F. Supp. 352 (S.D. N.Y. 1997).

<sup>58</sup> 931 F. Supp. 688, 689-93 (D. Ariz. 1996).

<sup>59</sup> *Id.* at 694, 699.

<sup>60</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice*, January-March 1997, p. 5.

<sup>61</sup> *Ibid.*, p. 3. In granting DOJ's motion for summary judgment, the court held that the District of Columbia violated title II of the ADA by failing to provide emergency 911 services to callers using TDDs. *Miller v. District of Columbia*, 983 F. Supp. 205, 205 (D.D.C. 1997). John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 24, 1998, Comments of the U.S. Department of Justice, p. 6 (hereafter cited as DOJ Comments, July 24, 1998).

### Technical Assistance Materials

DOJ has prepared one technical assistance document on the subject of emergency services. In its document on telephone emergency services, DOJ states that the ADA requires that telephone emergency services be directly accessible to individuals who use telecommunications devices for the deaf (TDDs) or who communicate via computer modem. Direct access is defined as the ability to "directly receive calls from TDD and computer modem users without relying on State telephone relay services or third party services."<sup>62</sup> In this document, DOJ also describes what is meant by TDD, computer modem communication, and telephone relay services. In addition, this technical assistance document notes that public safety agencies are required to provide direct access, through a standard seven-digit telephone number, to their emergency services.<sup>63</sup>

The technical assistance document on the ADA and law enforcement also addresses some issues related to emergency services. The document states that police officers are required to ensure effective communication; however, the use of communication aids depends on the nature of the communication required and the needs of the individual requesting such aids. For example, the ADA requires that consideration should be given to the expressed choice of the individual with the disability when determining the purpose for which the communication aid is to be used. According to the technical assistance document, if the individual with a hearing impairment expressly requests that a particular family member not be asked to interpret (a child, for example), police officers should defer to that request. However, a family member may interpret for a deaf or hearing-impaired person, "when the safety or welfare of the public or the person with the disability is of paramount importance."<sup>64</sup>

The technical assistance document on the ADA and law enforcement also notes that in providing emergency services, persons with

HIV/AIDS should be "treated just like any other person requiring medical attention."<sup>65</sup> The document notes further that "emergency medical service providers are required routinely to treat *all* persons as if they are infectious for HIV, Hepatitis B, or other bloodborne pathogens, by practicing universal precautions," since many persons may not know they are infected and because individuals are not required to disclose such information.<sup>66</sup>

### Settlement Agreements

DOJ also has addressed emergency treatment of persons who have or may have HIV/AIDS by negotiating a settlement agreement in at least one case. In 1994, DOJ resolved a complaint against the City of Philadelphia alleging that emergency medical technicians (EMTs) had refused to assist an individual with HIV. In the settlement agreement, the city agreed to provide sensitivity training to all EMTs and firefighters. The training also covered precautions to prevent the transmission of HIV/AIDS. In addition, the city was required to pay \$10,000 in compensatory damages and to provide a written apology to the individual to whom services were denied.<sup>67</sup>

### Policy Letters

DOJ has addressed the issue of emergency services, primarily 911 services and telecommunications devices for the deaf, in policy letters. In a letter to the Rhode Island Governor's Commission on the Handicapped, the Chief of DOJ's Public Access Section stated that an enhanced 911 system may be used by a State as long as it meets three requirements. First, nonvoice calls must be processed as effectively as voice calls are processed. Second, the system should respond to nonvoice callers as quickly as it does to voice callers who dial the local seven-digit number. Third, nonvoice callers must have direct access to services provided by the State or local government that are not connected to the enhanced system.<sup>68</sup> DOJ has provided extensive informa-

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<sup>62</sup> DOJ, CRD, DRS, "Commonly Asked Questions Regarding Telephone Emergency Services," December 1994, p. 2 (hereafter cited as DOJ/CRD, "Questions Regarding Telephone Emergency Services.")

<sup>63</sup> *Ibid.*, p. 3.

<sup>64</sup> DOJ/CRD, "Commonly Asked Questions About the ADA and Law Enforcement," p. 6.

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<sup>65</sup> *Ibid.*, p. 5.

<sup>66</sup> *Ibid.*, p. 5.

<sup>67</sup> DOJ, *Enforcing the ADA: A Status Report from the Department of Justice*, April 1994.

<sup>68</sup> John L. Wodatch, Chief, Public Access Section, DOJ, letter to Nancy Husted-Jensen, Chairperson and State ADA

tion on emergency telephone systems in other policy letters as well.<sup>69</sup> For example, in a letter to Senator Hutchinson, DOJ stated that public facilities, such as libraries, are not required to provide a public TDD unless the entity provides four or more public pay phones.<sup>70</sup>

Concerning tornado warning signals, DOJ stated in a policy letter that if tornado warnings are provided by State and local governments, then those systems are covered programs under title II of the ADA.<sup>71</sup> DOJ stated that the correspondent's suggestion of installing a flashing light as a tornado warning is one possible way of effectively communicating warning signals. DOJ noted, however, that "[t]he ADA does not dictate use of any particular method of complying with title II's effective communication requirement, as long as the method chosen ensures effective communication with persons with disabilities."<sup>72</sup>

In another letter, DOJ addressed the issue of shelter and mass care during and after a disaster. DOJ's letter to the Federal Emergency Management Agency (FEMA) noted that local Emergency Management Agencies receiving financial assistance through FEMA are subject to title II of the ADA as are private organizations working with them, such as the American Red Cross. The letter states that "[t]he focus of Title II of the ADA and its implementing regulation is to ensure that, to the extent that a State or local governmental entity provides programs, services, and activities to

the public, they are readily accessible to and usable by individuals with disabilities."<sup>73</sup>

### **Discrimination Against Emergency Services Personnel in Employment**

#### **Title II Litigation**

Court decisions on employment discrimination against emergency services personnel favor emergency service employers. DOJ has not intervened in these cases or provided much guidance in this area.<sup>74</sup> For example, in the case of *Serrano v. County of Arlington*,<sup>75</sup> the applicant for a firefighter position had a history of back injuries and was limited in lifting heavy objects, yet had no apparent limitations in his day-to-day work. Although the limit in carrying objects may have prevented him from performing an important part of the duties of a firefighter, the plaintiff argued that he was considered to be incapable of performing any job requiring heavy labor.<sup>76</sup> However, according to the court:

The County of Arlington did not regard plaintiff as disabled within the meaning of the ADA merely because it considered him as unsuited for the particular demands of a firefighter. Moreover, plaintiff is unable to safely perform the essential functions of a firefighter. Accordingly, the plaintiff cannot establish a prima facie case under the ADA.<sup>77</sup>

In *Bridges v. City of Bossier*, the plaintiff argued that he was discriminated against because of his

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Coordinator, Governor's Commission on the Handicapped, State of Rhode Island, May 17, 1993, reprinted in 5 Nat'l Disability Law Reporter ¶ 222.

<sup>69</sup> See John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Barbara A. Mikulski, U.S. Senate, Nov. 29, 1993; Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, letter to James D. Goerke, Deputy Director, Advisory Commission on State Emergency Communications, Austin, TX, Feb. 9, 1994 (DJ# 204-012-00035); Stewart B. Oneglia, Chief, Coordination and Review Section, CRD, DOJ, letter to Robert J. Moldashel, President, Lakeland Communications, Inc., June 18, 1992 (DJ# 182-06-00049); John R. Dunne, Assistant Attorney General, CRD, DOJ, letter to Carl Levin, U.S. Senate, Apr. 20, 1992 (DJ# 192-180-04656).

<sup>70</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Kay Bailey Hutchinson, U.S. Senate, Dec. 28, 1996. See 10 NDLR ¶ 200.

<sup>71</sup> John L. Wodatch, Chief, DRS, CRD, DOJ, letter to correspondent, Sept. 17, 1996, reprinted in 8 NDLR ¶ 394.

<sup>72</sup> *Ibid.*

<sup>73</sup> Merrily A. Friedlander, Acting Chief, Coordination and Review Section, CRD, DOJ, letter to Adell Betts, Director, Office of Equal Rights, Federal Emergency Management Agency (DJ# 204-012-00058) (hereafter cited as Friedlander letter).

<sup>74</sup> One exception was a complaint filed with DOJ alleging that the Metro Government of Nashville and Davidson County had denied an individual, who is deaf in one ear, a position as a paramedic based on a policy that categorically excluded individuals with certain medical conditions, regardless of their abilities to perform job functions. On July 9, 1997, the district court entered a consent order in the case, *United States v. Metro Government of Nashville and Davidson County*, No. 3-97-0671 (M.D. Tenn.). Under the consent order, Metro hired the individual as a paramedic, will pay him approximately \$54,000 in backpay and compensatory damages, and establishes a hiring policy that will ensure that individuals are evaluated based on their abilities without applying categorical standards based on medical conditions. DOJ Comments, July 24, 1998, p. 6.

<sup>75</sup> 986 F.Supp. 992 (E.D. Va. 1997).

<sup>76</sup> *Id.* at 993-97.

<sup>77</sup> *Id.* at 1001.

disability, Factor IX deficiency (a form of hemophilia), when the city rejected his application for employment as a firefighter.<sup>78</sup> The city stated that, although it refused to hire the plaintiff because of his condition, it did not regard him as having a disability. The court upheld the district court's decision in favor of the city, stating that the plaintiff did not show that he had a disability under the ADA.<sup>79</sup> In this case, DOJ filed an *amicus* brief arguing that the city had regarded the plaintiff as unable to perform an entire class of jobs, therefore violating the ADA by assuming that the plaintiff was substantially limited in his ability to work.<sup>80</sup>

A third example is the case of *Smith v. City of Des Moines*.<sup>81</sup> The city implemented a new rule that required firefighters holding the rank of captain or below to pass a spirometry test of lung capacity to determine if firefighters could wear a self-contained breathing apparatus (SCBA). Smith, a firefighter for 33 years, passed the test in 3 out of 4 years. The next year, he narrowly passed the test and was referred to a specialist for further testing. Although he passed later spirometry tests, he scored low on the stress test. Thus, Smith was placed on sick leave and referred to other physicians. Because he passed the spirometry tests, four physicians concluded that he was capable of working as a firefighter. However, the fire department required Smith to remain on sick leave until April of that year when he would be 55 years of age and would be eligible for retirement. After Smith failed to qualify for disability retirement and did not file for pension benefits, the city fired him for failure to meet the physical fitness standards of the department. Smith brought suit claiming that his termination violated the ADA and the Age Discrimination in Employment Act.<sup>82</sup> The court determined that:

fitness and the ability to perform while wearing a SCBA are undoubtedly job-related and necessary requirements for firefighters. The dispute in this case is

not whether firefighters are physically fit, but how fitness can be most appropriately measured and how the city may distinguish those firefighters who are probably capable of performing the job from those firefighters who are probably not capable. The city has not proceeded arbitrarily, but rather has carefully developed a standard based upon the available medical literature using the best test available for measuring fitness, the stress test. . . . We conclude that Smith has not met his burden of presenting a triable issue on the business necessity defense.<sup>83</sup>

In another case, *Gilday v. Mecosta County*,<sup>84</sup> an emergency medical technician, was allegedly terminated for rude conduct. He presented evidence that under his condition, noninsulin-dependent diabetes mellitus, stress caused his blood sugar to fluctuate widely, causing him to become frustrated and irritable. The plaintiff argued that a reasonable accommodation to his disability would have been to transfer him to a station that was less busy than the one to which he was assigned, where he would have been better able to follow his treatment plan of oral medication, monitoring his blood sugar levels, and following a strict diet and exercise regimen and thus avoid the behavior for which he was terminated.<sup>85</sup> The district court held that the plaintiff was not disabled because his diabetes, when properly treated, did not substantially limit his ability to work or any other major life activity.

The Sixth Circuit reversed this ruling, holding that, in accordance with EEOC's interpretive guidelines, "the determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines or assistive or prosthetic devices."<sup>86</sup> The court then determined that the plaintiff had presented sufficient evidence to create material issues of fact as to whether his uncontrolled diabetes substantially limited his ability to work and thus constituted a disability. The court, therefore, reversed

<sup>78</sup> 92 F. 3d 329, 331 (5th Cir. 1996).

<sup>79</sup> *Id.* at 332-36.

<sup>80</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report from the Department of Justice*, October 1995-March 1996.

<sup>81</sup> 99 F.3d 1466 (8th Cir. 1996).

<sup>82</sup> *Id.* at 1467-68.

<sup>83</sup> *Id.* at 1472-73.

<sup>84</sup> 1997 U.S. App. LEXIS 33306 (6th Cir. Sept. 2, 1997).

<sup>85</sup> *Id.* at \*2-\*3.

<sup>86</sup> *Id.* at \*6-\*7, \*15 (quoting 29 C.F.R., pt. 1630, app. A, § 1630.2(h)). The Court held that EEOC's interpretation was consistent with the text of the statute, the purpose of the ADA, and the legislative history of the ADA. *Id.* at \*9-\*14.

the district court's summary judgment for the employer.<sup>87</sup>

### Settlement Agreements

In 1995, DOJ was involved in a formal agreement to resolve two complaints against firefighters who were discharged for reasons related to HIV. One complainant was discharged from his position as a firefighter when officials learned he was HIV positive. The other complainant was discharged because of his association with the first complainant. In the settlement agreement, Marshall County, Mississippi, agreed to reinstate the firefighters and paid each \$1,000 in damages. The county also agreed to provide HIV/AIDS training to all firefighters, to issue a nondiscrimination policy, to ensure the two complainants were not harassed, and to adopt a grievance procedure.<sup>88</sup>

Also, on April 8, 1998, DOJ entered a settlement agreement with Prince George's County, Maryland, to provide applicants with disabilities an equal opportunity to volunteer as emergency medical technicians. The agreement resolved complaints filed with DOJ charging that the Prince George's County, Maryland Police and Fire Department violated the ADA by refusing to certify two qualified applicants with hearing impairments. Under the terms of the agreement, the county no longer will reject automatically volunteer fire fighter or volunteer rescue technician applicants solely on the basis of disability; will evaluate, on an individual basis, every applicant's ability to perform the essential functions of the position; will provide training to all personnel who participate in making volunteer application decisions and to medical personnel hired to evaluate applicants; and will make an offer of reevaluation of the complainants' application for active membership.<sup>89</sup>

### Summary

Overall, it appears that DOJ is adequately implementing and enforcing title II, subtitle A, of the ADA. DOJ has responded well to indi-

viduals' and communities' requests for clarification and information about the ADA regarding law enforcement personnel procedures and the treatment of individuals with disabilities by law enforcement officials. In its policy letters, DOJ has addressed competently court decisions and has produced additional material in regard to those judicial issues.

DOJ has issued technical assistance materials to law enforcement and emergency service organizations about the applicability of the ADA. These documents have the potential to provide a great deal of information and understanding about the ADA to a great many people. For example, in *The Americans with Disabilities Act Title II Technical Assistance Manual*, DOJ provides general information on the ADA and specific information on issues such as public employment, accessibility, and effective communication.

However, as the Federal agency designated to address ADA violations by State and local government entities, DOJ has conducted surprisingly little litigation in this area to establish binding legal precedent.<sup>90</sup> In addition, certain topics have not been sufficiently addressed by DOJ. One such issue is alcoholism among law enforcement personnel. Alcoholism is a disease covered under the ADA. Perhaps policy guidance by DOJ within the ambit of law enforcement and emergency service departments would distinguish alcoholism from current drug use, and better inform hiring and personnel policies and contribute to alleviation of discrimination against such employees. In addition, the issue of reasonable accommodation must be addressed. Public entities, even after the passage of the ADA, are not making much progress in adapting working conditions to those who have disabilities and are qualified to work. DOJ should develop and publish additional assistance for title II implementation which would promote better hiring policies

<sup>87</sup> *Id.* at \*16-20.

<sup>88</sup> DOJ, CRD, DRS, *Enforcing the ADA: A Status Report Update from the Department of Justice*, January-March 1995, p. 5.

<sup>89</sup> DOJ Comments, July 24, 1998, p. 6.

<sup>90</sup> According to DOJ, "DRS believes [litigation] is an essential tool for credible and efficient enforcement to prevent discrimination against persons with disabilities." DOJ Comments, July 24, 1998, p. 7. However, DOJ is required, under the title II regulation and Executive Order 12988, to attempt to reach a voluntary resolution of complaints prior to commencing litigation. A decision to litigate is made only where the DRS and individuals or entities in violation of the ADA cannot agree on appropriate remedies or interpretation of the law. *Ibid.* See 28 C.F.R. § 35.174 (1997); Exec. Order No. 12983, 3 C.F.R. 158 (1997).

and better treatment of workers who acquire a disability during employment.

Although DOJ has written a few *amici curiae* briefs, it has not actively been involved in addressing many of these issues in the courts. Organizations such as the National Association of Protection and Advocacy Systems have criticized DOJ for not initiating enough litigation.<sup>91</sup> Others have noted that DOJ is more likely to settle cases than litigate cases.<sup>92</sup> DOJ has stated that situations do not always develop into lawsuits, and resolution can be achieved in other ways, such as settlement agreements. The cases DOJ is mostly likely to litigate are those with disputed facts or questions about areas of ADA law that are not well established.<sup>93</sup>

## Prisons

Prisons are one of the areas in which DRS has been actively engaged in title II implementation, compliance, and enforcement. DRS receives a large volume of complaints from prisoners,<sup>94</sup> accounting for approximately 25 percent of all complaints received.<sup>95</sup> Other information provided to the Commission by DRS staff indicates that in 1997, DRS completed investigations of 261 complaints filed by disabled inmates. Also, as of January 1998, 695 of 1,240 open title II complaints involved prisons.<sup>96</sup>

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<sup>91</sup> Curtis L. Decker, Executive Director; Gary Gross, Director of Legal Services; and Paula Rubin, Staff Attorney; National Association of Protection and Advocacy Systems, interview in Washington, DC, Nov. 12, 1997, p. 4. See also Imparato interview, p. 7.

<sup>92</sup> Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, interview in Washington, DC, Oct. 20, 1997, p. 7.

<sup>93</sup> Breen interview, p. 5.

<sup>94</sup> Staff, DRS, CRD, DOJ, interview in Washington, DC, Nov. 6, 1997, p. 2 (hereafter cited as DRS Staff November 1997 interview), statement of John Wodatch, Chief. See also Renee Wohlenhaus, Deputy Section Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 3; and Nichol interview, p. 3.

<sup>95</sup> Robb Wolfson, Investigator, DRS, CRD, DOJ, interview in Washington, DC, Apr. 15, 1998, p. 2.

<sup>96</sup> John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 3, 1998, DRS Response to Commission's Information Request, p. 10. Other entities also receive ADA complaints from prisoners. For instance, the Michigan Protection and Advocacy Service has had "several calls regarding prisoners with men-

The prison population in the United States is growing and aging. At the end of June 1996, more than 1 million persons were incarcerated in State prisons. In addition, almost 600,000 persons were imprisoned in local jails. The prison population has risen consistently over the past decade, and the total number of prisoners under Federal, State, and local jurisdiction increased by 5.3 percent from 1995 to 1996.<sup>97</sup> The average age of prison inmates is rising. Thus, since older inmates are more likely than younger inmates to be disabled or become disabled and require special accommodations, the number of prisoners with disabilities is likely increasing.<sup>98</sup>

There are few overall statistics on the number of individuals with disabilities in the Nation's prisons. DOJ recently reported that of the 131,632 inmates in the California prison system, 345 used wheelchairs due to a permanent disability; 650 used canes, prostheses, or walkers; 141 were hearing impaired despite use of a hearing aid; and 218 had visual impairments that were not corrected to 20/200 with corrective lenses.<sup>99</sup> A 1993 California Corrections Department study reported that 11 percent of male and 15 percent of female prison inmates suffered from severe mental disorders.<sup>100</sup> According to the National Institute of Justice, between 6 and 13 percent of the Nation's inmate population (between 640,000 and 800,000 inmates) may have a mental disability.<sup>101</sup>

Some prisons are not accessible to prisoners and visitors with disabilities because of the age of the prisons themselves.<sup>102</sup> Inmates with dis-

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tal illness being denied medication." Maes letter, attachment, p. 8.

<sup>97</sup> DOJ, Bureau of Justice Statistics, "Prison and Jail Inmates at Midyear 1996," *Bureau of Justice Statistics Bulletin* (January 1997), p. 1.

<sup>98</sup> Ira P. Robbins, "George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison," *Yale Law and Policy Review*, vol. 15 (1996), p. 56 (hereafter cited as Robbins, *The ADA in Prison*). Robbins notes that the rise in prisoner age corresponds with the spread of mandatory minimum sentencing policies. *Ibid.*

<sup>99</sup> See Brief for the United States As Intervenor and *Amicus Curiae* at 42, 124 F.3d 1019 (9th Cir. 1997), citing ER 73-74.

<sup>100</sup> See Robbins, "The ADA in Prison," p. 59, n. 47.

<sup>101</sup> See NIJ, "Mental Disabilities and Corrections," p. 1.

<sup>102</sup> Allison J. Nichol, Deputy Chief, DSR, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 3 (hereafter cited as Nichol interview).

abilities are prone to having their personal safety jeopardized by fellow inmates, architectural hazards, and inability to evacuate during an emergency. For these and other reasons, they may be particularly vulnerable to discrimination and oppression within the penal system.<sup>103</sup>

Although a wide variety of disabilities is represented among the Nation's prison population, elderly prisoners, and those with cognitive deficits, hearing impairments, and HIV present particular difficulties and challenges that require accommodations.<sup>104</sup> For example, deaf and hard of hearing inmates have distinct problems, such as not hearing announcements or emergency warnings. Despite the apparent "invisibility" of hearing deficits, prison guards notice deaf inmates' lack of response to commands, and fellow inmates may take advantage of their vulnerability to physical abuse. Inmates with HIV/AIDS require special considerations. As one scholar has noted:

Accommodation of HIV-infected prisoners creates a range of issues, including mainstreaming, protection from physical violence and institutional staff prejudice, and providing for their extensive medical needs. These needs regularly clash with the peculiar threat that HIV and AIDS present in a prison setting. Sexual assault is commonplace among inmates, and with HIV infections already thriving, the potential for transmission of the disease is considerable. The conflict centers on the struggle between equal protection

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<sup>103</sup> See Elaine Gardner, "The Legal Rights of Inmates with Physical Disabilities," *St. Louis University Public Law Review*, vol. 14 (1994), p. 175 (hereafter cited as Gardner, "The Legal Rights of Inmates," see also Robbins, *The ADA in Prison*, p. 50.

<sup>104</sup> See Robbins, "The ADA in Prison," pp. 62-63, citing Peter Baker, "Assembly Ratifies Allen's Assault on Violent Crime: Work on Paying for Parole Plan Is Put on Hold Until Next Year," *The Washington Post*, Oct. 1, 1994, at C1; NIJ, "Mental Disabilities and Corrections," p. 2; Paula N. Rubin and Susan W. McCampbell, "The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services," DOJ, Office of Justice Programs, National Institute of Justice, July 1994, p. 2 (hereafter cited as NIJ, "Providing Inmate Services"). The frequent invisibility of mental disabilities, however, distinguishes them from "visible physical disabilities and becomes an additional obstacle to successful legal challenges." Robbins, "The ADA in Prison," p. 58. Additional challenges faced by deaf and hearing-impaired inmates during incarceration are addressed in Bonnie P. Tucker, "Deaf Prison Inmates: Time to Be Heard," *Loyola of Los Angeles Law Review*, vol. 22 (1988), p. 1, as cited in Robbins, "The ADA in Prison," p. 63.

versus special needs, and on prisoners' rights versus deference to prison authorities.<sup>105</sup>

At the end of 1995, 23,404 inmates (or 2.4 percent) in State correctional facilities were HIV positive. Twenty-one percent of these individuals were confirmed AIDS cases. Between 1991 and 1995, about one in three of the Nation's inmate deaths were due to AIDS-related causes.<sup>106</sup>

## Applicability of Title II

The applicability of title II to prisons and prisoners has generated considerable debate. DOJ has indicated consistently that title II's nondiscrimination protections extend to prisoners. The implementing regulations prepared by DOJ for title II of the ADA "cover all services, programs, or activities provided or made available by public entities."<sup>107</sup> The title II regulations also specifically list correctional institutions among the public entities under DOJ's jurisdiction.<sup>108</sup> In its *amicus* briefs, policy letters, and technical assistance materials, DOJ has clearly and consistently stated that prisoners in correctional facilities are protected under title II of the ADA, since such facilities are public entities. For instance, DOJ's *Title II Technical Assistance Manual* includes accessibility standards for residential units in jails and other correctional institutions.<sup>109</sup>

However, although the title II regulations specifically state that correctional institutions are included under the jurisdiction of the Department of Justice,<sup>110</sup> neither the statute nor the title II regulations clearly state that *prisoners* are protected by the ADA. As a result, there was disagreement among the courts as to

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<sup>105</sup> Robbins, "The ADA in Prison," p. 61.

<sup>106</sup> See Laura Maruschak, "HIV in Prisons and Jails," DOJ, Bureau of Justice Statistics, Office of Justice Programs, 1995, August 1997, p. 1.

<sup>107</sup> 28 C.F.R. § 35.102(a) (1997). See Gardner, "The Legal Rights of Inmates," p. 178 ("It is manifest that correctional facilities are among these entities governed by Title II of the ADA and its regulation.") (citing section-by-section analysis, 28 C.F.R. pt. 35, app. A). DOJ recognized the ADA's applicability to jails and prisons, and incorporated reference to correctional facilities when it drafted the title II regulations. See also Robbins, "The ADA in Prison," p. 85.

<sup>108</sup> 28 C.F.R. § 35.190(b)(6) (1997).

<sup>109</sup> DOJ, *Title II Technical Assistance Manual*, § II-6.3300(6).

<sup>110</sup> See 28 C.F.R. § 35.190(b)(6) (1997).



whether prisons and jails are covered under title II and whether incarcerated individuals are part of the ADA's protected class. Some courts ruled that the ADA does apply to State and local correctional facilities and the prisoners incarcerated in them, and other courts held that it does not. The split among the courts on this issue may be best observed among the Federal circuits. For instance, in 1997 the Ninth Circuit determined that Congress intended to include corrections administration, prisons and their programs, and inmates when developing the language of the ADA.<sup>111</sup> The Third Circuit and Seventh Circuit also held that the ADA applies to State correctional facilities.<sup>112</sup> In contrast, the Tenth Circuit held that the ADA does not apply to a prisoner's claim that he was denied prison employment opportunities because of his disability.<sup>113</sup> Part of the controversy surrounding the relevance of the ADA to incarcerated individuals relates to differing views on the extent to which "legal rights" should be afforded to convicted criminals.<sup>114</sup> In addition, according to the chief judge of the Seventh Circuit Court of Appeals, even if persons within public jails or prisons who are not inmates (e.g., employees) are protected by the ADA, "it would not necessarily follow" that those correctional facilities must modify their programs to promote the accessibility of prisoners with disabilities.<sup>115</sup>

In June 1998, the U.S. Supreme Court ended the debate on this issue in its ruling in *Pennsyl-*

*vania Department of Corrections v. Yeskey*.<sup>116</sup> The Pennsylvania Department of Corrections had denied inmate Yeskey, who was hypertensive, the opportunity to participate in a motivational boot camp program that would have shortened the length of his sentence.<sup>117</sup> The Middle District Court of Pennsylvania dismissed Yeskey's 1994 complaint alleging a violation of his rights under the ADA and held that the ADA did not apply to State prisons.<sup>118</sup> However, in July 1997, the Third Circuit Court of Appeals reversed the lower court's opinion and ruled that the language of the ADA and DOJ's title II implementing regulations were "all encompassing" and sufficiently broad to find that State prisons and their programs, services, and activities, including a boot camp program, are covered by the statute.<sup>119</sup> The Third Circuit also held that inmates with disabilities were protected by the ADA.<sup>120</sup> The Supreme Court unanimously affirmed the decision of the Third Circuit and held that the plain language of title II extends to prison inmates. Writing for the Court, Justice Scalia stated:

Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity" [in the ADA statute] creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which at least theoretically "benefit" the prisoners (and any of which disabled prisoners could be "excluded from participation in"). Indeed, the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a "program." The text of the ADA provides no basis for

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<sup>111</sup> See *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) ("we conclude that the plain language of the ADA...and our prior interpretations of that analysis support application of the [ADA] to State prisons").

<sup>112</sup> *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170-74 (3rd Cir. 1997); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 485-87 (7th Cir. 1997).

<sup>113</sup> *White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996); see also *Torcasio v. Murray*, 57 F.3d 1340, 1344-52 (4th Cir. 1995) (holding that ADA's applicability to prisons is not clearly established, but strongly hinting that it is inapplicable).

<sup>114</sup> Robbins, "The ADA in Prison," p. 85. See Gardner, "The Legal Rights of Inmates," pp. 199-209 for discussion of constitutional and other Federal statutory rights and protections granted to all individuals, including prison inmates with disabilities.

<sup>115</sup> See *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996) (applicability of ADA to prison inmates questioned, but expressly left open; prisoner's complaint not covered by ADA even if it were applicable); see also Robbins, "The ADA in Prison," p. 85.

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<sup>116</sup> *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998), *aff'g* 118 F.3d at 168 (3rd Cir. 1997).

<sup>117</sup> 118 S.Ct. at 1954..

<sup>118</sup> 118 F.3d at 169; "Court to Decide Whether Prisoners Covered by Key Law," accessed at <http://dynamic.webpoint.com/news/oso/story/0,1024,50005449,00.html>, p. 1; "Supreme Court to Decide Whether State Prisoners Covered Under ADA," *Disability Compliance Bulletin*, vol. 11, iss. 4 (Feb. 12, 1998), p. 7 (hereafter cited as "Supreme Court to Decide Whether State Prisoners Covered Under ADA").

<sup>119</sup> 118 F.3d at 169-70 (citing 42 U.S.C. § 12131(1)(B)); "Supreme Court to Decide Whether State Prisoners Covered Under ADA," p. 7.

<sup>120</sup> 118 F.3d at 171-75.

distinguishing these programs, services, and activities from those provided by public entities that are not prisons.<sup>121</sup>

The Court held that the term "qualified individual with a disability" in the statute unambiguously applied to State prisoners.<sup>122</sup> The Court declined to address whether application of the ADA to State prisons is a constitutional exercise of Congress' power under either the commerce clause or section 5 of the 14th amendment because the petitioners failed to raise this argument before either the district court or the circuit court.<sup>123</sup>

### **Provisions Facilitating Access of Prisoners with Disabilities to Programs**

DOJ has taken the position in its regulations, litigation, and *amicus curiae* briefs that it is authorized to ensure that prisoners with disabilities are not denied access to the services, programs, and activities available to prisoners without disabilities.<sup>124</sup> The ADA and its implementing regulations state explicitly that a public entity's obligations are to "qualified" individuals with disabilities. To be "qualified" for a program, an inmate must meet the "essential eligibility requirements."<sup>125</sup> However, some eligibility cri-

teria are illegitimate. For example, a program eligibility requirement that excludes inmates on psychotropic medications may violate the ADA. On the other hand, a requirement that such inmates "be stable while on medication" is a legitimate rule for program participation. Further, a high security inmate cannot file a complaint of discrimination under title II of the ADA if he or she is not offered a program provided to lower security inmates.<sup>126</sup>

Prison inmates with disabilities, similar to others protected by title II of the ADA, are entitled to information that effectively describes public entities' programs and activities. To comply with title II, State and local correctional facilities must provide disabled inmates with: services in the most integrated setting appropriate to the disabled inmates' needs, auxiliary aids for hearing and visually impaired inmates, a qualified sign language interpreter and access to a TDD system for hard of hearing inmates, and measures that make programs "usable" and "readily accessible" by disabled inmates.<sup>127</sup>

Although inmates with mental disabilities must not be excluded from programs and services available to other inmates, correctional agencies are not required under the ADA to facilitate "program access" for inmates who could jeopardize the safety of others, unless the risks can be eliminated by reasonable accommodations. When an inmate in a public correctional facility, attempting to participate in a particular activity, directly threatens the well-being of others, he or she is considered not "qualified" for such an activity.<sup>128</sup>

The definition of auxiliary aids and services for persons with visual and hearing deficits is extensive. Some auxiliary aids and services for

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<sup>121</sup> 118 S.Ct. at 1955 (citations omitted).

<sup>122</sup> *Id.* In response to the recent Supreme Court ruling that the ADA covers prison inmates, Sens. Strom Thurmond and Jesse Helms introduced a bill July 7 to exempt State and local prisons from ADA compliance. The State and Local Prison Relief Act (S. 2266) would amend title II of the ADA and section 504(b) of the Rehabilitation Act to exclude from liability any operations relating to State and local prisons. The disability community is extremely concerned about any attempt to amend the ADA. Stephen F. Gold, a Philadelphia attorney who has represented plaintiffs in several title II cases in Pennsylvania, noted that prisons currently make accommodations for inmates' religion, a policy that has not harmed the facilities' operations. He also noted that Strom Thurmond should be asked if prisons also should discriminate based on race or sex. See "Proposed Legislation Would Exempt Prisons From ADA," BNA's Americans with Disabilities Act Manual, vol. 7, no. 14 (July 23, 1998), p. 84.

<sup>123</sup> 118 S.Ct. at 1956.

<sup>124</sup> See *Armstrong v. Wilson*, 942 F. Supp. 1252, 1254, 1259 (N.D. Cal. 1996) (expansive language of the ADA, pursuant to congressional delegation of authority to establish that ADA applies to State correctional institutions).

<sup>125</sup> "Prisoners' Rights Under the ADA," accessed at <http://wco.com/-aerick/ada.htm>, p. 1. See NIJ, "Providing Inmate Services," p. 1.

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<sup>126</sup> "Prisoners' Rights Under the ADA," accessed at <http://wco.com/-aerick/ada.htm>, p. 1.

<sup>127</sup> Gardner, "The Legal Rights of Inmates," pp. 179-80. DOJ's regulations require that each service, program, or activity of a public entity, when viewed in its entirety, be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (1997). TDDs (telecommunication devices for the deaf) are relatively inexpensive devices that enable a hearing-impaired person to use a telephone by typing and receiving electronic messages over telephone lines to another individual using a TDD. Gardner, "The Legal Rights of Inmates," p. 182.

<sup>128</sup> See NIJ, "Providing Inmate Services," p. 2.

hearing impaired individuals include hearing aids, note takers, and transcription services. Auxiliary aids and services for visually impaired individuals include mobility aids such as canes, readers, and Brailled materials.<sup>129</sup> Correctional facilities covered by title II must provide these sensory devices (and/or others similar) unless this obligation causes "fundamental alteration" of programs and services or creates undue burden.<sup>130</sup> When determining the appropriate auxiliary provisions, public entities, including penal institutions, must generally give preference to disabled individuals' requests.<sup>131</sup> The "deference" to a disabled individual's requests is critical because of the variety of types and severity levels of disabilities, the many types of available devices, and the fact that certain auxiliary aids are effective for some individuals with a particular disability, yet not for others.

The ADA title II regulations define a "qualified" interpreter as one who is able to "interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."<sup>132</sup> Prisons have frequently relied on other inmates to act as interpreters and facilitate communication with deaf inmates.<sup>133</sup> One particular obstacle is that the privacy available to nondisabled inmates during medical or counseling sessions, for instance, is relinquished when a deaf inmate needs a hearing peer to interpret. Courts have heard cases where interpreters have done "more harm than good," by leaking confidential information and threatening the hearing-impaired inmates whom they were supposed to assist.<sup>134</sup>

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<sup>129</sup> Gardner, "The Legal Rights of Inmates," pp. 180, 183. See 28 C.F.R. § 35.104 (1997) (definition of auxiliary aids and services).

<sup>130</sup> 28 C.F.R. § 35.164 (1997).

<sup>131</sup> Gardner, "The Legal Rights of Inmates," pp. 184, 185. DOJ's regulation states: "In 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 C.F.R. § 35.160(b)(2) (1997).

<sup>132</sup> 28 C.F.R. § 35.104 (1997).

<sup>133</sup> See Gardner, "The Legal Rights of Inmates," p. 182.

<sup>134</sup> Gardner, "The Legal Rights of Inmates," p. 182 (citing *Boner v. Lewis*, 857 F.2d 559, 561-63 (9th Cir. 1988) (information regarding nature of deaf inmate's crime leaked to general prison population by inmate interpreter); Complaint in *DuQuin v. Polk Correctional Institution*, Complaint Nos. 04-91-4012, 04-91-4013 (U.S. Dep't. of Educ., Office

### **Architectural Barriers in Prisons**

Many of the Nation's existing jails and prisons were built for a younger, abler population.<sup>135</sup> Because of the need to accommodate persons with disabilities in correctional and other public facilities, the Architectural and Transportation Barriers Compliance Board (Access Board) revised its Americans with Disabilities Act Accessibility Guidelines to include correctional facilities and other entities covered by title II of the ADA.<sup>136</sup> In June 1994, the Access Board published an interim rule adding provisions specifically applicable to State and local government facilities to its ADA accessibility guidelines, and DOJ published a notice of proposed rulemaking to adopt those provisions as standards. The guidelines became effective on April 13, 1998.<sup>137</sup> They are intended to assist DOJ in establishing accessibility standards for constructing new and modifying existing State and local facilities covered by title II of the ADA. The guidelines address the standards for building detention and correctional facilities to accommodate disabled inmates, staff, and visitors.<sup>138</sup> Until DOJ adopts the guidelines as standards, the guidelines "are advisory only and are not to be construed as requirements."<sup>139</sup>

The guidelines for detention and correctional facilities apply to jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutions where occupants are under some degree of restraint or restriction for security reasons. In general, new and altered correctional facilities operated by nonfederal public entities must have at least 2 percent, but

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for Civil Rts., Region IV) (inmate interpreter alleged to have extorted cigarettes and food from a deaf inmate in exchange for accurate interpreting)).

<sup>135</sup> Robbins, "The ADA in Prison," p. 56.

<sup>136</sup> Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, 63 Fed. Reg. 2000, 2009-2,013 (1998) (to be codified at 36 C.F.R. part 1191, app. A §§ 12.1-12.6). In addition to addressing correctional facilities, the 1998 guidelines propose requirements for transportation facilities and judicial, legislative, and regulatory facilities. See 63 Fed. Reg. 2,000, 2,042-45 (1998).

<sup>137</sup> *Id.* at 2,000-2,001. See also 59 Fed. Reg. 31,818: (1994) (Notice of Proposed Rulemaking).

<sup>138</sup> *Id.* at 2,000, 2,045-2,048, 2,056-2,058 (1998).

<sup>139</sup> *Id.* at 2,000, 2,001 (1998).

not less than one "accessible" cell, as well as at least one "housing or holding" cell that is fully equipped with audible emergency warning systems or permanently installed telephones. The correctional facility's cells deemed "accessible" must be distributed across different levels of security and "holding classifications" (e.g., male/female, adult/juvenile). Additional accessibility requirements pertain to entrances, security systems, and visiting areas.<sup>140</sup>

Public entities need not remove physical barriers in all existing buildings, however, as long as they make their programs accessible to persons who are unable to use an inaccessible existing facility. Also, public entities are not required to take any action that would result in a "fundamental alteration" in the nature of the service, program, or activity or in "undue financial or administrative burdens." This concept of "fundamental alteration" and "undue burdens" only applies under title II's requirements of program access in existing facilities and not under title II's requirements for new construction and alterations. Under title II's new construction and alterations requirement, public entities must ensure that newly constructed buildings and facilities are free of architectural and communication barriers that restrict access or use by persons with disabilities. When a public entity undertakes alterations to an existing building, it also must ensure that the altered portions are accessible.<sup>141</sup>

Some prison officials have argued that costs faced by State and local government entities, such as departments of corrections, to comply with ADA's program access requirements can be prohibitive.<sup>142</sup> Because of their concerns about managing costs and dispersing disabled inmates efficiently throughout a State, some corrections departments have created centralized facilities

for this population.<sup>143</sup> This practice reflects the larger struggle of public entities to preserve their financial futures while complying with ADA requirements. In a letter to the executive director of the Association of State Correctional Facilities, DOJ stated that the ADA generally requires reasonable modifications to a covered entity's policies, practices, or procedures when such modifications are essential to eliminate discrimination based on disability. However, program modifications are not required if they cause undue burden and/or "fundamentally alter" the nature of a public entity's service, program, or activity.<sup>144</sup> As long as the modifications effectively eliminate discrimination, the corrections department has complied with its title II obligations for program access. Overall, although the ADA requires correctional institutions to make modifications to ensure that inmates are not discriminated against due to their disabilities, the statute does not prevent the essential changes from being made in a cost-effective and efficient manner.<sup>145</sup>

### **Professional Licensing Statutory and Regulatory Framework**

In deciding issues of character and fitness to practice, professional licensing boards, including State bar examiners, historically have asked applicants about history of or treatment for mental illness and substance abuse, as well as other

<sup>140</sup> *Id.* at 2,046-2,048, 2,056-58 (1998).

<sup>141</sup> DOJ Comments, July 24, 1998, p. 8. See 28 C.F.R. §§ 35.150, 35.151 (1997).

<sup>142</sup> Robbins, "The ADA in Prison," p. 56. When *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) was pending in the Eastern District Court of California, the head of the State corrections department's health care unit, Kyle McKinsey, estimated that it would cost \$300 million annually to improve mental health services for mentally ill inmates. Robbins, "The ADA in Prison," p. 60.

<sup>143</sup> *Ibid.*, p. 108.

<sup>144</sup> Deval Patrick, Assistant Attorney General, CRD, DOJ, letter to George M. Camp, Executive Director, Association of State Correctional Facilities, Apr. 11, 1995 (hereafter cited as Patrick letter) reprinted in 7 Nat'l Disability L. Rep. ¶ 425., pp. 2-3; 28 C.F.R. § 35.150(a)(3), 164 (1997). Corrections administrators may be concerned that security could be compromised when complying with ADA mandates to provide disabled inmates with auxiliary aids and services. Gardner, "The Legal Rights of Inmates," pp. 195-96.

<sup>145</sup> Patrick letter, p. 2. However, the defense of undue financial burden can be difficult for corrections departments to prove, especially since many auxiliary aids and equipment can be inexpensive and used repeatedly by multiple inmates. Administrative, rather than financial burdens, could be a more appropriate argument made by corrections officials when not providing particular programs or services to disabled inmates. For instance, achieving "full integration" for inmates with disabilities could create administrative burdens. Gardner, "The Legal Rights of Inmates," p. 195.

questions of a personal nature.<sup>146</sup> Before the ADA was enacted in 1990, a law student with a disability might have been able to challenge discrimination by a law school under the Rehabilitation Act of 1973. However, it was not until the passage of title II of the ADA, covering State and local governments, that such a student would have recourse under a Federal statute against a State licensing board.<sup>147</sup>

Title II's scope is very broad, covering all State and local governments, regardless of whether they receive Federal financial assistance. It is the first Federal civil rights statute to cover State professional licensing boards. Precisely because the statute is broad enough to reach what had heretofore been solely State prerogatives, such as licensing boards, the licensing issue has emerged as an important one in the development of title II law. Specifically, the issue has arisen as to when State application requirements and testing procedures violate title II's nondiscrimination mandate.

DOJ's title II regulations were expressly authorized by Congress (42 U.S.C. § 12134(a)), they "should be accorded controlling weight unless [they are] arbitrary, capricious or manifestly contrary to statute."<sup>148</sup> Several provisions in DOJ's title II regulation apply to licensing and certification by public entities. A public entity makes reasonable modifications in its policies, procedures, and practices, "when the modifications are necessary to avoid discrimination on the basis of disability. . . ."<sup>149</sup> Public entities, thus, are prohibited from administering "a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability. . . ."<sup>150</sup>

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<sup>146</sup> Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply With the ADA and Constitution," *Journal of Legislation*, vol. 20 (1994), p. 147 (hereafter cited as Coleman and Shellow, "Ask About Conduct, Not Mental Illness)."

<sup>147</sup> Commerce Clearing House, "Americans with Disabilities Act of 1990—Law and Explanation," *Labor Law Reports*, Issue No. 320, no. 395 (1990), p. 9.

<sup>148</sup> *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 171 (3rd Cir. 1997) (quoting *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 2418 (1995)), *aff'd*, 118 S.Ct. 1952 (1998).

<sup>149</sup> 28 C.F.R. § 35.130(b)(7) (1997).

<sup>150</sup> *Id.* § 35.130(b)(6) (1997).

DOJ noted in the section-by-section analysis accompanying its notice of formal rulemaking for its title II regulation that some comments "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."<sup>151</sup> DOJ stated that it did not adopt this suggestion because the other provisions in the regulation, such as its general prohibition of discrimination, program access, and communications requirements, all apply to courses and examinations provided by public entities. DOJ also noted that another section of its regulation provides protection against discrimination. This is the provision requiring that a public entity administer programs, services, and activities "in the most integrated setting appropriate to the needs of the qualified individuals with disabilities."<sup>152</sup>

Finally, the regulation implementing title II prohibits public entities from applying criteria that have the effect of differentiating among people on the basis of a disability unless such criteria are necessary "for the provision of the service, program, or activity offered."<sup>153</sup> A qualified individual with a disability cannot be denied licensure or certification if the person meets the essential eligibility requirements for the task involved.<sup>154</sup> This requirement also applies when a public entity contracts with a private entity to handle licensing and certification responsibilities.<sup>155</sup>

DOJ's title II regulation perhaps is most effective in protecting people with disabilities who seek to obtain State licenses when it provides for simple equality of access. The regulation states that a public entity may not "limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed

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<sup>151</sup> 56 Fed. Reg. 35,694, 35,702 (1991).

<sup>152</sup> *Id.* at 35,719.

<sup>153</sup> 28 C.F.R. § 35.130(b)(8) (1997).

<sup>154</sup> DOJ's section-by-section analysis notes that 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." 28 C.F.R. pt. 35, app. A § 35.130 at 477 (1997).

<sup>155</sup> *Id.* § 35.130(b)(3) (1997).

by others receiving the aid, benefit, or service.”<sup>156</sup> The broadness of this provision is entirely consistent with the ADA’s overall theme of a broad prohibition against disability discrimination.

### Professional Licensing Issues

DOJ has played a significant role in guiding the direction of the law with respect to State licensing activities and title II. In addition to the regulatory and interpretive guidance DOJ has provided, it also has litigated this issue and filed *amicus curiae* briefs on behalf of plaintiffs. In addition, DOJ has issued informal policy guidance in the form of policy letters and technical assistance materials.<sup>157</sup> This effort mainly has focused on ensuring that State and local licensing boards provide reasonable modifications to their procedures, policies, or practices when necessary to avoid discrimination on the basis of disability.<sup>158</sup>

### Application Requirements

One of the key areas relating to title II and professional licensing procedures has been application requirements for membership in a given profession. Every State, for example, requires applicants to its State bar to take a bar examination before they can practice law in that State. The same is true for medical students seeking to practice medicine, for accountants, and for other professionals.

In its *Title II Technical Assistance Manual*, DOJ has provided the following example of a plan that would violate the statute:

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<sup>156</sup> *Id.* § 35.130(a)(vii) (1997).

<sup>157</sup> As it has with other emergent title II issues, DOJ has produced a significant amount of technical assistance material on professional licensing and title II. For example, *Testing Accommodations for Persons with Disabilities Under the Americans with Disabilities Act: The Impact on Licensure, Certification and Credentialing* is a brochure for government officials explaining the ADA requirements for agencies that offer or require examinations for licenses, credentials, or certification for educational, professional, or trade purposes, produced by the Association on Higher Education and Disability; and *Testing Accommodations for Persons with Disabilities: A Guide to Licensure, Certification, and Credentialing* is a 26-page booklet for agencies, institutions, and organizations that offer examinations leading to licenses, credentials, or certification for educational, professional, or trade purposes, produced by the Association on Higher Education and Disability (formerly the Association on Handicapped Student Service Programs in Postsecondary Education).

<sup>158</sup> 28 C.F.R. § 35.130(b)(7) (1997).

An essential eligibility requirement for obtaining a license to practice medicine is the ability to practice medicine safely and competently. State Agency X requires applicants for licenses to practice medicine to disclose whether they have ever had any physical and mental disabilities. A much more rigorous investigation is undertaken of applicants answering in the affirmative than of others. This process violates title II because of the additional burdens placed on individuals with disabilities, and because the disclosure requirement is not limited to conditions that *currently* impair one’s ability to practice medicine.<sup>159</sup>

DOJ has stated some of the key elements in an inquiry as to whether a particular licensing method violates title II. Clearly, the plan in this example would violate title II because it treats individuals with disabilities differently from those without disabilities by forcing people who report that they have had a physical or mental illness to undergo more rigorous investigation. The second reason why this example would violate title II is that its eligibility requirements are not based on a *current* inquiry into the individual’s ability to practice medicine. Rather, it asks whether the applicant has *ever* had a physical or mental disability. Put simply, DOJ has stated its main concern as ensuring that public entities do not “make unnecessary inquiries into the existence of a disability.”<sup>160</sup>

This last point is important because DOJ’s analysis of title II violations in the area of professional licensing procedures has focused extensively on the purpose behind certain questions in these procedures. In general, to address this concern, DOJ seeks to ensure that the inquiries into applicants’ backgrounds are as narrowly tailored to their abilities in the field in which they are being tested (e.g., law, medicine), as focused on current information, and as nonintrusive as possible. It should be noted that, in the context of State professional licensing application inquiries, as in other ADA-related contexts,

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<sup>159</sup> DOJ, *Title II Technical Assistance Manual*, § II-3.5300 (1994 Supp); Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (Horsham, PA: LRP Publications, 1992), p. 25:14 (quoting § II-3.5300) (hereafter cited as Tucker and Goldstein, *Legal Rights of Persons with Disabilities*).

<sup>160</sup> DOJ, *Title II Technical Assistance Manual*, § II-3.5200; Tucker and Goldstein, *Legal Rights of Persons with Disabilities*, p. 25:14 (quoting § II-3.5300).

the most controversial and most commonly seen issues have to do with mental illness and substance abuse.

Here, as elsewhere, DOJ has been clear in reiterating these standards in other guidance. For example, in a 1996 policy letter written by DOJ in response to a letter of inquiry from a congressman relating to people with chemical dependency such as alcoholism, DOJ stated:

Whether a licensing board's questions regarding an applicant's or licensee's history of alcohol or drug abuse is permissible under the ADA will depend on whether the questions are necessary to the objective of practicing the profession at issue in a competent and ethical manner. Such questions must be focused on *actual, current impairments* of candidates, abilities or functions, and must be *narrowly tailored* to determine the current fitness to practice the profession.<sup>161</sup>

DOJ has issued guidance on medical questions in other policy letters. For example, DOJ has stated that boards of medical examiners are permitted to ask questions that screen out, or tend to screen out, individuals with disabilities only if the criteria are "necessary" to ensure that the board is licensing persons fit to practice medicine.<sup>162</sup> DOJ has determined that some questions asked by boards of medical examiners appear to be too broad, in particular if a medical board inquires as to whether an applicant has ever been hospitalized or a patient in a mental or other institution of confinement, or has ever been treated or received medication for a mental or behavioral condition. Use of such phrases as "have you ever been" presents a problem in terms of time period. Time periods should be limited to the recent past, such as within the last 5 years.<sup>163</sup> Questions about hospitalization in a mental or other institution of confinement, DOJ states, should be narrowly tailored to seek information that responds directly to legitimate concerns about granting licenses to or renewing licenses of persons whose serious mental or behavioral impairments would affect their ability

to practice medicine so that others would be exposed to significant health and safety risks.<sup>164</sup>

DOJ also has issued informal guidance on questions about physical and mental health. DOJ suggests that these types of questions be tied more closely to safe practice of medicine. For example, asking if an individual's physical or mental health would affect his or her ability to practice medicine so that others could be exposed to significant health and safety risks is more closely tied to the safe practice of medicine than asking whether the individual is currently in good physical and mental health.<sup>165</sup>

DOJ has investigated several State professional licensing situations. For example, DOJ found that the Arizona bar application required applicants to answer questions relating to a history of mental, emotional, or nervous problems, as well as inquiries regarding treatment for excessive use of alcohol and drugs. According to DOJ's Letter of Findings to the Arizona bar admissions agency, these questions violated title II.<sup>166</sup> Moreover, according to DOJ, the questions would have violated title II even if the Arizona Bar Association's Committee on Character and Fitness had not used the responses to these questions to penalize applicants in any way.<sup>167</sup> Arizona changed its bar application questions as a result of DOJ's investigation.<sup>168</sup>

In addition, DOJ has filed briefs as an *amicus curiae* in at least three cases addressing the issue of application requirements. For example, in *Clark v. Virginia Board of Bar Examiners*,<sup>169</sup> DOJ filed an *amicus* brief in which it advanced the argument it has made consistently in its informal policy guidance, namely, that some State agencies' application questions for professional licensing examinations violate title II's nondiscrimination requirements. In *Clark*, DOJ's *amicus* brief stated that the Virginia Board of Bar Examiners application for admission asked the

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<sup>161</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Bennie Thompson, U.S. House of Representatives, Washington, DC, Aug. 1, 1996 *reprinted* in 9 Nat'l Disability L. Rep. ¶ 352.(emphasis added).

<sup>162</sup> DOJ, *Policy Letter No. 63*, p. 2 (April 1993).

<sup>163</sup> *Ibid.*, p. 3 (April 1993).

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<sup>164</sup> According to DOJ, the inquiry needs to focus on the present ability to meet essential eligibility requirements.

<sup>165</sup> DOJ, *Policy Letter No. 63*, p. 4, (April 1993).

<sup>166</sup> See Complaint No. 8-11 (DOJ Letter of Findings, Nov. 7, 1994).

<sup>167</sup> See *ibid.*

<sup>168</sup> See Tucker and Goldstein, *Legal Rights of Persons with Disabilities*, p. 25:13, no. 60.

<sup>169</sup> 880 F. Supp. 430 (E.D. Va. 1995).

question: "Have you within the past five (5) years been treated or counseled for any mental, emotional, or nervous disorders?"<sup>170</sup>

DOJ noted in its *amicus* brief in *Clark* that applicants who answered in the affirmative to this question were required to provide additional information concerning their diagnosis, course of treatment, and prognosis, identify any treating physician or counselor, and authorize the release of their records.<sup>171</sup> DOJ relied on the same two-pronged argument it made in the example from its *Title II Technical Assistance Manual*: first, that applicants who answer affirmatively to this question are treated differently from other applicants because they have to provide personal information about treatment for a disability; second, the reason for the question being on the exam is not sufficiently narrowly tailored to the purpose of licensing fit practitioners of law.<sup>172</sup> The court in *Clark* agreed with DOJ's and the plaintiff's argument and enjoined the board from asking future applicants this question.<sup>173</sup>

In another *amicus* brief, *Medical Society of New Jersey v. Jacobs*,<sup>174</sup> DOJ again returned to a basic goal of the ADA in supporting its argument against the New Jersey State Board of Medical Examiners:

While the ultimate goal of the New Jersey State Board of Medical Examiners ("the Board") to ensure that only persons able to practice medicine competently and safely be licensed is a laudable one, the means selected to achieve that goal is not.

The licensure questions at issue in this case target for further investigation those individuals who have histories or diagnoses of disabilities. A core purpose of the ADA is the elimination of barriers caused by the use of stereotypic assumptions "that are not truly indicative of the individual ability of [persons with disabilities] to participate in, and contribute to society. By categorizing persons with disabilities as potentially unfit and imposing additional burdens of investigation upon them, the Board is engaging in

<sup>170</sup> Recommended Findings of Fact and Conclusions of Law of the United States as *Amicus Curiae* at 1, *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995) (hereafter cited as U.S. *Amicus Curiae* in *Clark*).

<sup>171</sup> *Id.* at 1.

<sup>172</sup> *Id.* at 1-2.

<sup>173</sup> 880 F. Supp. 430, 431.

<sup>174</sup> No. 93-3670, 1991 U.S. Dist. LEXIS 14294 (D.N.J. 1993).

precisely the kind of impermissible stereotyping that the ADA proscribes.<sup>175</sup>

DOJ was successful in *Jacobs*. The court held that the practices of the board of medical examiners violated title II.<sup>176</sup> In general, DOJ and the courts typically have agreed on the key issues that State professional licensing inquiries must be about current information only and narrowly tailored to the purpose behind the examination to avoid a title II violation. One example of a court's agreeing with DOJ's position on this point is *In re Petition and Questionnaire for Admission to the Rhode Island State Bar*.<sup>177</sup> In this case, the Rhode Island Bar admissions agency adopted a recommendation to eliminate bar application questions about applicants' history of substance abuse or mental-health-related treatment, only permitting questions concerning whether applicants *currently* are suffering from a disorder or using drugs and alcohol to the extent that it would interfere with their practice of law. This action is consistent with the ADA, whose civil rights protections do not extend to current illegal drug users, but do cover former or recovering drug users.<sup>178</sup>

Other courts have followed suit on this issue.<sup>179</sup> For example, in *Ellen S. v. Florida Board of Bar Examiners*, a Florida court held that a bar admissions requirement that applicants disclose whether they have *ever* sought treatment for a mental, emotional, or nervous condition *and* authorize release of their medical records vio-

<sup>175</sup> Memorandum of the United States as *Amicus Curiae* at 1-2, *Medical Society of New Jersey v. Jacobs*, No. 93-3670, 1991 U.S. Dist. LEXIS 14294 (D.N.J. 1993).

<sup>176</sup> The court held that extra investigations of qualified applicants for a license to practice medicine or a renewal of this license who answer "yes" to questions concerning mental health and alcohol or drug use history violates title II. 1991 U.S. Dist. LEXIS 14294 at \*20-\*21. It denied plaintiff's request for a preliminary injunction, however, stating that there was no record evidence that individuals who answer "yes" to such questions are subject to additional investigations with any frequency or rapidity. *Id.* at \*30-\*31.

<sup>177</sup> 683 A.2d 1333, 1336-38 (R.I. 1996).

<sup>178</sup> See 42 U.S.C. § 12114 (1994).

<sup>179</sup> Two commentators, Tucker and Goldstein, in their treatise on Federal disability law, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, have provided a list of cases that have found similarly to DOJ in the Arizona investigation. Tucker and Goldstein, *Legal Rights of Persons with Disabilities*, pp. 25:12 to 25:13 & n.59.



lated title II.<sup>180</sup> In accord with DOJ's guidance on this issue as enunciated in its Technical Assistance Manual and policy guidance, courts and State licensing agencies appear to have recognized the importance of asking only questions related to *current* impairments that might negatively affect a professional career.

Nonetheless, there have been a few dissenters. For example, in *McCready v. Illinois*, the court found that where questions about a history of mental health or substance abuse were asked of third parties or references for the applicant, the procedure did not violate title II.<sup>181</sup> In at least one case, a Texas court found that questions about mental illness over the last 10 years on Texas' bar admission application did not violate title II.<sup>182</sup> The court noted that the questions were limited to certain specific mental illnesses, including bipolar disorder and schizophrenia.<sup>183</sup> The court found, however, as a matter of law that there was no title II violation. The court observed:

Is it necessary that the Board inquire whether an applicant has been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or other psychosis before licensing the individual to assume these responsibilities? Before licensing the individual to write wills, manage trusts set up for minors and disabled individuals, or draft contracts affecting parties' rights and finances? Before licensing the individual to represent a parent in a proceeding to determine if the parent will maintain or lose custody of a child? Before licensing the individual to represent a individual charged with a crime who faces loss of liberty or even life? In each of these proceedings, the lawyer must be prepared to offer competent legal advice and representation despite the stress of understanding the responsibility the lawyer has assumed while balancing other clients' interests and time demands. The rigorous application procedure, including investigating whether an applicant has been diagnosed or treated for certain serious mental illnesses, is indeed necessary to ensure that Texas' lawyers are capable, morally and mentally, to provide these important services.<sup>184</sup>

The *Applicants* court agreed with DOJ and the majority of courts in that it, too, held that "broad-based" questions about mental health would be impermissible. The court stated that "the Board has changed its inquiry and subsequent investigation form following the strict statutory language to a narrowly focused inquiry. The current question 11 is narrowly focused on the specific serious mental illnesses experts have advised the Board are likely to affect an applicant's present fitness."<sup>185</sup> The court agreed that title II does require a narrow tailoring of questions to ensure that stereotypes and myths about disabilities do not infect the process. However, it disagreed that the reformulated questions were too "broad based," and it saw no violation of the statute based on differential treatment of people with disabilities. On this point, the court essentially argued that the questions about mental illness were necessary to ensure against potential direct threats and to ensure the "case-by-case, individualized" inquiry required under the ADA.<sup>186</sup> Finally, the *Applicants* court noted that "the affirmative answer does not result in an immediate denial of a license to practice law," and therefore no right protected under the ADA was abrogated.<sup>187</sup> The court wrote: "The Board's process furthers the goal of the ADA to integrate those defined as mentally disabled into society while ensuring that individuals licensed to practice law in Texas are capable of practicing law in a competent and ethical manner."<sup>188</sup>

The arguments of the *Applicants* court are persuasive. However, DOJ's interpretation of the statute is prevailing in the courts. It seems that the crux of the difference between the two arguments is how discrimination on the basis of disability is viewed in this context. The question is, is it discrimination to require more of an applicant who responds that he or she does have a history of mental illness? Or, is discrimination

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<sup>180</sup> 859 F. Supp 1489, 1493-94 (S.D. Fla. 1994).

<sup>181</sup> No. 94 C 3582, 1995 U.S. Dist. LEXIS 791 at \*19-\*21 (E.D. Ill. 1995).

<sup>182</sup> *Applicants v. Texas State Bd. of Bar Examiners*, No. A 93 CA 740 SS, 1994 U.S. Dist. LEXIS 21290 at \*31-\*32 (W.D. Tex. 1994).

<sup>183</sup> *Id.* at \*2.

<sup>184</sup> *Id.* at \*29-\*30.

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<sup>185</sup> *Id.* at \*30-\*31.

<sup>186</sup> *Id.* at \*26-\*27. The court stated that the board strove to "avoid improper generalization or stereotyping of mentally disabled individuals, as defined by the ADA and to apply objective criteria on an individualized basis to determine if an applicant poses a threat to the public if licensed." *Id.* at \*26.

<sup>187</sup> *Id.* at \*32.

<sup>188</sup> *Id.* at \*32.

only present if that individual is denied a license to practice as a result of having answered yes?

The basic ADA issue that DOJ has confronted in its investigations and cases involving professional licensing requirements is the myths, fears, and stereotypes that have historically accompanied certain disabilities and continue to affect the lives of people with these disabilities. DOJ stated its major concern with respect to this issue eloquently in its *amicus* brief in the *Clark* case:

At the heart of the Virginia Board of Bar Examiner's case is a belief that inquiries into treatment, counseling, or diagnosis of any mental illness will yield information that will predict an attorney's inability to practice law. While the Board asserts that it has not and will not deny a license solely on the basis of an affirmative response to [a question asking about previous treatment for mental illness], it cannot be disputed that [this question's] broad inquiry into the applicant's mental health history reflects an assumption that past diagnosis of or treatment for mental or emotional conditions renders the applicant more likely than other candidates to be substantially impaired in his or her ability to perform as a lawyer.<sup>189</sup>

An increasing number of lawsuits challenging the legality of mental health history inquiries is forcing State bar examiners and courts to consider the effect of title II and potential alternatives to these types of questions that the statute might require.<sup>190</sup> To date, the only jurisdiction to remove all questions relating to mental disability from its bar application is the District of Columbia.<sup>191</sup>

The American Bar Association has recommended that State bar examiners tailor questions relating to mental health in a manner that will elicit only information relevant to an applicant's current qualifications to practice law.<sup>192</sup> In

<sup>189</sup> U.S. *Amicus Curiae* in *Clark* at 7-8.

<sup>190</sup> Carol J. Banta, "Note, The Impact of the Americans with Disabilities Act on State Bar Examiners' Inquiries Into the Psychological History of Bar Applicants," *Michigan Law Review*, vol. 94 (October 1995), pp. 168-70 (hereafter cited as Banta, "The Impact of the ADA on State Bar Examiners' Inquiries").

<sup>191</sup> "Bar Exams, Medical Boards Are Putting ADA to the Test," *Disability Compliance Bulletin (LRP)*, vol. 4, iss. 1 (July 7, 1993), p. 7.

<sup>192</sup> Tucker and Goldstein, "Legal Rights of Persons with Disabilities," pp. 25:13, n.60 (discussing resolution drafted

in addition, the ABA suggests that such questions be "narrow both as to the time periods covered and the scope of information sought."

As the court in *Applicants v. Texas State Board of Law Examiners* observed, there is a balancing of interests between the nondiscrimination requirements of title II and the interest States have in ensuring that the public is safe from unqualified practitioners, whether the field is law, medicine, or some other. Many States traditionally have required applicants to provide information about their mental health history.<sup>193</sup> Striking the appropriate balance, as in other areas of ADA law, has proven somewhat difficult. Many suggestions have been made for reforming the system. For example, some legal commentators have advocated a conduct-based (e.g., has the applicant demonstrated professionalism, responsibility and integrity in prior activities?) as opposed to a status-based (e.g., is the applicant a mental health patient?) analysis.<sup>194</sup>

### Testing Procedures

Other issues relating to professional licensing and title II are more controversial. One of the most significant issues relates to the examination and the test-taking procedure itself. Challenges have emerged because of the need to clarify the extent to which State licensing bodies are required by the ADA to modify testing procedures for applicants with disabilities who sit for licensing exams.<sup>195</sup> The main dispute in the

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by members of the ABA's Commission on Mental and Physical Disability, Section of Legal Education and Admissions to the Bar, National Conference of Bar Examiners and the Association of American Law Schools).

<sup>193</sup> *Clark v. Virginia Bd. of Law Examiners*, 880 F. Supp. 430, 438-41 (E.D. Va. 1995) (discussion of various States' requirements); see generally Catherine C. Cobb, "Comment, Challenging a State Bar's Mental Health Inquiries Under the ADA," *Houston Law Review*, vol. 32 (Winter 1966), p. 1384 (hereafter cited as Cobb, "Challenging a State Bar's Mental Health Inquiries Under the ADA"); Deborah L. Rhode, "Moral Character as a Professional Credential," *Yale Law Journal*, vol. 94 (1985), pp. 575-83.

<sup>194</sup> Coleman and Shellow, "Ask About Conduct, Not Mental Illness"; Phyllis Coleman and Ronald A. Shellow, "Restricting Medical Licenses Based on Illness is Wrong—Reporting Makes It Worse," *Journal of Law and Health*, vol. 9 (1994/1995), p. 273; Cobb, "Challenging a State Bar's Mental Health Inquiries Under the ADA."

<sup>195</sup> See, e.g., *Argen v. New York State Bd. of Law Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994) (applicant did not prove by

courts is how far a State licensing board must go in making reasonable accommodation or modification to individuals with disabilities who are candidates for membership in a State licensed profession. This controversy is borne out in the caselaw and in DOJ's letters of findings in title II investigations, *amicus curiae* briefs, and title II litigation.

For example, DOJ has found at least one State agency, the New York Board of Bar Examiners, in violation of title II. DOJ found that the board refused to provide qualified individuals with disabilities the accommodations necessary, based on the nature and severity of their disabilities, to afford them an opportunity to demonstrate the legal knowledge and legal reasoning ability that the examination sought to measure.<sup>196</sup> In a letter of findings detailing title II violations by the New York State Board of Law Examiners,<sup>197</sup> DOJ stated that a formal written voluntary compliance agreement was necessary to provide appropriate remedies for the victims of past discrimination and would ensure that the types of violations that had occurred in the past would not happen again. DOJ stipulated that standards and procedures for processing requests for accommodation would be included in the compliance agreement. The compliance agreement would also include standards and procedures for determining whether the applicant was a qualified individual with a disability and for making an individualized determination of the accommodations necessary to provide such persons an opportunity to participate in and benefit from the bar examination that is equal to the opportunity afforded to others.<sup>198</sup>

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preponderance of evidence that he suffered from learning disability entitling him to special accommodations for taking bar exam); *Pazer v. New York Bd. of Law Examiners*, 849 F. Supp. 284 (S.D.N.Y. 1994) (same); *In re Petition of Kara B. Rubenstein*, 637 A.2d 1131 (Del. 1994) (applicant with learning disability ordered admitted after board of examiners denied applicant additional time to take multistate bar examination (MBE) portion with extra time and passed MBE portion without extra time in previous administration).

<sup>196</sup> See New York State Board of Law Examiners (DOJ Letter of Finding, Jan. 14, 1994).

<sup>197</sup> DOJ, *Policy Letter No. 119* (January 1994).

<sup>198</sup> DOJ, *Policy Letter No. 119*, p. 9 (January 1994).

DOJ has sought to resolve title II issues through its litigation and *amicus curiae* work.<sup>199</sup> For example, DOJ filed an *amicus* brief in *Rosenthal v. New York Board of Law Examiners*, in which it explained that although title II itself does not set forth specific requirements for testing practices, title III does. Title III's testing standards, DOJ argued, "are useful as a guide for determining what constitutes discriminatory conduct by a public agency in testing situations under both Titles I and II."<sup>200</sup> The court in this case relied on title III and its implementing regulations even though it was a title II case, because title III regulations discuss professional licensing and testing procedures and title II regulations do not.<sup>201</sup>

Court response has been mixed in title II cases involving professional licensing applicants seeking modifications to testing procedures to accommodate a disability. Some courts have found that the claimant did not have a disability that would entitle him or her to accommodation. On the other hand, where evidence has been sufficient to show, say, a learning disability or visual impairment, courts have appeared responsive to the need for reasonable modification. For example, in *D'Amico v. New York State Board of Law Examiners*, a court ordered the New York State Board of Bar Examiners to accommodate a vision-impaired candidate by allowing the person to take the examination over 4 days rather than 2.<sup>202</sup> Similarly, in *Weintraub v. Board of Bar Examiners*, a court held that a learning-disabled individual was entitled to accommoda-

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<sup>199</sup> Daniel Searing, Supervisory Attorney, Office Administration, DRS, CRD, DOJ, interview in Washington, DC, Apr. 13, 1998, p. 2. Mr. Searing noted DRS continues to write a lot of *amicus* briefs to bring more clarity to the statute. *Ibid.*

<sup>200</sup> Memorandum of Law by United States of America, Stating the Government's Views on Issues Pending Before the Court, at 4 n.2, *Rosenthal v. New York Board of Law Examiners*, No. 92 Civ. 1100 (S.D.N.Y. July 29, 1992). The case was settled when the board agreed to grant extra time to take the examination to the applicant, who had severe dyslexia. Don DeBenedictus, "Bar Examiners Respond to the ADA," *ABA Journal* (November 1992), p. 20.

<sup>201</sup> See 42 U.S.C. § 12189 (1994) (examinations and courses related to licensing); 28 C.F.R. 36.309 (1997) (same); 28 C.F.R. pt. 36, app. B § 36.309 (DOJ analysis of ADA provision and implementing regulation on examinations related to licensing).

<sup>202</sup> 813 F. Supp. 217, 291 (W.D.N.Y. 1993).

tions in the form of extended time to complete the exam.<sup>203</sup>

However, in other cases, courts have held that no accommodation was required. For example, in several cases, courts have found evidence of disability insufficient to allow any form of accommodation or modification to the normal testing procedure.<sup>204</sup> In general, courts are applying the same analysis as under title I, that is, a determination of whether the ADA claimant can prove that he or she is a qualified individual with a disability.

### Other Licenses

DOJ also provides technical assistance and issues policies on such licenses as driving and hunting. The phrase "essential eligibility requirements" is particularly important in the context of State licensing requirements. Although many programs and activities of public entities do not have significant qualification requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge, and abilities. For example, an individual seeking a driver's license is not a "qualified individual" unless he or she can operate a motor vehicle safely. A public entity may establish requirements, such as vision requirements, but denying a driver's license to all individuals who have missing limbs, for example would be discriminatory if the individual could operate a vehicle safely without use of the missing limb.

Unfortunately, a major barrier for people with mental illnesses has been obtaining driver's licenses.<sup>205</sup> For instance, the California Depart-

ment of Rehabilitation reported the following incident:

We received a call on the ADA technical assistance line from an individual who was bi-polar. He had been driving for his present employer for a number of years incident free. When he was diagnosed with a bipolar disorder he was put on medication. He disclosed to his employer who had no problems with this. However, when he went to renew his license Department of Motor Vehicles would not renew it because of his condition (and/or the medication he was tak[ing] to control his condition). Neither the employee nor the employer could understand DMV's rational[e]. And this is a policy on which they will not budge.<sup>206</sup>

Some departments of motor vehicles (DMVs) historically have required answers to overly broad questions about past mental illness or substance abuse, such as "Have you ever been a patient or committed to an institution for mental disorders or drugs and/or alcohol?" An affirmative answer to such a question might result in a refusal to grant a license until the applicant submitted a letter of release. According to the Bazelon Center for Mental Health, which investigated a DMV in South Carolina, these questions often were crafted on the mistaken assumption of a high correlation between mental illness and driving accidents.<sup>207</sup> These types of questions, however, are prohibited by the title II regulation, providing that eligibility criteria that screen out a class of people violate title II, unless the criteria can be shown necessary to providing services.<sup>208</sup>

DOJ also has issued policies on other licenses. In response to a letter seeking guidance on the issuance of a special hunting permit that allows individuals with disabilities to shoot game animals from a stationary vehicle, DOJ stated that an ADA regulation permits a public entity to offer benefits to individuals with disabilities, or a particular class of individuals with disabilities, that it does not offer to individuals

<sup>203</sup> Tucker and Goldstein, *Legal Rights of Persons with Disabilities*, p. 25:15 (citing *Weintraub v. Board of Bar Examiners*, No. 0E-0087, *slip op.* (Mass. Sup. Jud. Ct. 1992)).

<sup>204</sup> See *Christian v. New York State Bd. of Law Examiners*, 899 F.Supp. 1254 (S.D.N.Y. 1994) (denying a motion for preliminary injunction filed by a person with a learning disability who sought to require the State bar examiners to provide accommodations necessary for her to take the bar exam); *Pazer v. New York State Bd. of Law Examiners*, 849 F. Supp. 284 (S.D.N.Y. 1994) (denying injunctive relief to a man seeking accommodation to compensate for alleged "visual processing" disability because evidence was insufficient to show learning disability); *Argen v. New York State Bd. of Law Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994) (denying testing accommodation or modification for bar exam student who failed to prove he had a learning disability).

<sup>205</sup> Bazelon Center for Mental Health Law, *Opening Public Agency Doors: Title II of the Americans with Disabilities Act*

and *People with Mental Illnesses: A Collaborative Approach for Ensuring Equal Access to State Benefit and Service Programs* (Washington, DC: Judge David L. Bazelon Center for Mental Health Law, August 1995), pp. 32-33 (hereafter cited as Bazelon Center, *Opening Public Agency Doors*).

<sup>206</sup> Martin letter, attachment, p. 4.

<sup>207</sup> Bazelon Center, *Opening Public Agency Doors*, p. 33.

<sup>208</sup> 28 C.F.R. § 35.130(b)(8) (1997).

without disabilities.<sup>209</sup> DOJ stated that the purpose of this provision is to allow State and local governments to provide special benefits, beyond those required by the ADA, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.<sup>210</sup>

Overall, DOJ's requirements for specific inquiries narrowly tailored to the purposes for which they are being asked, namely, a determination as to whether the candidate is qualified, has given title II vitality in this area. This emphasis on the qualifications of a professional has forced many State agencies and institutions into discovering how little their collective myths, fears, and stereotypes about people with disabilities have to do with being qualified to practice law or medicine. In part because of DOJ's guidance in policy letters and arguments in *amicus* briefs, there has been a noticeable change in the way licensing applications and testing procedures are conducted.

## Public Health Care

Health care providers, including all State and municipally managed hospitals, nursing homes, health plans, health care programs, health insurance, and all health care services, direct or contractual, fall under the scope of title II of the ADA.<sup>211</sup> The health care facilities and programs that are operated by State and local governments must not exclude qualified individuals with disabilities, on the basis of disability, from receiving their benefits, services, and programs, nor subject such individuals to discrimination.<sup>212</sup>

Many of the comments on DOJ's February 1991 proposed title II regulation raised concerns

about how it would affect the operations of health care providers. Most health care providers offer information about their operations as a public service to anyone who requests it. Commentators requested clarification on whether public health care providers would be required to provide equally effective communication for individuals with impaired hearing or speech.<sup>213</sup> DOJ addressed the communications concern in the provision in the title II regulation that requires a public entity to provide effective telecommunication systems for individuals with disabilities.<sup>214</sup>

Commentators also raised concerns about the effect of the ADA with respect to health and safety concerns of individuals with disabilities. In developing its title II regulations, DOJ had to address questions relating to safety policies and the inclusion of individuals with disabilities who pose a significant risk to the health or safety of others.<sup>215</sup> DOJ has relied on a regulatory provision developed for title III of the act when issues of safety standards in public entities have arisen.<sup>216</sup> This provision states that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, and advantages of the public entity, if that individual poses a direct threat to the health or safety of others.<sup>217</sup> DOJ cites *School Board of Nassau County v. Arline*, to support this position.<sup>218</sup> In that case, the U.S. Supreme Court recognized the need to balance the interests of people with disabilities against legitimate concerns for public safety. In accord with *Arline*, DOJ's analysis in its title II implementing regulations states that, although a person with a disability is protected under the provisions of title II, a person who poses a threat to others will not be "qualified" for inclusion if reasonable accommodations or modifications to the

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<sup>209</sup> DOK, *Policy Letter No. 55*, p. 1 (February 1993) (citing 28 C.F.R. § 35.130(c) (1997)).

<sup>210</sup> *Ibid.*

<sup>211</sup> 28 C.F.R. §§ 35.130(b)(1),(3) (1997) (exclusion of qualified individual with a disability from participation in or benefits of services, prohibited, whether offered directly by a public entity, or through contractual, licensing, or other arrangements).

<sup>212</sup> *Id.* § 35.130(a) (1997). The Department of Health and Human Services (HHS), not DOJ, is the Federal agency responsible for investigating alleged title II violations by public health care providers. *Id.* § 35.190(b)(3).

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<sup>213</sup> *Id.* pt. 35, app. A § 35.161(1997).

<sup>214</sup> *Id.* § 35.161 (1997).

<sup>215</sup> *Id.* pt. 35, app. A § 35.104, at 472-73 (1997).

<sup>216</sup> *See Id.* § 36.208 (1997) (public accommodation not required to provide goods, services, accommodations to an individual who poses a direct threat to the health or safety of others).

<sup>217</sup> 42 U.S.C. § 12182(b)(3) (1994).

<sup>218</sup> 480 U.S. 273 (1987).

public entity's policies, practices, or procedures will not eliminate that risk.<sup>219</sup>

### Integrated Setting

One of the most important issues relating to title II and health care has been the provision requiring that individuals with disabilities be placed in the most integrated setting possible to ensure the full inclusion of individuals with disabilities within the community or within a State or local institution. The legislative history of the ADA confirms that Congress intended the act to end the unnecessary segregation of people with disabilities from the rest of the community.<sup>220</sup> Both the House and Senate reports emphasized that one of the major purposes of the act was to end the isolation, exclusion, and segregation of individuals with disabilities.<sup>221</sup> In the ADA statute, Congress addressed the discrimination against persons with disabilities in the "critical area[ ] . . . [of] institutionalization. . . ." <sup>222</sup> Thus, in both the ADA's legislative history and its findings and purposes as they are outlined in the legislation, Congress recognized that the isolation, segregation, and exclusion "represented by unjustifiable institutionalization constitute disability-based discrimination."<sup>223</sup> Unnecessary

and unjustifiable institutionalization of persons with disabilities also was identified specifically in congressional testimony by numerous supporters of the ADA as one of the forms of segregation and discrimination that the act was intended to eliminate.<sup>224</sup>

The title II regulations recognize that in the case of individuals with disabilities, "discrimination takes many different forms, including programs that perpetuate the false assumption that people with disabilities must be segregated from the rest of society in institutions."<sup>225</sup> The title II regulations address both institutionalization and the need for integration of persons with disabilities. The regulations declare that a State's provision of services in an unnecessarily segregated setting constitutes unlawful disability-based discrimination. This provision, known as the "integration regulation," requires States to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."<sup>226</sup> DOJ's analysis of its regulations explains that this regulatory provision requires all public entities to ensure a setting that enables each person with a disability in their care to interact with persons without disabilities to the "fullest extent possible."<sup>227</sup> The preamble to the title II regulations states that "integration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegates persons with disabilities to second-class status."<sup>228</sup> Thus, DOJ's regulations reflect Congress' determination that services must be provided in an appropriate integrated setting.

In the final regulations, DOJ recognized that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and, in most instances, separate programs or requirements for individuals with disabilities are not permitted.

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<sup>219</sup> 28 C.F.R. pt. 35, app. A § 35.104, at 472 (1997). However, the determination of a person who is a "direct threat" cannot be based on generalizations or stereotypes. It must be based on individual assessment, current medical evidence, and the best available objective information. The assessment also must include whether reasonable modifications will mitigate the risk or threat. *Id.* at 472-73.

<sup>220</sup> See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485 (I), 101st Cong., 2d Sess. 24 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 268 ("The Americans with Disabilities Act (ADA) will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the mainstream of American society").

<sup>221</sup> See S. Rep. No. 116, 101st Cong., 1st Sess. 8 (1989); 135 Cong. Rec. 19,801 (1989).

<sup>222</sup> 42 U.S.C. §§ 12101(a)(3) (1994).

<sup>223</sup> United States' Response to Defendants' Motion for Judgment on the Pleadings and Plaintiffs' Motion for Summary Judgment on Plaintiffs' Claims Under the Americans with Disabilities Act of 1990 at 5-6, *Wyatt v. Hanan*, No. 3195-N (M.D. Ala.) (hereafter cited as *Wyatt v. Hanan*, U.S. *Amicus Curiae*). This is an ongoing class action lawsuit initially filed in 1971 claiming that facilities operated by the Alabama Department of Mental Health and Mental Retardation violated residents' rights under Federal law, including the ADA. The named defendant has changed when a new commissioner of mental health takes office. *Wyatt v. Poundstone III*, No. 3195-

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N, 1995 U.S. Dist. LEXIS 13672 (M.D. Ala. April 18, 1995) (granting motion in part, denying in part).

<sup>224</sup> *Wyatt v. Hanan*, U.S. *Amicus Curiae* at 13.

<sup>225</sup> *Id.* at 11.

<sup>226</sup> 28 C.F.R. § 35.130(d) (1997); *Wyatt v. Hanan*, U.S. *Amicus Curiae* at 8.

<sup>227</sup> *Id.* pt. 35, app. A § 35.130, at 478 (1997).

<sup>228</sup> *Id.* pt. 35, app. A § 35.130, at 476 (1997); *Wyatt v. Hanan*, U.S. *Amicus Curiae* at 8-9, 11.

However, DOJ's analysis of the regulations states that section 504 of the Rehabilitation Act of 1973 permits separate programs in limited circumstances and that Congress "clearly intended" that the regulations issued under title II adopt the standards of section 504.<sup>229</sup> It also addresses the unlawful and segregated environment within State institutions, including health care facilities.

Many of the commentators asked for clarification on a public entity's obligations when it offers a separate program but an individual with a disability chooses not to participate in the program. DOJ's position is that each situation has to be assessed individually. It stated that it is impossible to make a generalized statement as to what level of modification would be required in the integrated program. The first step is to question whether the separate program is necessary and what would be required to include individuals with disabilities in the integrated program.<sup>230</sup>

### **Policies on Title II and Health Care Policy Letters on Health Care Issues**

To date, DOJ has issued few policy letters addressing health care issues. Policy letters, which express DRS' position on issues, usually respond to inquiries on interpretation and implementation of the regulations.<sup>231</sup> Although many of these inquiries fall under title III rather than title II,<sup>232</sup> DOJ states in its analysis of the title II regulations that some issues, such as safety and integration, are applicable or the same as those requirements under title III.<sup>233</sup>

In 1992, DOJ received a complaint that the California Health and Safety Code discriminated against individuals with mental impairments by failing to require health insurance plans to continue coverage of dependent children with mental impairments other than mental retardation.

The coverage for other children was limited by age, whereas children with mental retardation or physical disabilities required continued coverage.<sup>234</sup> In its letter of findings, DOJ did not find the California code in violation of title II of the ADA. DOJ explained that although title II prohibits public entities from enforcing regulatory requirements that would discriminate against individuals with disabilities, title II generally permits State and local governments to provide benefits to a particular class of individuals with particular types of disabilities that they do not provide to individuals with different disabilities.<sup>235</sup> Where a benefit is provided to a particular class of individuals with particular types of disabilities (in this case, mental retardation and physical disabilities), discrimination is determined by comparing the treatment of all individuals with disabilities to the treatment provided to similarly situated individuals without disabilities.<sup>236</sup>

In 1993, DRS provided informal guidance to the Texas Department of Mental Health and Mental Retardation on application of the ADA to group homes provided for persons with mental retardation.<sup>237</sup> The agency said that it contracts with private citizens for placement of persons with mental retardation into their homes and asked if these homes are considered places of public accommodation under title III of the ADA and what were the State's and owners' obligations to upgrade the accessibility of these homes.<sup>238</sup> DRS' response was that for this particular group home program, the State must ensure that the contract activities were carried out in a manner consistent with the State's title II responsibilities.<sup>239</sup> DRS explained that title II

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<sup>229</sup> See 28 C.F.R. pt. 35, app. A § 35.130 at 478 (1997). See also *Madden-Tyler v. Maricopa County* 189 Ariz. 472, 943 P.2d 822, 829 (Ariz. Ct. App. 1997) (title II and all of its requirements are applicable under the standards set forth in section 504 of the Rehabilitation Act).

<sup>230</sup> 28 C.F.R. pt. 35, app. A § 35130, at 478-79 (1997).

<sup>231</sup> Wodatch interview, p. 3.

<sup>232</sup> *Ibid.*

<sup>233</sup> See 28 C.F.R. § 35.130, pt. 35, app. A § 35.130, 472, 476 (1997).

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<sup>234</sup> DOJ, CRD, Coordination and Review Section, policy letter of finding to Unknown Complainant, California, re: Healthcare, Feb. 3, 1992 (hereafter cited as CRD Unknown Healthcare letter of finding, California).

<sup>235</sup> *Ibid.*; 28 C.F.R. § 35.130(c) (1997).

<sup>236</sup> CRD Unknown Healthcare letter of finding, California.

<sup>237</sup> John L. Wodatch, Chief, Disability Rights Section (formerly the Public Access Section), CRD, DOJ, Policy letter to David L. Rollison, Texas Department of Mental Health and Mental Retardation, San Antonio State School, San Antonio, TX, June 15, 1993 (hereafter cited as Rollison Healthcare Policy letter).

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*; 28 C.F.R. §§ 35.130(a)(ii), 130(b) (1997).

requires the State to ensure "program access," which means that the program, when viewed as a whole, must be accessible to qualified persons with disabilities. Title II also requires the State to administer its services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.<sup>240</sup> The homes themselves were not covered by title II, and under different circumstances, they would fall under title III. For example, the homes would be covered under title III if they were social service center establishments that provided meals, transportation, and counseling. The homes would not be subject to the ADA if they simply provided a "family-like" living arrangement, without any social services.<sup>241</sup>

DOJ's position on health and life insurance coverage and premiums for persons with disabilities is made clear in at least two policy letters. DRS wrote that the ADA allows insurance companies to charge more for insurance, to deny health insurance to an individual with a preexisting condition for that condition, or to offer policies that limit coverage for certain procedures or treatments, but only if the higher charges or limitations in coverage are based on sound actuarial data and principles.<sup>242</sup>

Responding to a 1993 inquiry on whether health and life insurance premiums could be affected by a person's disability, DRS wrote that while the ADA does provide some protection for individuals with disabilities, the act does not prohibit the use of legitimate actuarial considerations.<sup>243</sup> DRS also recommended that the writer, a parent, ask the appropriate State officials about different or additional protections for the child with a disability.<sup>244</sup> Another inquiry asked if developmentally disabled children are protected by the ADA and if so, whether that prevents discrimination by companies that pro-

vide health insurance.<sup>245</sup> Although this particular inquiry fell under title III of the ADA (an insurance company is a private entity), a public entity that provides goods and services may not discriminate on the basis of disability. DRS' response was that although the ADA does provide some protection for individuals with disabilities in dealings with insurance companies, it does not prohibit the use of legitimate, sound actuarial considerations in setting charges or refusal to provide coverage.<sup>246</sup>

DRS' response to an inquiry on whether the ADA permits public or private entities to provide medical or dental treatment to persons with disabilities (in this case, HIV) in segregated settings was clear.<sup>247</sup> First, DRS wrote that the ADA prohibits discrimination against an individual on the basis of an individual's HIV or AIDS condition. This is true whether the entity is public or private. Second, DRS wrote that "under both titles II and III, the ADA generally prohibits the provision of separate or different services to individuals with disabilities, unless it is necessary to make the services as effective for people with disabilities as they are to others."<sup>248</sup> Third, the response stated that both public and private entities are required to provide their services in the most integrated settings appropriate to the needs of the individuals with disabilities. DRS then elaborated on the exceptions found in the "integration" requirement (under titles II and III).<sup>249</sup>

DRS explained that both titles II and III contain an exception to the general integration requirements when an individual with a disability poses a "direct threat" to the health or safety of others.<sup>250</sup> According to DRS, a direct threat is

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<sup>240</sup> Rollison Healthcare Policy letter.

<sup>241</sup> *Ibid.*

<sup>242</sup> See John L. Wodatch, Chief, Disability Rights Section (formerly the Public Access Section), CRD, DOJ, Policy letter to Unknown Constituent, no location, Dec. 9, 1993, re: Healthcare, reprinted in 5 NDLR ¶ 85 (hereafter cited as DOJ Healthcare Policy letter to Unknown Constituent).

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> John L. Wodatch, Chief, Disability Rights Section, (formerly the Public Access Section), CRD, DOJ, Policy letter to Unknown Respondent, Sherman, TX, June 17, 1993, re: Healthcare (hereafter cited as Unknown Healthcare Policy letter, Texas).

<sup>246</sup> *Ibid.*

<sup>247</sup> John L. Wodatch, Chief, Disability Rights Section (formerly the Public Access Section), CRD, DOJ, Policy letter to A. Laurence Field & Associates, DE, Sept. 10, 1993, re: Healthcare (hereafter cited as Field & Associates Healthcare Policy letter).

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*; 28 C.F.R. pt. 35, app. A § 35.130, at 472-73 (1997).



defined as a "significant risk" to the health or safety of others that cannot be eliminated or satisfactorily mitigated by reasonable modifications to the covered entity's procedures."<sup>251</sup> According to DOJ's analysis of its title II regulation, an individual who poses a direct threat is not considered a "qualified" individual for services or programs being offered.<sup>252</sup>

The issue of segregation appears to surface for persons who are HIV positive or have AIDS. However, under both titles II and III, individuals with HIV or AIDS may not be treated in a segregated setting unless it is necessary to provide those individuals with treatment as effective as is provided to individuals without HIV or AIDS. DOJ's position is that individuals with HIV or AIDS do *not* pose a direct threat to health professionals or other medical patients as long as reasonable sanitary methods can satisfactorily mitigate the risk of spreading the virus.<sup>253</sup>

#### ***Amicus Curiae Briefs in Health Care Related Cases***

DRS develops ADA policy through *amicus* briefs and litigation, and DOJ has filed numerous *amicus* briefs in support of plaintiffs who alleged discrimination in health care under title II.<sup>254</sup> However, DRS has been selective in the cases involving health care. Most of the cases involving health and life insurance fall under title III, although DRS did file a brief in a case challenging a cap in medical benefits for AIDS for Illinois State employees.<sup>255</sup> Another title II issue in health care is the use of interpreters in hospitals.<sup>256</sup>

To date, the focus of DOJ's title II health care briefs has been cases involving public entities and their interpretation and/or implementation of DOJ's "integration regulation."<sup>257</sup> For example, in *Wyatt v. Hanan*, the plaintiffs sued the State of Alabama because it operated a dual system for providing residential care, treatment, and train-

ing to residents with mental disabilities.<sup>258</sup> According to the suit, the State operated five institutions for persons with developmental disabilities and mental retardation and six institutions for people with mental illness. DOJ's position in the case was that community-based programs represent integrated services both because they are physically located in the mainstream of society and because they provide opportunities for people with mental disabilities to interact with nondisabled persons.<sup>259</sup> DOJ wrote in its *amicus curiae* brief that confinement of persons with mental disabilities in Alabama's institutions constituted segregation because individuals living in such facilities are separated from the community and are isolated from where others live, work, and engage in life's activities.<sup>260</sup> Many individuals who were institutionalized in Alabama, professionals had determined, were placed improperly and should be served in appropriate community-based programs.<sup>261</sup>

The legal question in the case was whether the defendants' unnecessary segregation of individuals with disabilities constituted discrimination under title II of the ADA.<sup>262</sup> DOJ's position was that the case clearly fell under title II and that the defendants misinterpreted the prohibition in title II against segregation.<sup>263</sup> DOJ sided with the plaintiffs' motion for summary judgment on the grounds that unnecessary segregation of individuals with disabilities in institutions is a form of discrimination prohibited by the ADA and the corresponding regulations,<sup>264</sup> that ending the discriminatory segregation and isolation through unnecessary institutionalization is a specific purpose of the ADA,<sup>265</sup> that the ADA regulations require States to provide services in the most integrated setting appropriate to the needs of people with disabilities,<sup>266</sup> and that

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<sup>251</sup> Field & Associates Healthcare Policy letter; 28 C.F.R. pt. 35, app. A § 35.130, at 472 (1997).

<sup>252</sup> See 28 C.F.R. pt. 35, App. A § 35.130, at 472 (1997), Field & Associates Healthcare Policy letter.

<sup>253</sup> Field & Associates Healthcare Policy letter.

<sup>254</sup> John Wodatch, Section Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 16, 1998, p. 4; Breen interview, p. 1.

<sup>255</sup> Wodatch interview, p. 3.

<sup>256</sup> *Ibid.*

<sup>257</sup> 28 C.F.R. § 35.130 (d) (1997).

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<sup>258</sup> *Wyatt v. Hanan*, Brief for the United States as *Amicus Curiae* at 1, 871 F. Supp. 415 (N.D. Ala. 1994).

<sup>259</sup> *Id.* at 2.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 1.

<sup>264</sup> *Id.* at 3.

<sup>265</sup> *Id.* at 5.

<sup>266</sup> *Id.* at 8.

ADA's legislative history affirms that one of its major purposes is to remove the unnecessary segregation.<sup>267</sup> In the brief, DOJ also cited case-law that supports the "integration regulation," which affirms that States are obligated to provide services in the most integrated setting.<sup>268</sup>

One of the cases that DOJ discusses in its *amicus* brief is *Helen L. v. Didario*.<sup>269</sup> In this case, six plaintiffs sued the Pennsylvania Department of Public Welfare alleging that it violated title II of the ADA by failing to provide services to people with disabilities in the community through its attendant care program rather than in a nursing home.<sup>270</sup> The district court dismissed two individuals as plaintiffs because they had been discharged from the nursing home and denied the plaintiffs' motion for summary judgment. Plaintiff Idell S. filed a notice of appeal. The remaining plaintiffs dismissed their claims because they no were longer in nursing homes.<sup>271</sup> DOJ filed an *amicus curiae* brief in support of the appellant. It based its brief on the grounds that a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,<sup>272</sup> and that the unnecessary segregation of individuals with disabilities is a form of discrimination prohibited by the ADA and its implementing regulations.<sup>273</sup>

The appellate court found that the Pennsylvania Department of Public Welfare violated the ADA when it required the appellant to remain in the segregated setting of the nursing home.<sup>274</sup> The Third Circuit specifically addressed the title II integration regulation of the ADA, and confirmed that the "ADA and its attendant regulations clearly define unnecessary segregation as a

form of illegal discrimination against the disabled."<sup>275</sup> At the time of the *Wyatt v. Hanan* case, the Third Circuit in *Helen L. v. Didario* was the only appellate court that had addressed the integration regulation specifically. Relying on the integration regulation, the Third Circuit underscored that the "ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides and ignores them."<sup>276</sup> The appellate court reversed the district court and ordered it to enter summary judgment in favor of the appellant.<sup>277</sup>

In three separate cases, all involving individuals with disabilities inappropriately institutionalized in Maryland's public institutions, DOJ filed *amicus curiae* briefs in support of the plaintiffs' motion for partial summary judgment under their title II claim.<sup>278</sup> In all three cases, DOJ argued that Maryland had "unnecessarily segregated" the plaintiffs in institutions, and failed to provide care in the most integrated setting appropriate to their needs—community-based programs.<sup>279</sup> As stated in other related cases where DOJ filed an *amicus* brief, the department argued that the unnecessary segregation is a form of discrimination prohibited by the ADA and the title II regulations.<sup>280</sup> DOJ also challenged the defendant's position that the cases did not fall under title II. It stated in its brief that by failing to serve qualified individuals with mental disabilities in the most appropriate integrated setting, the defendants violated title II of the ADA. In support of its position, DOJ cited the statute

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<sup>267</sup> *Id.* at 12.

<sup>268</sup> *Id.* at 14–17.

<sup>269</sup> 46 F.3d 325 (3rd Cir.), *cert. denied*, 516 U.S. 813 (1995).

<sup>270</sup> *Id.* at 327–28.

<sup>271</sup> *Id.* at 328. Two plaintiffs were not parties to the summary judgment motions of the district court. *Id.* at 328 n.4.

<sup>272</sup> Brief for the United States as *Amicus Curiae* at 4, *Helen L. v. Didario*, 46 F.3d 325 (3rd Cir.), *cert. denied*, 516 U.S. 813 (1995) (hereafter cited as U.S. *Amicus Curiae*, *Helen L. v. Didario*).

<sup>273</sup> U.S. *Amicus Curiae* at 8–16, *Helen L. v. Didario*.

<sup>274</sup> *Helen L. v. Didario*, 46 F.3d at 335–39.

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<sup>275</sup> *Id.* at 332–33.

<sup>276</sup> *Id.* at 335.

<sup>277</sup> *Id.* at 339.

<sup>278</sup> Memorandum of the United States In Support of Plaintiffs' Motion for Partial Summary Judgment on ADA Claim And In Opposition to Defendant's Motion for Summary Judgment, *Williams v. Wasserman*, 937 F. Supp. 524 (D.Md. 1996) (No. CCB–94–880) (hereafter cited as U.S. *Amicus Curiae*, *Williams*). Plaintiffs moved for summary judgment on behalf of a subclass of *Williams* plaintiffs. Plaintiffs did not move for summary judgment on behalf of the individual plaintiff in a related case, *Hunt v. Ebberts* (No. CCB–91–2564), nor on behalf of any of the plaintiffs with mental retardation in another related case, *Hattie J. v. Wasserman* (No. CCB–9401187). Defendants moved for summary judgment on the ADA claims in all three cases. *Id.* at 1 n.2.

<sup>279</sup> *Id.* at 1–2.

<sup>280</sup> *Id.* at 2; 28 C.F.R. § 35.130(d) (1997).

and the regulations, as well as the legislative history and Congressional intent of the act.<sup>281</sup>

The Department has issued legal positions in other health care areas. For example, in 1997, the Department issued a Memorandum of Intervenor on behalf of the plaintiffs in *Anderson and Garrison v. Pennsylvania Department of Public Welfare*.<sup>282</sup> In this case, plaintiffs filed suit alleging that the State had failed to ensure that the health maintenance organizations (HMOs) with which it had contracted provided medical services for eligible citizens or offered facilities that were accessible to individuals with mobility impairments. In addition, the plaintiffs alleged that the State failed to ensure that when HMOs rendered such services, necessary medical information was provided to HMO patients with visual impairments in appropriate alternative formats.<sup>283</sup> The defendant asserted that title II could not be enforced in this case.

The Department's memorandum addresses the broad constitutional jurisdictional coverage of title II of the ADA and "intentional discrimination" under the equal protection clause.<sup>284</sup> In its analysis, the Department said that Congress intended to extend the ADA to every aspect of society and that the discrimination against persons with disabilities was severe, and resulted from both intentional and nonintentional conduct.<sup>285</sup> In this case, the Department broadened the scope of protection under title II and expanded its discussion of the title beyond its regulations.<sup>286</sup> DOJ wrote that in title II of the ADA, Congress attempted to redress discrimination against persons with disabilities by mandating that "qualified individual[s] must be provided *meaningful access* to the benefit that the

[entity] offers."<sup>287</sup> This includes the benefits offered by the HMOs contracted by State governments.

### **Recent Legal Challenges and Research Studies**

In addition to DOJ's policy letters and *amicus curiae* briefs on health care issues, there have been numerous challenges, in and out of court, against State health care services and plans. Also, research studies have assessed the implementation of State health care services and benefits for individuals with disabilities. Some complaints focus on deinstitutionalization while other cases have involved persons with certain disabilities who felt they were excluded from or denied certain services under State health plans or services. For example, there have been suits against State health care practices and services in such States as Pennsylvania,<sup>288</sup> Texas,<sup>289</sup> Georgia,<sup>290</sup> and Iowa.<sup>291</sup>

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<sup>287</sup> *Id.* at 28, 32.

<sup>288</sup> See *Easley v. Snider*, 36 F.3d 2975 (E.D. Pa. 1994). In this case, the plaintiffs contended that because they have mental disabilities they should not be denied access to a program for attendant care because of the disability. In the program, the State allows mentally alert persons who have physical disabilities to use surrogates in the management of their financial affairs but prohibits a similar arrangement for persons who are not mentally alert. The U.S. district court held that the State's exclusion of nonmentally alert persons from the program did not violate title II of the ADA because disabled persons who were not mentally alert were not simply a subgroup of the physically disabled. Rather, their cases involved an additional handicap, severe degree of mental instability, which rendered participation in the program ineffectual. *Id.* at 305-06.

<sup>289</sup> In *Elizabeth B. v. Texas Dep't of Protective and Regulatory Services Region #8* three plaintiffs alleged that the Texas Department of Protective and Regulatory Services, which has the responsibility for evaluating and placing individuals who are the managing conservatorship of the State into alternative living arrangements, failed to provide "necessary and statutorily guaranteed alternative living arrangements for children with disabilities in the conservatorship which is the most integrated setting. The suit contends that State officials "erroneously placed the plaintiff in the home even though children with similar and significantly more profound disabilities are living in family settings." The suit alleges that the State's department violated title II of the ADA, specifically, 28 C.F.R. § 35.130(b)(1)(iv) (providing different and unequal service to individuals with disabilities than to others). "Texas Accused of Unnecessary Institutionalization of Children," *Disability Compliance Bulletin*, vol. 4, iss. 16 (1994), p. 10.

<sup>290</sup> See *L.C. v. Olmstead*, No. 1:95-CV-1210, 1997 U.S. Dist. LEXIS 3540 (N.D. Ga. 1997). In this case, the U.S. District

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<sup>281</sup> U.S. *Amicus Curiae* at 5-12, *Williams*.

<sup>282</sup> Memorandum of Intervenor United States in Opposition to Defendant's Cross Motion for Partial Summary Judgment, *Anderson v. Pennsylvania Dep't of Public Welfare*, 1991 U.S. Dist. LEXIS 154924 (E.D. Pa. 1998) (No. 97-39-808) (hereafter cited as *Anderson v. Pennsylvania*, Memorandum of Intervenor, *Anderson*).

<sup>283</sup> Memorandum of Intervenor at 2, *Anderson*.

<sup>284</sup> In the case, the defendants alleged that the interpretation of title II is too broad and is inappropriate or has no basis under the Constitution and the equal protection clause. See Memorandum of Intervenor at 8-9, *Anderson*.

<sup>285</sup> *Id.* at 3-12.

<sup>286</sup> See *id.* at 14, 28-30, 36.

Research studies and reports also show that persons with certain disabilities are less likely to be placed in adequate community-based programs because the programs do not meet their needs.<sup>292</sup> A 1992 law review article that focused on the treatment of the mentally ill in institutionalized versus deinstitutionalized settings found that many mentally ill individuals remain institutionalized because of inadequate commu-

nity treatment services.<sup>293</sup> The researcher reviewed legal cases and research studies and found that since 1955, most seriously mentally ill people have been less likely to find their homes in institutions and more likely to find their treatment alternatives in the community.<sup>294</sup> However, many mentally ill individuals "are still confined to institutions either because no less restrictive options are available or because existing options are not utilized to integrate individuals with disabilities into community settings."<sup>295</sup>

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Court for the Northern District of Georgia ruled that State mental health officials violated title II of the ADA by continuing to institutionalize two mentally retarded individuals in a State mental hospital instead of community-based treatment, and issued an injunction barring the State from violating the plaintiffs' rights under the ADA. The court also ordered the State to release one of the plaintiffs to an appropriate community-based program, and ordered that the other plaintiff receive appropriate support services to maintain her current community placement. *Id.* at \*12-\*13.

In her legal analysis of numerous court cases, the researcher noted that when a professional has recommended community-based treatment, but the State has not implemented the decision, the courts have been receptive to a substantive right to treatment claim under the due process clause of the 14th amendment.<sup>296</sup> However, the researcher maintained that the lack of community services often results in the "unnecessary confinement of [individuals] in highly restrictive settings for lack of another place to go."<sup>297</sup> She further explains that "[m]ental health professionals who continually recommend services that do not exist become frustrated and tend to 'conform their recommendations. . .to the constraints imposed by the State's inadequate service delivery system, rather than. . .exercise true professional judgment.'"<sup>298</sup> In other words, when many of these professionals realize that what

<sup>291</sup> See *Conner v. Branstad*, 839 F.Supp. 1346 (S.D. Iowa 1993). In this class action suit, plaintiffs who were mentally and physically disabled challenged the State of Iowa's system of providing services to the class in an institutional setting rather than in a community-based environment. The district court dismissed plaintiffs' title II claim, holding that neither the explicit language of the ADA, its legislative history, 28 C.F.R. § 35.130(d), nor analogous Rehabilitation Act precedent required States to make "fundamental" or "substantial" modifications to their programs to create or expand alternative community-based services. *Id.* at 1357-58 & n.19.

<sup>292</sup> See Margaret A. Nosek and Carol A. Howland, "Personal Assistance Services: The Hub of the Policy Wheel for Community Integration of People with Severe Physical Disabilities," *Policy Studies Journal*, vol. 21, no. 4 (1993), pp. 789-800. This article discusses the difficulty in providing Personal Assistance Services for persons with severe physical disabilities. It states that the "success of persons with severe physical disabilities in living independently in the community, . . . depends, in part, on getting and maintaining adequate personal assistance with such tasks." A personal assistant is someone who assists with activities of daily living to compensate for functional limitations in physical . . . capabilities." *Ibid.*, pp. 789-90. According to the New York City Task Force on Medicaid Managed Care, "Often, a person with a disability requires a specialist or sub-specialist, a team including specialists, or a specialty care center to provide for their health care. In many instances, the coordination of care from a specialist or a specialty care center is necessary in order for a person with disability to have "an equal opportunity to achieve the same result from a Medicaid managed care program as those persons without disabilities. Susan M. Dooha, Director of Health Care Process, Public Policy Department, Gay Men's Health Crisis, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 13, 1998, attachment, New York City Task Force on Medicaid Managed Care, p. 3 (hereafter cited as Dooha New York City Medicaid Managed Care letter and Attachment).

<sup>293</sup> Stacy E. Seicshnaydre, "Comment: Community Mental Health Treatment for the Mentally Ill—When Does Less Restrictive Treatment Become a Right," *Tulane Law Review*, vol. 66 (1992) (hereafter cited as Seicshnaydre, "Community Mental Health Treatment for the Mentally Ill"). The author attributes the deinstitutionalization of the mentally ill to several factors including the discovery of overcrowded hospitals where neglect and brutality went "unchecked," and the emergence of "psychotropic" medication. To facilitate deinstitutionalization, commitment standards were heightened so that individuals must be proved to be a threat to themselves or others before they may be institutionalized. The article focuses on trends in mental health care as they affect the community mental health treatment of mentally ill people confined in institutions. *Id.*, at 1971-74.

<sup>294</sup> *Id.* at 1971.

<sup>295</sup> *Id.* at 1981.

<sup>296</sup> *Id.* at 1983 (quoting *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1195 (W.D.N.C.), *aff'd*, 902 F.2d 250 (4th Cir. 1988), *cert. denied*, 498 U.S. 951 (1990)).

<sup>297</sup> *Id.* (quoting *Flaherty*, 699 F. Supp. at 1196).

<sup>298</sup> *Id.* at 1985, 1990.

the individual really needs does not exist in the State, they will recommend a service that exists or is available, although they know it is inadequate. The researcher wrote that whether the ADA can affect these conditions is debatable. Although she wrote that the act provides more protection for individuals with disabilities than ever before,<sup>299</sup> without "adequate enforcement," the ADA will not "combat discrimination and segregation" of persons with mental disabilities adequately.<sup>300</sup>

An article published in 1996 also discussed mental health treatment for persons with mental disabilities.<sup>301</sup> The author concluded that "compared to physical health care, mental health care has been subjected to stricter limits on utilization, higher co-payments, lower benefit caps and more restricted types of offered services."<sup>302</sup> For children with serious mental health needs, "denial of access to the appropriate services can lead to unnecessary institutionalization or family breakup."<sup>303</sup>

Some of the challenges to health care services have centered on the restrictive provisions provided in State health insurance plans that affect persons with disabilities. A 1993 study by the National Council on Disability reported that a major problem in health care for many persons with disabilities is that "they have faced an ongoing struggle to obtain and retain the health care coverage they need to live independently and productively."<sup>304</sup> Persons with disabilities

who have health insurance are "typically underinsured, with coverage packages that are oriented to acute care and that do not meet their specific chronic and long-term care needs."<sup>305</sup> Specifically, the study reports that 3 million persons with disabilities, or 15 percent of the disability community, do not have any form of health insurance, and "millions more do not have access to adequate health insurance."<sup>306</sup>

The problem with State health insurance for individuals with disabilities surfaced in South Carolina. Individuals and an advocacy group filed suit against the South Carolina Health Insurance Pool (SCHIP), a nonprofit State entity that was created to assist "uninsurable but non-indigent persons in securing reimbursements for costs of their medical care."<sup>307</sup> In *Doe v. South Carolina Health Insurance Pool*, the plaintiffs alleged that SCHIP violated title II of the ADA because it unlawfully discriminated against persons with AIDS or HIV infection by excluding them from coverage.<sup>308</sup> The major plaintiff was a man diagnosed with HIV in 1985, and AIDS in 1989. He was qualified for coverage by SCHIP because he worked and was not eligible for medicaid or medicare. He was denied coverage by private health insurance companies. All health insurers authorized to issue or provide health insurance in the State are members of the pool.<sup>309</sup> The AIDS exclusion was added in 1989 by the State legislature.<sup>310</sup> The suit asked the district court for a "declaration that the exclusion of persons with HIV infection from SCHIP violates the ADA and is therefore unenforceable, and for an injunction directing SCHIP to admit Doe to the pool."<sup>311</sup>

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<sup>299</sup> *Id.* at 1985, 1990.

<sup>300</sup> *Id.* at 1985-86. The author discusses with approval cases like *Jackson v. Fort, Stanton Hospital & Training School*, 757 F.Supp. 1243, 1311 (D.N.M. 1990), in which the court stated that "lack of available alternatives does not excuse defendants from providing care in community settings for those individuals whose IDTs [interdisciplinary teams] have, in the exercise of their professional judgments, recommended community care." Seichnaydre, "Community Mental Health Treatment for the Mentally Ill," pp. 1981-82.

<sup>301</sup> Leonard S. Rubenstein, "Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care," *St. Louis Law Journal*, vol. 40 (1996), pp. 1-40 (hereafter cited as Rubenstein, "Ending Discrimination Against Mental Health Treatment").

<sup>302</sup> *Id.* at 315 & n. 1.

<sup>303</sup> *Id.* at 315.

<sup>304</sup> National Council on Disability, *Sharing the Risk and Ensuring Independence: A Disability Perspective on Access to Health Insurance and Health-Related Services*, (Washington, DC: National Council on Disability, Mar. 4, 1993), p.1.

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(hereafter cited as NCD, *Sharing the Risk and Ensuring Independence*); see also "Council's Health Care Study Urges Pooling of Risk and Cost," *Disability Compliance Bulletin* (LRP), vol. 3, iss. 19 (Apr. 14, 1993), p. 5.

<sup>305</sup> NCD, *Sharing the Risk and Ensuring Independence*, p. 1.

<sup>306</sup> *Ibid.*, pp. 1-2.

<sup>307</sup> "South Carolina 'High Risk' Pool Sued," *Disability Compliance Bulletin* (LRP), vol. 3, iss. 20 (Apr. 28, 1993), p. 3 (hereafter cited as "High Risk Pool Sued").

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*, p. 4.

In 1995, the district court, in *Givens v. South Carolina Health Insurance Pool*, approved SCHIP and the exclusion of persons with HIV/AIDS from SCHIP coverage.<sup>312</sup> The plaintiff argued that the SCHIP policy violated title II, although it is a nonprofit corporation. The position was that the program was created by the State legislature, receives tax credits, and the governor appoints members of the board.<sup>313</sup> The defendants argued that SCHIP is not a public entity, and that the decision to exclude persons with HIV/AIDS from coverage was a "valid underwriting decision. . . consistent with state law."<sup>314</sup> The court did not focus on SCHIP as a public entity, but on insurers who can restrict coverage based on "underwriting risks that are based on, or not inconsistent with, state law."<sup>315</sup> The court determined that because South Carolina approves the "denial of coverage of HIV-related illnesses, the ADA was not violated."<sup>316</sup> The plaintiff filed an appeal with the Fourth Circuit and asked the court to examine the legitimacy of the State law. He alleged that although the ADA does allow insurers to underwrite risks based on actuarial data, the HIV exclusion in South Carolina "was written into the law casually, with no debate and no actuarial studies."<sup>317</sup> In 1997, the South Carolina legisla-

<sup>312</sup> "Court Allows State's High-Risk Insurance Pool to Exclude Persons with HIV," *Disability Compliance Bulletin* (LRP), vol. 7, iss. 5 (Dec. 21, 1995), p. 10 (hereafter cited as "Court Allows State's High-Risk Insurance Pool to Exclude Persons with HIV"). The original plaintiff (DOE) died of AIDS-related causes and Sam Givens came forward to replace the deceased in the lawsuit. According to the LRP article, Givens had an insurance policy, but when he developed HIV and began to make claims for HIV-related illnesses, his premiums escalated beyond his ability to pay. He applied to SCHIP but was denied coverage because he was HIV-positive. *Ibid.*

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.* 42 U.S.C. § 12201(C)(2) (1994) provides that titles I-IV of the ADA shall not be construed to prohibit or restrict "a person or organization covered by [the ADA] from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."

<sup>316</sup> "Court Allows State's High-Risk Insurance Pool to Exclude Persons with HIV," p. 10.

<sup>317</sup> *Ibid.* See 29 C.F.R. pt. 35, app. A, § 1630.16(f), at 371 (1997) (employer cannot deny qualified individual with a

ture deleted the provision that excluded persons infected with HIV from coverage.<sup>318</sup>

Although a suit was not filed, disabled citizens and advocacy groups in Oregon challenged the State's health plan because they believed certain provisions would exclude persons with disabilities from coverage. These citizens maintained that under its original provisions, the Oregon Health Plan violated title II of the ADA.<sup>319</sup> Originally, the plan was viewed by its supporters as a way to extend coverage to uninsured Oregonians without "significantly raising costs."<sup>320</sup> Basically, the Oregon Health Plan limited medical treatments paid for by medicaid. The controversial component of the plan was its "ranking system," whereby 688 medical conditions and their treatments were prioritized.<sup>321</sup> Under the plan, those ranked near the top would be covered and those ranked near the bottom would not be covered. Advocates for persons with disabilities challenged the prioritization as discriminatory because rankings were based on "quality of life."<sup>322</sup> The more a medical procedure can improve the quality of life, the higher the

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disability equal access to insurance based on disability alone, if the disability does not pose increased risks).

<sup>318</sup> "South Carolina Prepared to Implement the Health Insurance Portability and Accountability Act of 1996," *The South Carolina Department of Insurance Newsletter*, vol. 2, iss. 2 (March-April 1997), p. 1. According to the newsletter, on Mar. 31, 1997, the South Carolina State legislature passed Senate Bill 287, which revises the South Carolina Health Insurance Pool. Changes from the original legislation include increasing the maximum benefit limit, capping the premiums in most circumstances, and deleting the provision that excludes persons infected with HIV from coverage.

<sup>319</sup> James V. Garvey, "Health Care Rationing and the Americans with Disabilities Act of 1990: What Protection Should the Disabled Be Afforded," *Notre Dame Law Review*, vol. 68 (1993), pp. 583-84 (hereafter cited as Garvey, "Health Care Rationing and the ADA"). This law review article is a lengthy discussion of the Oregon Health Plan, including the history, intent, and overall ADA implications of the plan. *Id.*, pp. 1-37; Disability Advocates Force Changes in Oregon Health Plan," *Disability Compliance Bulletin*, vol. 3, iss. 19 (Apr. 14, 1993), p. 1.

<sup>320</sup> "Disability Advocates Force Changes in Oregon Health Plan," *Disability Compliance Bulletin*, vol. 3, Iss. 19 (Apr. 14, 1993), p. 5 (hereafter cited as Disability Advocates Force Changes"). See also Garvey, "Health Care Rationing and the ADA," pp. 6-8.

<sup>321</sup> "Disability Advocates Force Changes," p. 1.

<sup>322</sup> *Ibid.*, p. 5.

ranking.<sup>323</sup> The advocates contended that such rankings were discriminatory because the “quality of life of persons with disabilities is generally viewed as lower than for persons without disabilities, thus, they would likely be denied equal access to health care.”<sup>324</sup> The prioritization process was based on the responses of 1,000 Oregonians who were asked to rank various health conditions, and not on objective medical evidence.<sup>325</sup>

The Bush administration rejected the plan, agreeing with the advocates that the Oregon Health Plan violated the ADA. The State’s subsequently revised plan was determined to have also violated the ADA. The Health Care Financing Administration, the Federal agency that oversees medicaid, “ordered Oregon to re-rank condition/treatments without relying on data collected with respect to returning patients to an asymptomatic state.”<sup>326</sup> Under the Clinton administration, “the Oregon Plan was approved only after Oregon officials agreed to abide by alterations mandated by the Health Care Financing Administration.”<sup>327</sup> By following the Health Care Financing Administration requirements, the Oregon Health Plan would be in compliance with the ADA.<sup>328</sup>

New York City has started plans for a medicaid-managed-care program.<sup>329</sup> In 1997, New York City’s Office of Medicaid Managed Care convened a task force to develop ADA compliance guidelines. Advocacy groups that participated in the planning process noted the problems with the Oregon State plan and the difficulty the State had in receiving approval from the Health Care Financing Administration because it did not meet the requirements of the ADA.<sup>330</sup> Advocates for people with disabilities and medicaid beneficiaries submitted suggestions that included and went beyond physical

and communications accessibility to health services.<sup>331</sup> They also addressed ADA compliance requirements.<sup>332</sup> In essence, “the advocates identified program issues that emerged throughout the Medicaid managed care planning process, and experts identified barriers and proposed constructive alternatives in health care services for the disabled.”<sup>333</sup>

These suggestions were incorporated in the New York City Task Force on Medicaid Managed Care. Some of the issues that the work group proposed in the ADA compliance guidelines that were presented to managed care organizations who want to contract with New York City included access to specialists and specialty care centers, member services and health education, case management, home visits, and an ombudsman program.<sup>334</sup> In October 1997, the city published its “Guidelines for MAMCO Compliance with ADA,” which outlines guidelines for “compliance, suggests methods for compliance, and [provides requirements] for compliance plan submissions.”<sup>335</sup>

However, even when some disabled persons are able to obtain health insurance, they find difficulty in obtaining access to the health care services. For example, in 1998, a paralyzed 32-year-old medicaid recipient from Takoma Park, Maryland, complained to the Civil Rights Division at DOJ that Maryland’s managed care health program denies her accessibility to health services.<sup>336</sup> She has been unable to find a doctor whose office is wheelchair accessible and equipped with “an exam table that can be lowered to 18 inches” to meet her needs.<sup>337</sup> Her attorneys’ position is that the complainant’s “health maintenance organization and the State of Maryland are ignoring her rights under the Americans with Disabilities

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<sup>323</sup> Ibid., p. 4.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.; see also Garvey, “Health Care Rationing and the ADA,” p. 1.

<sup>327</sup> “Disability Advocates Force Changes,” p. 4.

<sup>328</sup> Ibid.

<sup>329</sup> Dooha New York City Medicaid Managed Care letter, pp. 1–3 and Attachment, pp. 1–17.

<sup>330</sup> Dooha New York City Medicaid Managed Care letter, p. 1.

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<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid., p. 2.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid. and attachment, pp. 1–17.

<sup>336</sup> Avram Goldstein, “Is Managed Care Equipped for the Disabled,” *The Washington Post*, Apr. 22, 1998, pp. B1, B5. The Maryland Disability Law Center complained to the Civil Rights Division alleging that the complainant’s HMO and the State health department “have effectively denied her care for six months.” Ibid., p. B5.

<sup>337</sup> Ibid., pp. B1, B5.

Act.”<sup>338</sup> Maryland medicaid’s managed care organizations have redirected their members from specialty facilities (such as rehabilitation hospitals) to private physicians.<sup>339</sup> The complainant alleges that her HMO has yet to find a physician (to date, she has tried four different doctors) who can meet her needs. In one doctor’s office, there were stairs. In another office, the doors were too “narrow for her wheelchair.”<sup>340</sup> Disability advocates say that this situation “shows the difficulties facing individuals in medicaid programs in States that shift to managed care without careful planning for people with disabilities and special needs.”<sup>341</sup> One advocacy group, the National Health Law Program, alleges that the Health Care Financing Administration has not responded adequately to the problems affecting persons with disabilities in the State medicaid managed care programs or in ensuring that these programs are in compliance with the ADA.<sup>342</sup>

Finally, a Pennsylvania Federal district court judge has granted class certification for a class action suit brought by five psychiatric hospital residents alleging that a State department of public welfare violated title II by failing to provide them with services in the most integrated setting appropriate.<sup>343</sup>

In its report, the National Council on Disability stated:

access to health insurance and health-related services critically affects the ability of persons with disabilities to pursue employment and achieve independence. While the ADA did not resolve the problem of access to health care coverage for persons with disabilities, it improves access by requiring . . . the same health benefits as those without disabilities and by prohibiting

insurers from treating persons with disabilities differently without actuarial justification.<sup>344</sup>

DOJ’s title II regulations address some of the concerns raised about health care benefits and services for persons with disabilities, but its involvement in health care litigation has been limited. Although the department has issued policy letters on health care matters, these letters do not carry the same weight or merit the same deference as the regulations and technical assistance materials.<sup>345</sup> Information provided in response to a letter does not set binding precedent in all subsequent cases and the courts have not deferred to policy letters to the extent that they have to the regulations or technical assistance manuals.<sup>346</sup> Therefore, even when the department has taken a position or developed policy on health care issues, unless it is incorporated in the regulations or included in a technical assistance manual, it is unlikely that State and local governments will know what the position is.

## **Technology and State and Local Government Web Sites**

### **Technology—Emerging Issues**

A substantial portion of the Nation’s disabled individuals uses computers and the Internet.<sup>347</sup> According to a 1996 report issued by the American Foundation for the Blind, 29 percent of blind and visually impaired individuals had a computer in their homes. This compares to 25 to 40 percent of the general population.<sup>348</sup> Approximately 38 percent of blind and visually impaired individuals had used a computer during 1996;

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<sup>338</sup> Ibid., p. B1.

<sup>339</sup> Ibid., p. B5.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid. The article noted that in April 1998, a Federal judge ruled that “Pennsylvania’s managed care Medicaid program violated the ADA and that the program must make sure HMOs are free of architectural barriers.”

<sup>342</sup> Goldstein, “Is Managed Care Equipped for the Disabled,” p. B5.

<sup>343</sup> *Kathleen S. v. Dep’t of Public Welfare*, No. 97-6610, 1998 U.S. Dist. LEXIS 2027 (E.D. Pa. 1998); see also “Class Certification Granted In Integrated Setting Case,” *Nat’l Disability L. Rep.*, Apr. 23, 1998, p. 21.

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<sup>344</sup> NCD, *Sharing the Risk and Ensuring Independence*, p. 1.

<sup>345</sup> Breen interview, p. 3.

<sup>346</sup> Ibid.

<sup>347</sup> National Council on Disability, *Access to Multimedia Technology*, Washington, DC, Mar. 13, 1998, p. 52.

<sup>348</sup> NCD, *Access to Multimedia Technology*, p. 53, citing American Foundation for the Blind, Comments of the American Foundation for the Blind, Oct. 28, 1996, before the FCC WT Docket #96-198, in the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities; Wirthlin Worldwide, *Wirthlin Report*, vol. 6, no. 7 (McLean, VA: Wirthlin Worldwide, 1996); and Electronic Industries Association, *U.S. Consumer Electronics Sales and Forecast 1992-1993* (Arlington, VA: Consumer Electronics Manufacturing Association, 1996).



and 31 percent of these individuals had access to online services or the Internet.<sup>349</sup> According to the National Council on Disability, these figures were similar to those of the general population.<sup>350</sup> In addition, a 1996 report from an ongoing survey revealed that 8 percent of World Wide Web users had at least one disability; and approximately one-half of these individuals had visual impairments.<sup>351</sup> The National Council on Disability predicts that Internet use for individuals with visual impairments will continue to increase, if the service is accessible.<sup>352</sup>

According to the Foundation for Technology Access, technology can enhance individuals' opportunities to participate in a wide variety of activities.<sup>353</sup> Technology has the potential to "level the playing field"<sup>354</sup> for persons with disabilities; enable them to interact with other individuals; and reduce the personal mobility and communication barriers they confront due to their disabilities.<sup>355</sup> According to former Sen. Bob Dole, for people with disabilities, whether the disabilities are sensory, cognitive, motor, or communication, technology can enhance mobility and "provide the tools to speak, hear, see, write, learn, and work."<sup>356</sup> He added that technology fosters the means for individuals with disabilities to "live as fully and independently as possible and make the

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<sup>349</sup> NCD, *Access to Multimedia Technology*, p. 53.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*, p. 52, citing Georgia Institute of Technology (1996), accessed at [http://www.cc.gatech.edu/gvu/user\\_surveys/survey-04-1996](http://www.cc.gatech.edu/gvu/user_surveys/survey-04-1996).

<sup>352</sup> NCD, *Access to Multimedia Technology*, p. 53.

<sup>353</sup> Alliance for Technology Access, *Computer Resources for People With Disabilities* (Alameda, CA: Hunter House Publications, 1994), p. ix (hereafter cited as ATA, *Computer Resources*).

<sup>354</sup> National Council on Disability, *Access to the Information Superhighway and Emerging Technology by People With Disabilities* (Washington, DC: National Council on Disability, Sept. 30, 1996), p. xi (hereafter cited as NCD, *Access to the Information Superhighway*); and National Council on Disability, *Achieving Independence: The Challenge for the 21st Century: A Decade of Progress on Disability Policy: Setting an Agenda for the Future* (Washington, DC: National Council on Disability, July 26, 1996), p. 109 (hereafter cited as NCD, *Achieving Independence*).

<sup>355</sup> NCD, *Access to the Information Superhighway*, pp. ix, xi.

<sup>356</sup> Robert Dole, "Fulfilling America's Promise: Technology and the Disabled," U.S. Senate, Apr. 19, 1996, p. 2 (hereafter cited as Dole, "Fulfilling America's Promise").

same choices about their lives that their nondisabled peers can take for granted."<sup>357</sup> Thus, it is critical that individuals with disabilities be able to benefit from technology and have it become a regular part of their lives.<sup>358</sup>

Ideally, products, processes, devices, systems, and services should be "universally designed" so that they can accommodate people with the widest possible range of abilities, operating with various constraints, and in numerous environments and circumstances.<sup>359</sup> Universal design requires that products be equitable and flexible in use to accommodate a wide range of individual preferences as well as physical, perceptual, communication, and cognitive abilities.<sup>360</sup> Currently, according to the Trace Research and Development Center, "there are no universal designs or universally-designed products."<sup>361</sup> That is, no program, feature, service, or material in general is accessible to and usable by all individuals; and there can be potential consequences to individuals who are "left out."<sup>362</sup> As a result, individuals with disabilities could confront various access barriers.<sup>363</sup>

The National Council on Disability states that the disability community has been publicizing the notion of "universal design" for more than a decade, and reports that buildings and transportation systems should be usable by persons with a wide range of disabilities.<sup>364</sup> Barriers confronted by persons with disabilities include (a) signs, building directories, and other systems that were previously silent; (b) graphics in information kiosks and other interactive sites; and

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<sup>357</sup> *Ibid.*

<sup>358</sup> Alliance for Technology Access, *Computer Resources for People With Disabilities* (Alameda, CA: Hunter House Publications, 1994), p. ix.

<sup>359</sup> Greg Vanderheiden, Trace Research and Development Center, "Universal Design: What It Is and What It Isn't," University of Wisconsin at Madison, May 1996, p. 1 (hereafter cited as TRDC, "Universal Design"); and <http://www.trace.wisc.edu/publications/3.html>.

<sup>360</sup> <http://www.trace.wisc.edu/publications/3.html>.

<sup>361</sup> TRDC, "Universal Design," p. 1.

<sup>362</sup> Greg Vanderheiden, "Key Issues in Assuring That National Information Infrastructure in Classrooms is Accessible," Trace Research and Development Center, February 28, 1997; and TRDC, "Universal Design."

<sup>363</sup> TRDC, "Universal Design," p. 1.

<sup>364</sup> NCD, *Achieving Independence*, p. 110.

(c) "sealed public systems," such as fare machines, automated teller machines (ATMs), and other machines with touch screens.<sup>365</sup> However, despite these and other potential barriers confronted by individuals with disabilities, there are various strategies, assistive devices and services, and policy interventions/legislative initiatives that can foster and provide "complete and efficient access" to information and services for individuals with disabilities.<sup>366</sup>

### **General Advantages of Technological Devices and Services**

According to the National Council on Disability, individuals regularly and increasingly rely on technology to enhance functioning and perform routine tasks.<sup>367</sup> From eyeglasses to telephones to remote controls for televisions, the daily lives of individuals are shaped by technological innovation. Thus, if technological innovation proceeds in an accessible fashion, it can hold promise for individuals with disabilities and offer them the same array of benefits as those attained by their nondisabled peers.<sup>368</sup> Through telecommunications, individuals can conveniently obtain instant, up-to-date information in their homes from services (including those that are remotely located) that are otherwise inaccessible due to transportation, architectural, and communication barriers.<sup>369</sup> Obtaining information from electronic media can link users to various educational and medical services; and it virtually ensures anonymity, which makes a disability invisible or irrelevant.<sup>370</sup>

In addition, personal isolation can be diminished as individuals "congregate" and share their interests on line.<sup>371</sup> Furthermore, students can apply for financial aid and access a tutor while on line, and enroll in "distance learning courses."<sup>372</sup> Electronic information networks also enable individuals to (a) send an emergency alert to everyone in one's family simultaneously and have it arrive moments later; (b) obtain tax forms and computational assistance from accountants who provide online help; (c) search job postings confidently; (d) preview cars before visiting a dealer; (e) obtain a traffic report from a monitored location; and (f) select a vacation spot, book the flight, and reserve the hotel room by clicking on a "mouse."<sup>373</sup> Over time, "as the novel becomes the ordinary," the provision and cost of such technology becomes "standard fare in American business and culture."<sup>374</sup>

Online employee training programs can be less costly than traditional professional development, obtained when and where needed, and can improve work performance and create fewer interruptions in the work environment.<sup>375</sup> A 1997 report showed that the average time to train someone via computer technology was about half that of traditional instructor-led training.<sup>376</sup> Advances in technology create the option to work from one's home in a rural area, correspond with (and even supervise) co-workers in a distant city via e-mail, and receive and send documents on fax machines.<sup>377</sup> High-speed, "high bandwidth communication channels" enable scientists to conduct experiments in a laboratory located across the globe; and collaborate efforts and publish findings with remotely-located colleagues.<sup>378</sup> Individuals with cerebral palsy, for instance, who are unable to operate delicate instruments, and conduct chemical experiments in a laboratory using fragile glassware, could po-

<sup>365</sup> NCD, *Access to the Information Superhighway*, pp. xii and 36-41.

<sup>366</sup> *Ibid.*, pp. xii, 23-26; and National Council on Disability, *Access to Multimedia Technology by People with Sensory Disabilities* (Washington, DC: National Council on Disability, Mar. 13, 1998), transmittal letter from Marca Bristo, Chairperson (hereafter cited as NCD, *Access to Multimedia*).

<sup>367</sup> NCD, *Achieving Independence*, p. 107.

<sup>368</sup> *Ibid.*; NCD, *Access to the Information Superhighway*, p. 23.

<sup>369</sup> ATA, *Computer Resources*, p. 118; Don Barrett, Technology Information Specialist, Office of Communications and Information Services, Special Education and Rehabilitative Services, U.S. Department of Education, telephone interview, Apr. 6, 1998, p. 2 (hereafter cited as Barrett interview); and NCD, *Access to the Information Superhighway*, pp. xi, 23, 24.

<sup>370</sup> NCD, *Access to the Information Superhighway*, p. xi; and Barrett interview, p. 2.

<sup>371</sup> NCD, *Access to the Information Superhighway*, p. 23.

<sup>372</sup> *Ibid.*, pp. 6 and 24.

<sup>373</sup> *Ibid.*, pp. 3-5

<sup>374</sup> NCD, *Achieving Independence*, p. 107.

<sup>375</sup> NCD, *Access to Multimedia*, p. 15.

<sup>376</sup> *Ibid.*

<sup>377</sup> NCD, *Achieving Independence*, p. 108; and Robert Dole, "Fulfilling America's Promise: Technology and the Disabled," U.S. Senate, Apr. 19, 1996, p. 2.

<sup>378</sup> NCD, *Access to the Information Superhighway*, p. 6.

tentially be barred from achieving career goals as scientists. However, with simulations of the instruments and glassware on a computer screen, these individuals can conduct experiments using keyboard control or other interfaces to meet their needs.<sup>379</sup>

### **Technology-related Assistance**

In 1988, Congress acknowledged the powerful role that assistive technology and services can have for people with disabilities by passing the Technology-Related Assistance for Individuals with Disabilities Act of 1988, popularly referred to as the "Tech Act."<sup>380</sup> The Tech Act was one of the first pieces of Federal legislation to address the needs of all individuals with disabilities.<sup>381</sup> With passage of the Tech Act and amendments to the act in 1994, Congress sought to address the inaccessibility for individuals with disabilities of existing and developing telecommunications and information technologies, as well as the problem of inadequate information on the use of assistive technology resources.<sup>382</sup>

The Tech Act also clarifies that assistive technology services include:

- (A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
- (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
- (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
- (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- (E) training or technical assistance for an individual with disabilities, or, where appropriate, . . . the family members, guardians, advocates, or authorized representatives of such an individual; and
- (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.<sup>383</sup>

The Tech Act recognized the importance of assistive technology in the lives of persons with disabilities and was the premiere piece of legislation to define assistive technology devices and services.<sup>384</sup> The Tech Act explicitly mentions that these provisions are "essential to enable persons with disabilities to (a) have greater control over their lives; (b) participate in, and contribute more fully to activities in their home, school, work environments; (c) interact with their non-disabled peers; and (d) benefit from opportunities taken for granted by others."<sup>385</sup>

As amended in 1994, the Tech Act requires States to perform "systems change" and advocacy activities intended to modify laws, policies, and practices to increase access of individuals with disabilities to assistive technology.<sup>386</sup> For example, States must work to reach underrepresented and rural populations to improve their

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<sup>379</sup> *Ibid.*, p. 24.

<sup>380</sup> Pub. L. No. 100-407, 102 Stat. 1044 (codified as amended at 29 U.S.C. § 2201-2288 (Supp. 1996)) Congress amended this statute in 1994. Technology-related Assistance for Individuals with Disabilities Amendments of 1994, Pub. L. No. 103-218, 108 Stat. 50 (Supp. II 1996) (codified in 29 U.S.C. § 2201 note and in scattered sections of 29 U.S.C. See also Rehabilitation Engineering Society of North America (RESNA), *The Tech Act Accomplishments to Date* (Arlington, VA: Rehabilitation Engineering Society of North America, September 1996), p. 3 (hereafter cited as RESNA, *The Tech Act Accomplishments*).

<sup>381</sup> Behrmann, "AT for Students with Mild Disabilities," p. 72.

<sup>382</sup> 29 U.S.C. § 2201(a)(7) (Supp. II 1996) states that: "Many individuals with disabilities cannot access existing telecommunications and information technologies and are at risk of not being able to access developing technologies. The failure of Federal and State governments, hardware manufacturers, software designers, information systems managers, and telecommunications service providers to account for the specific needs of individuals with disabilities results in the exclusion of such individuals from the use of telecommunications and information technologies and results in unnecessary costs associated with the retrofitting of devices and product systems." See also Behrmann, "AT for Students with Mild Disabilities," p. 72.

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<sup>383</sup> 29 U.S.C. § 2202(3)(A)-(F) (Supp. 1996).

<sup>384</sup> Barbara Crowl and Karen Franklin, "A New and Improved Tech Act," accessed at <http://www.resna.org/tap/atq/newtech.htm>.

<sup>385</sup> 29 U.S.C. § 2201(a)(3)(A)-(D) (Supp. II 1996).

<sup>386</sup> *Id.* § 2211 (Supp. II 1996) (setting forth the systems change and advocacy activities States receiving grants from Secretary of Education are to undertake); RESNA, *The Tech Act Accomplishments*, p. 3.

accessibility to assistive technology services.<sup>387</sup> To date, State projects have conducted aggressive outreach to Hispanic, black, and Native American populations<sup>388</sup> and have made efforts to address concerns related to rural districts through various approaches.<sup>389</sup> The Tech Act program is administered by the U.S. Department of Education, Office of Special Education and Rehabilitation Services through the National Institute on Disability and Rehabilitation Research.<sup>390</sup>

According to the National Council on Disability, within the past decade, technological innovations have fostered the potential for a level of independence and productivity that was previously unattainable by persons with disabilities.<sup>391</sup> For instance, rapid advances in technological capability have created the means for 54 million people with sight, auditory, manual, or cognitive impairments to access computer screens and keyboards.<sup>392</sup> Because "digital information" is neither "visual, auditory, nor tactile," it can be translated (with appropriate programming) into any of these forms to match an individual's sensory or manual needs.<sup>393</sup>

### **Americans with Disabilities Act**

In title II of the ADA, auxiliary aids and services are defined to include a wide range of services and devices that are essential to ensur-

ing that equally effective communication takes place with respect to persons who have auditory, visual, or speech impairments.<sup>394</sup> The regulations and the analysis also list several potential aids and services.<sup>395</sup> The analysis of the regulations mentions that the examples are intended to be an illustrative rather than an "all inclusive or exhaustive catalogue" of potential devices.<sup>396</sup> RESNA argues that the aids and services can include "state of the art devices and emerging technology."<sup>397</sup> However, RESNA acknowledges that entities covered by title II of the ADA are not mandated to use the most recent or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication.<sup>398</sup>

According to RESNA, the title II regulations indicate that devices such as voice recognition systems, automatic dialing telephones, and infrared and other light control systems are means to promote access to and participation in services and programs.<sup>399</sup> However, RESNA is concerned that DOJ does not consider these devices as auxiliary aids or services that are essential for effective communication.<sup>400</sup> According to DOJ, under the ADA regulations, "effective communication" is a term of art that applies only to communication between the covered entity and a person who has a disability that affects speech, hearing, or vision. The term "auxiliary aids and services" encompasses the range of devices necessary to ensure effective communication between a covered entity and a person who has a hearing, speech, or vision impairment. Some

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<sup>387</sup> RESNA, *The Tech Act Accomplishments*, p. 5.

<sup>388</sup> *Ibid.* Specific State outreach grantees endeavors include: disseminating information about assistive technology to Hispanic consumers; developing comprehensive plans that target disabled blacks of all ages to increase their access to assistive technology; and utilizing a community liaison to address the needs of Native Americans. The Tech Act allows States the flexibility to determine specific approaches to accomplish these endeavors. *Ibid.*

<sup>389</sup> RESNA, *The Tech Act Accomplishments*, p. 5. Services to improve accessibility to technological services for disabled individuals in rural localities include use of mobile vans and establishment of numerous regional centers. The Tech Act allows States the flexibility to determine specific approaches to accomplish these endeavors. *Ibid.*

<sup>390</sup> Barbara Crowl and Karen Franklin, "A New and Improved 'Tech Act,'" accessed at <http://www.resna.org/tap/atq/newtech.htm>.

<sup>391</sup> NCD, *Achieving Independence*, p. 107.

<sup>392</sup> NCD, *Access to Multimedia Technology*, Letter of Transmittal.

<sup>393</sup> *Ibid.*

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<sup>394</sup> See 28 C.F.R., pt. 35, app. A, § 35.104, at 467. See also Robert R. Williams, "ADA and A.T.: What the Final Regulations Say (Title II)," p. 1, <http://www/resna.org/tap/atq/adaat2.htm>.

<sup>395</sup> See 28 C.F.R. § 35.104 (1997); 28 C.F.R., pt. 35, app. A, § 35.104, at 467. See also Robert R. Williams, "ADA and A.T.: What the Final Regulations Say (Title II)," p. 1, <http://www/resna.org/tap/atq/adaat2.htm>.

<sup>396</sup> 28 C.F.R., pt. 35, app. A, § 35.104, at 467. See also Robert R. Williams, "ADA and A.T.: What the Final Regulations Say (Title II)," p. 1, <http://www/resna.org/tap/atq/adaat2.htm>.

<sup>397</sup> Robert R. Williams, "ADA and A.T.: What the Final Regulations Say (Title II)," p. 1, accessed at <http://www/resna.org/tap/atq/adaat2.htm>.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

uses of advanced technology fit within this definition, but many do not. The fact that such technology does not fit within the concept of "effective communication" does not mean that it is not required by the ADA. Using commercially available technology to enable a person with a disability to do a job or participate in a program may be required as a "reasonable accommodation" or a "reasonable modification," depending on the context, to provide equal opportunity to people with disabilities. In addition, to the extent that such devices are fixed or built into the structure of a building, they may be included in the ADA Standards for Accessible Design, which governs the new construction of (or alterations to) buildings and facilities subject to the ADA.<sup>401</sup>

An architect in DOJ's Disability Rights Section stated that as new technology emerges, ADA standards should be updated and improved, much as building codes are changed to incorporate advances in the industry.<sup>402</sup> Standards and guidelines should be on a cyclical review and modification process. Standards should not be changed in terms of how stringent they are because they were not designed to accommodate all persons with disabilities.<sup>403</sup> Accessibility and cost should be balanced.<sup>404</sup>

With the support of assistive technology, individuals with disabilities have learned to communicate more effectively, develop their organizational skills, improve their ability to process information, and control their environments.<sup>405</sup> Assistive technology alone cannot eliminate the burdens and challenges faced by individuals

with disabilities.<sup>406</sup> However, it is increasingly becoming effective in accomplishing this objective as well as eliminating stereotypes about persons with disabilities.<sup>407</sup>

### ***Financial Barriers Associated with Assistive Technology***

Cost can be a major barrier for persons with disabilities to obtain access to assistive technology. According to a disability advocacy group, expenditures for adapted computers, communication devices, switches, and other technological aids that enable individuals with disabilities to participate in society can be substantial.<sup>408</sup> For instance, environmental control units can cost as much as \$6,500.<sup>409</sup> Similarly, TTYs could range in price from \$200 to \$6,000.<sup>410</sup> In 1996, former Kansas Sen. Robert Dole expressed concern that "thousands of the Nation's disabled individuals" cannot afford assistive technologies, some of which costs thousands of dollars.<sup>411</sup> In response, Senator Dole and Senator Conrad sponsored a provision in the Balanced Budget Act to allow Medicare beneficiaries to use their own funds to supplement medicare's payments for standard technologies, so that they can afford the more sophisticated devices.<sup>412</sup> Similarly, the Kansas legislature also recognized that financial barriers could preclude access to assistive technology by persons with disabilities; and they thereby authorized an annual \$100,000 appropriation to help pay for technology.<sup>413</sup> Limited funding is also available through various Federal programs.<sup>414</sup>

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<sup>401</sup> DOJ Comments, July 24, 1998, pp. 8-9.

<sup>402</sup> Ellen Harland, Architect, DRS, CRD, DOJ, interview in Washington, DC, Apr. 14, 1998, p. 4 (hereafter cited as Harland interview).

<sup>403</sup> *Ibid.*

<sup>404</sup> *Ibid.* The ADA Standards for Accessible Design implement the ADA requirements that buildings and facilities be designed and constructed to be readily accessible to people with disabilities. The ADA standards apply only to elements that are a fixed part of a building or facility. The ADA standards may require the use of certain building elements that utilize technological advances, but they do not govern the development of new technology or the use of technology in any context other than building design. DOJ Comments, July 24, 1998, p. 9.

<sup>405</sup> Judith Fein, "A History of Legislative Support for Assistive Technology," *Journal of Special Education Technology*, vol. 13 (Spring 1996), no. 1, p. 1.

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<sup>406</sup> Robert R. Williams, "Assistive Technology and People with Disabilities: Separating Fact From Fiction," p. 1, accessed at <http://www.resna.org/tap/atq/sepfact.htm>.

<sup>407</sup> *Ibid.*; and Robert R. Williams, "Assistive Technology: Making It Work For People on the Job," p. 1, accessed at <http://www.resna.org/tap/atq/makingit.htm>.

<sup>408</sup> Council for Exceptional Children, *CEC Today*, vol. 3, no 2 (August 1996), p. 1.

<sup>409</sup> ATA, *Computer Resources*, p. 238.

<sup>410</sup> *Ibid.*, p. 244.

<sup>411</sup> Dole, "Fulfilling America's Promise," p. 2.

<sup>412</sup> *Ibid.*

<sup>413</sup> *Ibid.*

<sup>414</sup> Mary Male, *Technology for Inclusion: Meeting the Special Needs of All Students*, 3rd ed. (Boston: Allyn and Bacon, 1997), p. 155 (hereafter cited as Male, *Technology for Inclusion*).

## Examples of Federal Initiatives

### U.S. Department of Education

The U.S. Department of Education (DOEd) considers "universal accessibility" to information to be a priority for the agency's customers (as well as employees), including those with disabilities.<sup>415</sup> The Department stresses that it is obligated to acquire computer hardware, software applications, and other information technology that are accessible by users with disabilities.<sup>416</sup> DOEd's Assistive Technology Team has issued accessibility requirements that are incorporated in all software development contracts,<sup>417</sup> and as of 1998, any software developed for DOEd under contract must meet accessibility requirements such as:

- provide keyboard access to all functions of an application (e.g., keyboard equivalents to all mouse actions);
- include clear and precise instructions for the use of keyboard functions;
- include clear and precise labels for all icons; and
- provide pull-down menu equivalents (that are keyboard accessible) for icon functions.<sup>418</sup>

### U.S. Department of Defense

The U.S. Department of Defense (DOD) established a goal to increase the representation of individuals with disabilities to 2 percent of its employees.<sup>419</sup> To support this goal, in 1990, DOD authorized \$10.7 million (over a 4-year period) for the Computer/Electronic Accommodations Program (CAP), which was the "largest and most innovative initiative" in the Federal Government to accommodate individuals with disabilities.<sup>420</sup>

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<sup>415</sup> U.S. Department of Education, "Requirements for Accessible Software Design," Version 1.1, Mar. 6, 1997, p. 1 (hereafter cited as DOEd, "Requirements for Accessible Software Design").

<sup>416</sup> Ibid.

<sup>417</sup> Judith Heumann, Assistant Secretary for Special Education, and Marca Bristo, Chairperson, National Council on Disability, letter to CEOs of IBM, Netscape, Novell, Oracle, and Sun Microsystems, Mar. 9, 1998, pp. 4-5 (hereafter cited as Heumann/Bristo letter), p. 2; and DOEd, "Requirements for Accessible Software Design," p. 1.

<sup>418</sup> DOEd, "Requirements for Accessible Software Design," pp. 1-2.

<sup>419</sup> DOD, Computer/Electronic Accommodations Program, brochure, p. 1.

<sup>420</sup> Ibid.

Additional funds have been appropriated to support the CAP program through 1999. The program is administered by DOD's Defense Medical Systems Support Center; and the major provisions are:

- purchase devices to make computers and telecommunications systems accessible to employees with disabilities;
- fund sign language interpreters, readers, and personal assistants for employees attending training classes of 2 or more days;
- provide "experts" who can solve accessibility problems related to computer hardware and software and other "adaptive technology"; and
- offer training and educational support.<sup>421</sup>

Overall, the CAP's provisions are intended to make DOD's work environments more accessible to employees with visual, auditory, dexterity, and cognitive impairments.<sup>422</sup> The program is based on the philosophy that with the appropriate accommodations, "people with disabilities have the power to excel."<sup>423</sup> Since the program's inception in October 1990 through October 1994, the CAP office provided more than 6,000 accommodations "throughout the DOD community."<sup>424</sup>

### State and Local Government Web Sites

Many State and local government agencies impart information as a service to the public through networks such as the Internet. The California Department of Rehabilitation, North Carolina Department of Human Resources, and the Rhode Island Office of Rehabilitation Services are examples of State agencies that use the Internet to provide information on their programs and services.<sup>425</sup> The ADA's mandate that public entities not deny individuals with disabilities the opportunity to participate in or benefit from any of

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<sup>421</sup> Ibid.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> See <http://www.catsca.com/>; <http://www.mindspring.com/~ncatp/>; and <http://www.ors.state.ri.us/>, as examples of Web sites that describe State agencies' programs and services, from Richard W. Riley, Secretary of Education, Dear Colleague letter to each school district in the Nation on the importance of providing accessible technology to students with disabilities, Oct. 7, 1997 (hereafter cited as Riley letter).

their services and activities<sup>426</sup> applies to information that State and local government entities provide through electronic media. Consequently, to comply with the ADA, State and local governments that use the Internet to provide information about their programs, services, and other provisions must ensure that their Web pages, or the information provided therein, are accessible to persons with disabilities.

The title II regulations stipulate that public entities cannot offer disabled individuals separate services that are not equal to, as effective as, or do not lead to the same level of achievement as services provided to others.<sup>427</sup> Unless public entities can find suitable substitutes for Internet services, they must enable persons with disabilities to take advantage of all benefits they make available to others through the Internet. For instance, to ensure accessibility of the Internet by persons with disabilities, DOJ mentioned in a technical letter that public entities could provide Web sites that are compatible with Lynx browsers and/or in text (i.e., screen-readable) format rather than exclusively in graphic formats.<sup>428</sup> In information provided to the Commission, however, DRS staff indicates that “[t]here is as yet no consensus as to technical standards for making websites accessible to people with disabilities, including those with impaired vision or hearing.”<sup>429</sup>

If a public entity cannot provide accessibility to its information via the Internet or World Wide Web, it may offer Web page information in other accessible formats, such as Braille, large print, and/or audio, for those with visual impairments.<sup>430</sup> Such aids and services that make visu-

ally delivered materials accessible to persons with impairments, must be furnished where necessary to assure effective communication, unless this provision results in undue burden or fundamental alteration of a program.<sup>431</sup>

### **Barriers Associated with Web Sites on the Internet**

Ideally, Web sites on the Internet should be universally designed so that they can accommodate people with the widest possible range of abilities, operating with various constraints, and in numerous environments.<sup>432</sup> Universal design requires that Web pages be compatible with the assistive technology used by persons who cannot access and use computer applications directly. According to the Trace Research and Development Center, “there are no universal designs or universally designed products.” Consequently, individuals with disabilities generally face various barriers when attempting to access State and local governments’ Internet services.

According to DRS staff, determining how to make information accessible to people with disabilities requires consideration of technological feasibility, degree of burden, and whether information is available elsewhere and in another format.<sup>433</sup> Presently, there is no means of providing access to computers or to the Internet that is accessible to all people with disabilities. For instance, a variety of computer programs and Web sites on the Internet that require multiple keystrokes may be burdensome for persons with disabilities to access; and adaptations and accommodations for persons with limited manual dexterity may not be sufficient for persons with visual impairments. Because of these technological limitations, some individuals with dis-

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<sup>426</sup> 28 C.F.R. § 35.130(a) (1997).

<sup>427</sup> *Id.* §§ 35.130(b)(1)(ii),(iii) (1997).

<sup>428</sup> Deval L. Patrick, Assistant Attorney General, CRD, DOJ, letter to Tom Harkin, U.S. Senate, re: accessibility of Web pages to people with visual disabilities, Sept. 9, 1996, (hereafter cited as Patrick letter).

<sup>429</sup> John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 3, 1998, DRS Response to Commission’s Information Request, p. 15.

<sup>430</sup> Patrick letter, p. 1. Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be pre-

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pared to offer those communications through accessible means as well. Thus, a public entity, regardless of whether it provides information via the Internet or World Wide Web, also must offer the information through accessible means, such as Braille, large print, or audio. DOJ comments, July 24, 1998, p. 9.

<sup>431</sup> Patrick letter, p. 1. *See also* 28 C.F.R. §§ 35.150(a)(3), 35.164 (1997) (undue burden provisions regarding program accessibility and communications, respectively).

<sup>432</sup> Greg Vanderheiden, Trace Research and Development Center, “Universal Design: What It Is and What It Isn’t.” University of Wisconsin at Madison, May 1996, p. 1 (hereafter cited as TRDC, “Universal Design”).

<sup>433</sup> DRS Staff November 1997 interview, statement of Wodatch, p. 6.

abilities may be denied access to some electronic and information technology.<sup>434</sup>

Although the World Wide Web can be an effective tool for learning and communicating, it relies on graphics, images, and enhanced video and audio capabilities to convey information.<sup>435</sup> Consequently, entire Web pages or portions thereof that are not text based can be beyond the reach of persons with visual impairments, despite their use of screen readers.<sup>436</sup> Similarly, individuals with hearing impairments are barred from fully accessing audio material.<sup>437</sup> These sophisticated technological capabilities can prevent full access to electronic information networks for disabled individuals, unless "accessibility is built into the technology."<sup>438</sup>

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<sup>434</sup> See *ibid.*

<sup>435</sup> National Center for Accessible Media, "The Web Access Project: Access to Multimedia on the Web," November 1997, p. 1 (hereafter cited as NCAM, "The Web Access Project").

<sup>436</sup> *Ibid.*, p. 1; NCD, *Access to the Information Superhighway*, p. 30; and NCD, *Access to Multimedia Technology*, p. 18. Web sites that are primarily text based pose few limitations for individuals with visual or hearing impairments. However, individuals with these impairments can be denied the opportunity to obtain information from the increasing number of Web sites that include sound, graphics, videos, and other newly developed technologies. See NCAM, "The Web Access Project," p. 1. According to the NCD, a major challenge for individuals with sensory disabilities is the "current evolution" of Web sites, as they move from a text-based interface to a multimedia, multimodal environment. National Council on Disability, *Access to Multimedia Technology by People with Sensory Disabilities* (Washington, DC: National Council on Disability, Mar. 13, 1998), p. 18 (hereafter cited as NCD, *Access to Multimedia Technology*).

<sup>437</sup> NCAM, "The Web Access Project," p. 1; NCD, *Access to the Information Superhighway*, p. 36; and NCD, *Access to Multimedia Technology*, p. 18

<sup>438</sup> NCD, *Access to the Information Superhighway*, pp. ix, 31, and 36. If accessibility is not built in, then individuals with disabilities need to secure potentially costly hardware and software adaptations. See NCD, *Access to the Information Superhighway*, p. 31. In contrast, with "built-in access," products or systems are designed so that they can be accessed and used without any assistive technologies. *Ibid.*, p. 51. Built-in access ensures that there is no delay between the time a device is released for general use and the time access adaptations are developed. *Ibid.*, p. xiv. According to NCD, "the user is not left without access because third-party manufacturers deem the market for access devices too small." *Ibid.*, p. xiv. With built-in access, a public entity, for instance, can place multimedia information on a computer screen that includes (a) a description track or (b) a caption track which allows visual information to be presented auditorily. Individuals with different abilities, limitations, and preferences can choose the presentation format that matches their needs. See *ibid.*, p. 51. A

Technology to access Web sites and to display and transmit information on the World Wide Web develops and changes rapidly. Consequently, regulations can become obsolete soon after they are published.<sup>439</sup> The rapid rate of development also makes it difficult for vendors to create the "access technologies" that keep pace with new information technologies. As new software is released to present information over the Internet, for instance, several months can transpire without solutions or approaches for disabled persons to access such information.<sup>440</sup> Most of the new technological developments create problems for persons with disabilities, especially when hardware/software designers wait to provide guidance on issues of accessibility until their products are finalized.

#### ***Lack of DOJ Guidance to State and Local Government Entities on Web Site Accessibility***

DOJ has been faulted for not being sufficiently proactive in addressing the issue of Web site accessibility.<sup>441</sup> DOJ has stated that "the Internet is a valuable sources of information and . . . people with disabilities should have access to it as effectively as people without disabilities."<sup>442</sup> However, to date, DOJ has not issued any accessibility standards for Web sites<sup>443</sup> and has issued only one policy letter on the issue of Web site accessibility.<sup>444</sup> DRS has not received any complaints about Web sites provided by public entities or otherwise.<sup>445</sup> The Special Legal Counsel for DRS, the issue of Web site accessibility first

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major hurdle to achieving built-in access is that it may not be possible to accommodate each type, severity, and combination of disabilities. *Ibid.*, p. xv.

<sup>439</sup> DRS Staff November 1997 interview, p. 6, statement of Savage.

<sup>440</sup> NCD, *Access to the Information Superhighway*, pp. 30-31.

<sup>441</sup> See Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, interview in Washington, DC, Oct. 20, 1997, p. 7.

<sup>442</sup> Patrick letter, p. 2.

<sup>443</sup> Jim Bostrom Architect, Technical Assistance Unit, DRS, CRD, DOJ, interview in Washington, DC, Apr. 16, 1998, p. 3 (hereafter cited as Bostrom interview).

<sup>444</sup> Breen interview, p. 6, referring to Deval Patrick, Assistant Attorney General, CRD, DOJ, letter to Tom Harkin, U.S. Senate, re: Application of the ADA to "web pages" on the Internet, Sept. 9, 1996.

<sup>445</sup> Breen interview, p. 6.



arose about 2 years ago and is not a well-established area. DRS intends to monitor it closely.<sup>446</sup>

The one policy/technical letter in which DRS addressed Web site accessibility stated that “[c]overed entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.”<sup>447</sup> Thus, DRS does not appear to require full Web site accessibility for individuals with disabilities, only requires that the information provided through the Internet be made equally accessible to individuals with disabilities through other means.

Explaining why DRS appears to consider printed information, which generally takes longer to receive, as an acceptable substitute for instant information from a Web site, the Special Legal Counsel said that the policy/technical letter on Web site accessibility did not constitute DRS’ definitive position.<sup>448</sup> He added that the letter did not deal with a title II entity and that private businesses are not necessarily required to make all of their information, particularly advertising, accessible. In contrast, he said, public entities, are providing services, which should be accessible. Although he acknowledged that printed materials obviously lack the convenience of Web information, the Special Legal Counsel said that the argument on the other side is that Web sites are merely an alternative form of providing services to individuals and the ADA only requires that the information be accessible to persons with disabilities in some other format, such as publications.<sup>449</sup> Thus, it may not be essential for persons with disabilities to have Web site access if the same information is provided in other ways.

The Special Legal Counsel said that technology changes so rapidly that it is difficult for the regulatory apparatus to respond quickly enough, and further, the government must regulate carefully in order not to hamper technological growth. A DOJ architect said that some DRS staff want to develop Web site accessibility guidelines, but added that it would be difficult to do so, because Internet technology is constantly growing and changing.<sup>450</sup> Any guidance that DOJ eventually developed would need to stay relevant over time. This could be accomplished by framing the guidance in terms of what “access” means rather than by providing specific technology recommendations.<sup>451</sup>

DRS has not provided much technical assistance related to Web site accessibility. The National Institute on Disability and Rehabilitation Research has produced some relevant technical assistance materials and a Boston television station, WGBH, has a Web site that also offers a lot of information. DRS has not been approached by any State or local governments for technical assistance and guidance, but has been approached by other Federal agencies as to how they can make their Web sites accessible. DRS advised them that they should offer a text-only option, as DOJ provides on its Web sites. DRS monitors what the National Institute on Disability and Rehabilitation Research does in this area.<sup>452</sup> For instance, in 1996, DRS staff recommended that NIDRR fund research on accessibility problems and the World Wide Web. DRS staff recommended a study that would define the nature and extent of barriers to Web sites that individuals with disabilities could confront, identify potential solutions and evaluate costs, and establish a mechanism to provide guidance and technical assistance to software developers and Internet service providers.<sup>453</sup>

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<sup>446</sup> Ibid.

<sup>447</sup> Patrick letter, p. 1.

<sup>448</sup> Breen interview, p. 6. *See also* John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 3, 1998, DRS Response to Commission’s Information Request, p. 15. (“The letter to Senator Harkin concerning Internet accessibility is an interim response to a complex, rapidly evolving issue. We hope to issue more definitive, comprehensive guidance at a later date.”)

<sup>449</sup> Breen interview, p. 6.

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<sup>450</sup> Bostrom interview.

<sup>451</sup> Ibid.

<sup>452</sup> Breen interview, p. 7.

<sup>453</sup> John Wodatch, Chief, DRS, CRD, DOJ, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Feb. 6, 1998, attachment: “ADA Related Research Issues for Discussion: Accessibility Problems and the World Wide Web,” DOJ, DRS, Response to U.S. Commission on Civil Rights, Preliminary Information Request, no. 6 (hereafter cited as “ADA Related Research Issues for Discussion”).

### **Other Activities Relating to Web Site Accessibility**

With hundreds of new Web sites being added every day, this issue will become more urgent as time goes by. Information disseminated by State and local government entities through the Internet must be accessible by individuals with disabilities, as part of the ever-growing number of Internet users. Although DOJ has not issued any policy guidance on public entity Web site accessibility for individuals with disabilities, several other agencies and organizations have attempted to address this emerging issue.

The Department of Education has issued accessibility requirements to be incorporated in all of the department's software development contracts. These guidelines stress the department's obligation to acquire information technology components that would be accessible to use by individuals with disabilities.<sup>454</sup> In addition, Secretary of Education Richard W. Riley, in a letter to every school district to the Nation, has urged access to information technology by all students, including those with disabilities. The letter was accompanied by a technical assistance package that included information on compliance with the ADA in purchasing and modifying computer software and hardware.<sup>455</sup>

The National Council on Disability also has published various technical recommendations to make Web sites accessible for persons with disabilities and, with the Department of Education, has recommended a partnership among software companies in developing new material that would meet accessibility requirements. The Department of Education and the National Council on Disability argue that accessible Web sites can be developed without hindering the creative efforts of Web page designers and that such technology and software can contribute to breaking the barriers that hinder education and employment efforts by individuals with disabilities.<sup>456</sup> Some of their general suggestions include:

- use "alternative text" attributes to describe what graphical images represent;

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<sup>454</sup> U.S. Department of Education, "Requirements for Accessible Software Design," version 1.1, Mar. 6, 1997, p. 1 (hereafter cited as DOEd, "Requirements for Accessible Software Design").

<sup>455</sup> Riley letter and attachment.

<sup>456</sup> Heumann/Bristo letter, pp. 4-5.

- avoid bit-mapped text that cannot be interpreted by a screen reader; or provide an ASCII-based alternative text;<sup>457</sup>
- to assist individuals with visual and cognitive/language impairments, use an alternative/supplemental presentation that does not rely on sight abilities (e.g., auditory format) when presenting visual information;
- to benefit individuals with hearing and cognitive/language impairments, present auditory information in an alternative/supplemental mode that does not require hearing; and
- to assist individuals with physical and cognitive/language impairments, include an alternate mechanism (e.g., "scanning" or "keyboard navigation") that enables individuals to access the selected information when constructing electronic media that require fine movement control and physical dexterity.<sup>458</sup>

In April 1997, a partnership among the World Wide Web Consortium, the White House, the Department of Education, and the National Science Foundation launched the Web Accessibility Initiative to promote Internet and Web site access for individuals with disabilities.<sup>459</sup> Issues covered by the Web Accessibility Initiative include: "technology development—protocols and data formats; tools supporting content in formats useable by persons with disabilities; technology guidelines; educational outreach; and research and advanced development."<sup>460</sup> In February 1998, the Web Accessibility Initiative released draft guidelines to assist Web site developers in designing accessible Web pages.<sup>461</sup> According to

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<sup>457</sup> NCD, *Access to Multimedia Technology*, p. 27.

<sup>458</sup> NCD, *Access to the Information Superhighway*, p. 45. In addition, the National Center for Accessible Media (NCAM) participates in the Web Access Initiative (WAI), which provides support to online service providers and Web site architects, and educates all members of the "Web community" about the importance of addressing accessibility when developing new products and services. WGBH, "The Web Access Project: The CPB/WGBH National Center for Accessible Media" brochure.

<sup>459</sup> National Council on Disability, *National Disability Policy: A Progress Report, July 26, 1996-October 31, 1997* (Washington, DC: National Council on Disability, Oct. 31, 1997), p. 27 (hereafter cited as NCD, *National Disability Policy*).

<sup>460</sup> Heumann/Bristo letter, p. 2.

<sup>461</sup> Web Accessibility Initiative, "Web Accessibility Initiative Draft Guidelines Make Web More Accessible," press release,

the Director of the Web Accessibility Initiative International Office, the guidelines are intended to be a "key reference for web authors and site builders" to ensure that their Web sites can be "reached by the broadest possible audience."<sup>462</sup> The technical guidelines focus on strategies to improve (a) the coding language (HTML 4.0) of Web pages,<sup>463</sup> (b) page layout formats, and (c) Web site navigation.<sup>464</sup>

The National Federation of the Blind has issued guidelines to ensure maximum accessibility and usability of Web pages by visually impaired individuals.<sup>465</sup> Some of the federation's suggestions for Web pages include: (1) layout should be simple and side-by-side presentation should be avoided; (2) screen access technology used by visually impaired individuals should show information on a computer, one line at a time, reading across, because information presented in columns could be confusing, especially if it is encountered unexpectedly; and (3) bulleted lists should be used rather than long text descriptions that tend to clutter screens without providing useful information.<sup>466</sup> In addition, when "image maps" are used on the Web pages, an alternate means for selecting the items contained within the maps should be provided. Information on a Web page can be placed above or below an image map, for instance, and should be accompanied by instructions for the user.<sup>467</sup>

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Feb. 3, 1998 (hereafter cited as WAI Press Release). The technical guidelines focus on strategies to improve (a) the coding language (HTML 4.0) of Web pages, (b) page layout formats, and (c) Web site navigation.

<sup>462</sup> WAI Press Release, p. 1.

<sup>463</sup> The use of HTML 4.0 allows for more structured forms and form menus, and better support for keyboard navigation. According to the American Foundation for the Blind, the use of HTML 4.0 can ensure "equal access to a great deal of Web content" for visually impaired individuals and others who rely on keyboard navigation or text-only displays. See WAI Press Release, p. 2. The Royal Institute for the Blind reported that the improvements of HTML 4.0 for Web sites ensures the inclusion of disabled individuals into the "World Wide Web community." Ibid.

<sup>464</sup> WAI Press Release, p. 1.

<sup>465</sup> National Federation of the Blind, "Eight Guidelines For Web Page Accessibility," no date (hereafter cited as NFB, "Guidelines").

<sup>466</sup> Ibid., pp. 1-2.

<sup>467</sup> Ibid., p. 2.

The American Printing House for the Blind's recommendations for Web site development include: (1) State and local government entities should create Web pages that can be manipulated by visually impaired individuals; and (2) providers of Web sites should focus on the content/text, avoid tables and graphics, have strong contrast between the background and print, and be "mouse independent" (i.e., use keyboard equivalents). Web pages with these characteristics can be virtually 100 percent accessible by individuals who rely on screen access readers and voice synthesizers to communicate with their computers.<sup>468</sup>

In January 1996, the Corporation for Public Broadcasting/WGBH Educational Foundation's National Center for Accessible Media (NCAM), initiated a Web Access Project. The project aims to research, develop, and evaluate methods of integrating "access technologies" (such as audio description) and new "Web tools" into Web sites so that they are "fully accessible" to visually and hearing impaired Internet users. NCAM has partnered with software and hardware manufacturers, the Federal Government, and other entities to disseminate technology, methods, and information to enhance Web site accessibility.

According to the director of the Web Access Project, as of April 1998, the Arizona Department of Archives and Public Records and the City of San Jose, California, are the two public entities that have had their Web sites reviewed by the National Center for Accessible Media.<sup>469</sup> As of February 1998, San Jose had completed "groundbreaking work" in the area of "accessible Web design" and is the first government jurisdiction in the Nation to implement a "Web accessibility policy."<sup>470</sup> The guidelines for accessible design are intended to ensure that Web sites accommodate all individuals regardless of their ages, language and literacy capabilities, disabilities, or computer preferences.<sup>471</sup> The City of San

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<sup>468</sup> Christine Anderson, Resource Services Manager, American Printing House for the Blind, Louisville, KY, telephone interview, Apr. 2, 1998.

<sup>469</sup> Geoff Freed, Director of the Web Access Project, National Center for Accessible Media, telephone interview, Apr. 7, 1998, p. 1 (hereafter cited as Freed interview).

<sup>470</sup> WAI Press Release, p. 3.

<sup>471</sup> DOEd, "Requirements for Accessible Software Design," p. 1.

Jose is adapting all its Web sites, both home page and departmental pages, and all future Web sites will follow technical standards developed by the city.<sup>472</sup>

The Web Access Project director indicated that there are no "official standards" with respect to designing accessible Web sites. Although the City of San Jose may refer to its guidelines for accessible design as "standards," they are actually recommended practices, such as: (a) link

photographs to their respective descriptions, (b) include "text transcriptions" for audio and video clips; and (c) avoid use of tables with more than two columns of text. In addition, all image maps will be connected to text that can be interpreted by a screen reader. San Jose also intends to link each of its Web sites to a supplemental page on "access instructions" that assists individuals with disabilities in browsing the Web sites.<sup>473</sup>

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<sup>472</sup> Freed interview, pp. 1-2.

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<sup>473</sup> See Freed interview, pp. 1-2.

# 5 Title II Outreach, Education, and Technical Assistance

The Americans with Disabilities Act required the responsible Federal departments and agencies to provide technical assistance as an integral part of the pre- and post-implementation phases. The Department of Justice, in consultation with the Equal Employment Opportunity Commission, the Department of Transportation (DOT), the Architectural and Transportation Barriers Compliance Board (ATBCB), and the Federal Communications Commission (FCC), was required to develop a technical assistance plan to assist entities covered by the ADA, and other Federal agencies, in understanding their responsibilities under the new law.<sup>1</sup> This was the first time that a Federal civil rights law required the provision of technical assistance.

Although the ADA recognized the importance of technical assistance, it did provide that no covered entity could use failure to receive technical assistance as a reason for noncompliance with the statute. Specifically the law stated:

An employer, public accommodation, or other entity covered under this Act shall not be excused from compliance with the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.<sup>2</sup>

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<sup>1</sup> Pub. L. No. 101-336, § 506 (a)(1), 104 Stat. 337, 371 (1990) (codified at 42 U.S.C. § 12206 (a)(1) (1994)).

<sup>2</sup> *Id.* § 506(e), 104 Stat. 337, 372 (1990) (codified at 42 U.S.C. § 12206 (e) (1994)).

## Technical Assistance Plan

The proposed plan defined technical assistance as “the provision of expert advice, and both general and specific information and assistance to the public and entities covered by the ADA.”<sup>3</sup> The purposes of the technical assistance were “to inform the public (including individuals with rights protected by the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance.”<sup>4</sup> The technical assistance plan proposed to make use of virtually all available types of communication. These included publications, exhibits, videotapes, public service announcements, and electronic bulletin boards. The plan stated that it was essential the information and materials be disseminated in alternate formats (e.g., Braille, large print, closed caption, etc.) so that it is understandable to individuals with different disabilities.<sup>5</sup> In addition, the plan required the responsible Federal agencies, under DOJ’s leadership, to make presentations at conferences and workshops and conduct training programs nationwide. The agencies were mandated to provide detailed advice to individuals on specific topics or in the resolution of a specific problem through such mechanisms as telephone hotlines, information clearinghouses, or onsite

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<sup>3</sup> Technical Assistance Plan for the Americans with Disabilities Act, 55 Fed. Reg. 50,237, 50,239 (1990) (DOJ-proposed technical assistance plan).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

experts.<sup>6</sup> Finally, the agencies were to establish a number of clearinghouses to collect and share information on the experiences of covered entities and individuals. Information for the clearinghouses was to be systematically collected and shared "to enhance the development, assessment, and replication of new and improved compliance methods and techniques."<sup>7</sup>

A long term goal of building the relationship between the Federal agencies and these "grassroots" organizations was to "build the capacity of these organizations to provide technical assistance to their respective constituencies" in the future.<sup>8</sup> The organizations were to assist the agencies in defining the "differing problems and technical assistance needs" of the various groups represented by the disability community. They were expected to participate in development and delivery of the technical assistance initiatives. Both DOJ and EEOC made extensive use of the disability rights organizations in their training and development, production and dissemination of the technical assistance materials.<sup>9</sup>

### Interagency Coordination

To assure that the development and implementation of the Federal Government's ADA technical assistance efforts were effective, comprehensive, and maximized the available resources, the plan required the Department of Justice to establish and chair a Technical Assistance Working Group. It was initially composed of the four implementing agencies (DOJ, EEOC, DOT and FCC) and representatives from the ATBCB, the National Council on Disability (NCD), the President's Committee for the Employment of People with Disabilities (PCEPD),

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<sup>6</sup> *Id.* The four agencies with primary responsibility for implementing the ADA were identified as the Department of Justice, the Equal Employment Opportunity Commission, the Department of Transportation, and the Federal Communications Commission. *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ruth Lusher, Technical Assistance Coordinator, Disability Rights Section (DRS), Civil Rights Division (CRD), U.S. Department of Justice (DOJ), interview in Washington, DC, Dec. 4, 1997 (hereafter cited as Lusher December 1997 interview) and William White, Acting Director, Office of Communications and Legislative Affairs, U.S. Equal Employment Opportunity Commission (EEOC), interview in Washington, DC, Dec. 5, 1997 (hereafter cited as White interview).

the Small Business Administration (SBA), the Department of Commerce (DOC), and other Federal "agencies with technical assistance responsibilities and activities that the Attorney General may identify and invite to participate."<sup>10</sup>

The representatives of the agencies coordinating technical assistance activities were to "meet at least twice annually."<sup>11</sup> The Working Group, which is now called the ADA Technical Assistance Coordinating Committee and is chaired by the Department of Justice, generally meets every 3 to 4 months to exchange information, coordinate efforts, and deal with technical assistance issues that arise.<sup>12</sup> Because there was a heavy initial workload associated with developing and implementing the technical assistance program, the group met every 2 to 3 months in the first few years of ADA implementation efforts.<sup>13</sup> Now 22 agencies involved in ADA enforcement and technical assistance participate in the Interagency Coordinating Group.<sup>14</sup> The group was expanded by DOJ because the impact of the law was greater than initially contemplated, e.g., the National Endowment for the Arts, which deals with accessibility issues for museums.<sup>15</sup>

### Reporting

The plan further provided that the Department of Justice would prepare an annual report describing technical assistance provided by or on behalf of the Federal Government in support of the ADA. The report was to be issued by December 31 of each year.<sup>16</sup> However, according to the chair of the ADA Technical Assistance Coordinating Committee for DOJ, no annual reports on technical assistance were issued.<sup>17</sup> But there is a section on technical assistance efforts in the quarterly *Enforcing the ADA: A Status Report*

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<sup>10</sup> 55 Fed. Reg. at 50,240.

<sup>11</sup> *Id.*

<sup>12</sup> Roster of ADA Technical Assistance Coordinating Committee, Feb. 3, 1998.

<sup>13</sup> Ruth Lusher, Technical Assistance Manager, DRS, CRD, DOJ, interview in Washington, DC, Mar. 18, 1998 (hereafter cited as Lusher March 1998 interview).

<sup>14</sup> DOJ, CRD, DRS, DOJ ADA Technical Assistance Program, January 1993-June 1997, attachment B, p. 6.

<sup>15</sup> Lusher March 1998 interview.

<sup>16</sup> 55 Fed. Reg. at 50,240.

<sup>17</sup> Lusher March 1988 interview.

from the Department of Justice.<sup>18</sup> The first report was issued in July 1993.<sup>19</sup>

The information in the sections on technical assistance in the status reports is not nearly as comprehensive as envisioned in the annual technical assistance report called for in the proposed Technical Assistance Plan issued in December 1990. For example, the Technical Assistance Section in a recent ADA Enforcement Status Report states briefly the requirement that DOJ provide technical assistance on the ADA. The introductory statement describes generally the kinds of information sources that are available to those with duties and rights under the law. The section gives information on DOJ's ADA home page, the ADA information line, the ADA fax on demand system, and publications. There is an advisory on a new ADA publication, which also provides information on other Federal sources of ADA information, including EEOC, FCC, DOT, ATBCB, and PCEPD.<sup>20</sup>

The Attorney General was further mandated to prepare guidelines for annual updates to the Technical Assistance Plan by the agencies represented in the Working Group. The Attorney General also had the authority to require other agencies having technical assistance responsibilities to submit updates that "describe progress made during the past fiscal year to implement the provisions of ADA and this plan, the results of any assessments or evaluations of technical assistance delivery or innovative methods or procedures to promote compliance, and program initiatives proposed for the current fiscal year."<sup>21</sup> No formal updates on progress in implementing the ADA and the plan were ever completed.<sup>22</sup> However, DRS sent out a survey to a large group of Federal agencies—including many not envisioned by Congress when the ADA was enacted—inviting them to participate in the ADA Technical Assistance Working Group and share their ADA plans and activities, including the plans and outreach efforts

of their contractors and grantees. The DRS staff has attempted to collect and place this information in a database but has run into several computer-related problems over the years. Most of these problems have now been corrected, and a report is expected to be issued in 1988.<sup>23</sup>

### **DOJ Technical Assistance Program Early Implementation Efforts**

DOJ's ADA technical assistance and outreach program is in Washington, D.C., in what is now the Disability Rights Section of the Civil Rights Division. The Department has no regional, district, or field offices. From the beginning, DOJ saw technical assistance as a distinct and essential part of implementing ADA.<sup>24</sup>

Initially, the Office of the Americans with Disabilities Act (OADA), which was part of the Coordination and Review Section (CORS) of the Civil Rights Division, had few staff and relied on other CORS staff to assist in the technical assistance effort. Over time, the Department developed specialized staff, publications, and services to carry out its technical assistance mandate. In October 1992, OADA became a separate section—the Public Access Section. It was later renamed the Disability Rights Section.<sup>25</sup>

Staff assigned to the ADA was small initially. Between fiscal years 1991 and 1993, staff involved in the technical assistance effort included four full-time and one part-time professionals and two to four contractors. Attorneys, architects, and other professional staff supported the technical assistance program by serving shifts on the ADA information line, drafting technical assistance materials, reviewing materials developed by grantees, and participating in the ADA speakers' bureau. Support staff included one full-time clerical and three to four half-time stay-in-school students.<sup>26</sup> In 1993, Attorney General Reno authorized additional term staffing resources, which permitted the attorneys

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<sup>18</sup> Ruth Lusher, Technical Assistance Program Manager, DRS, CRD, DOJ, telephone interview, Feb. 23, 1998 (hereafter cited as Lusher February 1998 interview).

<sup>19</sup> Lusher March 1998 interview.

<sup>20</sup> DOJ, CRD, DRS, *Enforcing the ADA, A Status Report from the Department of Justice (October-December 1997)*, pp. 12-14.

<sup>21</sup> 55 Fed. Reg. at 50,240.

<sup>22</sup> Lusher March 1998 interview.

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<sup>23</sup> Ibid.

<sup>24</sup> Lusher February 1998 interview.

<sup>25</sup> DOJ, CRD, DRS, answers to U.S. Commission on Civil Rights Questions to Ruth Lusher, Technical Assistance Coordinator, Apr. 20, 1998 (hereafter cited as DOJ Answers, Apr. 20, 1998).

<sup>26</sup> Ibid.

and architects to work on more complaints and other ADA implementation responsibilities.<sup>27</sup>

This report focuses on technical assistance provided in support of title II. (DOJ is also responsible for technical assistance for title III.) DOJ was required to issue regulations implementing the nontransportation requirements of title II by July 26, 1991, and State and local government operations were required to be in compliance by January 26, 1992.<sup>28</sup>

DOJ was expected to expand existing technical assistance activities designed to ensure that entities and individuals covered by title II learn about the ADA's requirements and develop the capability to identify and solve compliance problems. The goal was to provide technical assistance to as many entities as possible over the term of the plan (fiscal years 1991-1994).<sup>29</sup>

In July 1990, DOJ established an information hotline to respond to requests for information from covered entities and individuals.<sup>30</sup> Attorneys and architects in DOJ staffed the hotline, to the point of its interfering with their work on investigating and litigating complaints. In 1993, Attorney General Reno authorized the hiring of 10 term employees—who serve up to 4 years—to staff the information line and carry out other technical assistance activities. Most of the first hired were members of the disability community or were active in disability rights efforts. Many of these staff members had also completed the Disability Rights Education and Defense Fund (DREDF) training on the ADA, given in 1992 and 1993. DRS has managed to keep the slots filled during the last 4 years and retain the staff.<sup>31</sup>

DRS has requested that the 10 positions be made permanent in the fiscal year 1999 budget request.<sup>32</sup> On an average day, the information line receives 400 calls, one-third of which are handled by ADA specialists; the remaining callers are ordering publications or obtaining information through the automated system. The 400 call volume more than doubles when there is a

media story or some other event occurs that publicizes the ADA.<sup>33</sup> For example, after distributing ADA information in an IRS quarterly mailing to more than 6 million small businesses, DOJ received 100,000 telephone calls.<sup>34</sup>

Early efforts were also made to develop and distribute general ADA information materials such as fact sheets, pamphlets, and copies of the law, which were printed in alternative formats. By May 1993, the Department had disseminated over 2 million copies of the regulations, publications, and fact sheets.<sup>35</sup> DOJ also established a speakers' bureau to make DOJ staff available for speeches and participation in workshops, seminars, classes, conferences, conventions, and other similar outreach efforts.<sup>36</sup> The Department also created an exhibit for use at such gatherings to focus attendees' attention on the ADA and to facilitate the distribution of materials.<sup>37</sup> The Department staff made an increasing number of appearances at conferences, averaging approximately 120 per year after implementation until fiscal year 1995 and the governmentwide furloughs. For example, in fiscal year 1992, there were 173 speaking engagements and the exhibit was shown at 5 conferences.<sup>38</sup> However, since the fiscal year 1996 shutdowns and furloughs, DOJ has only averaged about 60 appearances a year. In fiscal year 1996, there were 67 speaking engagements on ADA and in fiscal year 1997, there were 61 speaking engagements.<sup>39</sup> The drop in speaking engagements is also partly because of limited financial resources for technical assistance since fiscal year 1996.<sup>40</sup>

### Pre-1993 Implementation Efforts

Little documentation is available on Justice Department technical assistance efforts before fiscal year 1993. DRS staff did provide a statement prepared for the Inspector General in

<sup>27</sup> Lusher March 1998 interview.

<sup>28</sup> Pub. L. No. 101-336, §§ 106,246, 104 Stat. 327,336,353 (1990) (codified at 42 U.S.C. §§ 12116, 12161 note (1994)).

<sup>29</sup> 55 Fed. Reg. 50,242.

<sup>30</sup> Lusher December 1997 interview.

<sup>31</sup> Lusher March 1988 interview.

<sup>32</sup> *Ibid.*

<sup>33</sup> See DOJ Comments, July 24, 1998.

<sup>34</sup> Lusher December 1997 interview.

<sup>35</sup> Lusher March 1998 interview.

<sup>36</sup> 55 Fed Reg. at 50,242.

<sup>37</sup> *Id.*

<sup>38</sup> U.S. Department of Justice ADA Speaking Engagements and Exhibits Information Sheet.

<sup>39</sup> *Ibid.*

<sup>40</sup> Lusher December 1997 interview.



1993, which described some of these early out-reach efforts:

- Two IRS mailings were sent out that reached 6 million businesses both in 1992 and in 1993. One mailing provided the telephone number for the Department's information line and the other offered to send information to those who sent in the business reply card.
- A mailing was sent out to 7,600 supermarkets for placement of ADA materials on their public bulletin boards. The mailing also included a card for ordering additional information. The Department estimated these supermarkets served 120 million shoppers per week.
- Through the National Council of State Legislatures, more than 90,000 State and local officials were mailed reply cards for ordering ADA materials.
- A mailing with a letter from the Assistant Attorney General for Civil Rights was sent to 15,000 architects and other design and construction officials in 15 States with active building projects to offer ADA technical assistance.
- Early versions of ADA Questions and Answers and fact sheets were distributed; they were in Spanish and in alternative formats, e. g., Braille, large print, audiotape, and computer disk. The "Q & As" have been revised several times since the ADA was enacted.
- The ADA Technical Assistance Manual was distributed in January 1992 and a revised version was sent out in 1993.
- An ADA Handbook was sent out in the fall of 1991 and a revised one was sent out in December 1992. It contained the regulations, with accessibility standards, questions and answers, a list of resources, etc.
- The DOJ maintained a speakers' bureau that provided speakers for professional meetings and training conferences to explain the ADA to interested organizations, business groups, and Federal agencies.
- DOJ operated an information line and an electronic bulletin board through which ADA documents could be downloaded by individuals with computer modems. These are still available but have been improved over the years.

Funding for the Disability Rights Section's ADA technical assistance program varied between fiscal year 1991 and fiscal year 1997. Although the information on funding provided by

DOJ does not include the salaries of the employees who had other ADA program responsibilities, it does illustrate the variance in funding since ADA was enacted. In fiscal year 1991, there was a \$2 million nonrecurring increase for technical assistance, for a total allocation of \$4,040,000. In fiscal year 1992, the total technical assistance fund was \$2,324,000. In fiscal year 1993, the funds peaked at \$4,584,000. Funding for technical assistance has declined every fiscal year since then, and in fiscal year 1997, the money received was only \$2,900,000.<sup>41</sup>

### Technical Assistance Manual

In fiscal year 1991, DOJ began to focus its technical assistance efforts on additional research, requests from contacts, and information received during the process of issuing regulations.<sup>42</sup> One of the earliest efforts was the development and distribution, in conjunction with EEOC, of the ADA Handbook.

This comprehensive handbook provided information—some of it highly technical—on compliance requirements of titles I, II, and III of the ADA. It was widely distributed, at no cost, in January 1992 to private employers, State and local governments, libraries, the disability rights community, etc. The handbook contained information on the hotlines for DOJ and EEOC. The information line telephone number provided, at that time, for DOJ was not toll free while EEOC's was toll free. Also included in the handbook was a copy of the ADA statute and an ADA resource list. The approximately 380-page handbook also included sections such as ADA Accessibility Guidelines, Uniform Federal Accessibility Standards, Summary Chart on Coverage and Effective Dates, Terms Defined in Statute and Regulations, Summary of Legislative History and Related Information, Disability-Related Tax Provisions Applicable to Business, Supreme Court Cases Related to Section 504, Opinions Related to Section 504 of the Attorney General and the Office of Legal Counsel, Related Federal Disability Laws, ADA Questions and Answers, and ADA Highlights—Title II and ADA Highlights—Title III.

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<sup>41</sup> Budget Information—Disability Rights Section FY 1991 to FY 1998, provided by DRS.

<sup>42</sup> 55 Fed. Reg. at 50,242.

The ADA required that each Federal agency responsible for implementing the law produce and distribute a technical assistance manual to covered entities and individuals.<sup>43</sup> The technical assistance manual(s) was to be distributed "no later than 6 months after applicable final regulations are published under Titles I, II, III, and IV."<sup>44</sup>

The final Department of Justice regulations on title II were published in the *Federal Register* on July 26, 1991,<sup>45</sup> and the Technical Assistance Manual was issued in January 1992. Updates were issued in 1993 and 1994.<sup>46</sup>

DOJ has no plans to update the Technical Assistance Manual because the technical assistance program approach now favors targeted brochures, such as Q & As on specific topics. Further, the Chief of the Disability Rights Section said that the Federal courts have begun to give deference to the manuals because the agency's interpretation was contemporaneous with the passage of the ADA and the issuance of Department regulations. To avoid the risk of losing this deference, DRS has decided not to continue issuing updates to the manuals.<sup>47</sup>

There also were plans for the Technical Assistance Manual to be placed on CD-ROM, according to the 1990 Technical Assistance Plan.<sup>48</sup> The CD-ROM project was not done in 1993 because people with disabilities and covered entities could not use this technology due to insufficient equipment.<sup>49</sup> People with disabilities and covered entities now typically have the equipment, and DRS plans to make the Technical Assistance Manual available in CD-ROM and in other formats in the next year or so.<sup>50</sup>

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<sup>43</sup> 42 U.S.C. § 12206 (c)(3) (1994).

<sup>44</sup> *Id.*

<sup>45</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694-35,723 (1990) (codified at 28 C.F.R. pt. 35).

<sup>46</sup> Lusher March 1998 interview.

<sup>47</sup> John Wodatch, Chief, DRS, CRD, DOJ, interview in Washington, DC, Apr. 16, 1998.

<sup>48</sup> 55 Fed. Reg. at 50,243.

<sup>49</sup> Lusher March 1998 interview.

<sup>50</sup> *Ibid.*

## Training and Education Programs

Training was a second area that received concentrated attention from the outset.<sup>51</sup> In 1991 and 1992, DOJ, in conjunction with EEOC, conducted joint training, funded through a contract to DREDF. Under joint oversight by the two agencies, DREDF conducted "train the trainers" training in phase I for 400 who were for the most part involved in the disability rights movement. Once trained they were expected to train others in employer groups, other covered entities, covered individuals, and others. In phase II, 100 of these trainers received advanced training that focused, in part, on alternative dispute resolution. The participants were trained and certified as mediators.

In phase I, five sessions, lasting 5 to 6 days, were held around the country. Participants included people with disabilities, parents of individuals with disabilities, facilitators for information access, and Federal ADA grantees of DOJ and the Department of Education's National Institute on Disability and Rehabilitation Research (NIDRR).<sup>52</sup> The phase I participants trained almost 60,000 people, including 18,336 persons with disabilities; 12,332 employers; 13,040 State and local governmental personnel; 9,181 public accommodations personnel; 4,239 parents of persons with disabilities; and 598 alternative dispute resolution (ADR) personnel. In phase I, 416 ADR negotiations were also attempted.<sup>53</sup>

More than 80,000 people were trained by the 100 participants who received both phase I and phase II training, including 22,039 persons with disabilities, 16,968 employers, 17,976 State and local governmental personnel, 16,835 public accommodations personnel, 5,642 parents of persons with disabilities, and 747 ADR personnel. There were 332 ADR negotiations attempted. In addition to the grant requirements, technical assistance activities by participants included: 900 articles published in newsletters and journals; 48 continuing contributions to newsletters targeted to persons with disabilities, employers, and other covered entities; 4 instructional/informational

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<sup>51</sup> Lusher December 1997 interview.

<sup>52</sup> EEOC, Americans with Disability Act (ADA) Training and Implementation Network List of Participants, September 1993.

<sup>53</sup> Lusher March 1998 interview.

videotapes on ADA implementation done by an independent producer and distributed to employers and others; 70 local access broadcast station appearances by project participants to discuss ADA and its impact; 3 continuing television series involving participants (2 on PBS stations); and 3 overseas presentations on ADA. Ten of the participants were recipients of local, State, or national awards recognizing their efforts to promote effective ADA implementation and full inclusion of people with disabilities.<sup>54</sup>

### Technical Assistance Grants and Contracts

Another area of focus during the initial implementation phase was the awarding of grants and contracts to nonprofit organizations to develop technical assistance materials. The ADA authorized grants to individuals and entities who had duties and rights under the statute. The grants and contracts technical assistance program was set up to ensure broad dissemination of information about the rights and duties established by the ADA and to provide technical assistance on effective compliance techniques.<sup>55</sup>

In the first few years, an average of 20 technical assistance grants was awarded per year. In fiscal year 1991, there was one solicitation and 15 grants; 4 were awarded in fiscal year 1992. In fiscal year 1993, 22 grants were awarded and 5 supplemental awards were made to original grantees with continuing grants. In fiscal year 1994, 12 grants and 7 continuing grants were awarded. In fiscal year 1995, 21 grants were awarded and 5 grants continued. In fiscal year 1995, the Department of Justice began State-based community education grants designed to build networks supporting ADA among the various State and local governmental agencies. In fiscal year 1996, 14 grants and 4 continuing grants were awarded. In fiscal year 1997, there was no solicitation because of funding limitations, but supplemental funding was provided to 3 continuing grants.<sup>56</sup> It has taken about 2 to 3 years to publish and distribute the technical assistance material from the time that the grant was awarded.<sup>57</sup> Many of the techni-

cal assistance program grants were awarded to groups involved in disability rights, but most were awarded to such groups as the U.S. Conference of Mayors, the Police Executive Research Forum, National Association of Towns and Townships, and other entities that had responsibilities under title II or title III of the ADA.<sup>58</sup> Most of the development grants are coming to an end. DRS staff is looking into producing informational materials inhouse in the future; many will be updates or revisions to previously issued publications.<sup>59</sup>

The goal of these initial technical assistance efforts was to inform and train covered entities about ADA requirements and how to solve compliance problems. Included in the information that DOJ proposed to disseminate were examples of model compliance strategies and the offer of assistance to covered entities in achieving compliance. During this initial phase, DOJ proposed in the Technical Assistance Plan efforts to determine the most effective types of informational and training materials and mechanisms for delivery of training for the different audiences that they were mandated to reach.<sup>60</sup>

One of the other methods of technical assistance that DOJ planned to use was teleconferencing and videotaping training sessions to disseminate information on the ADA.<sup>61</sup> The staff conducted teleconference training in January 1992 for the American Institute for Architects and did another teleconference in June 1997.<sup>62</sup> DOJ proposed to use varying presentation formats and questions and answers in the training sessions and videotapes. The technical assistance plan also stated that wherever possible other agencies involved in enforcing the ADA or providing technical assistance about the ADA would be asked to participate in these conferences.<sup>63</sup> Many of these were accomplished through the grant program and included training videos developed by the Disability Rights Education and Defense Fund and Building Owners and Mayors Association International.<sup>64</sup>

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<sup>58</sup> See DOJ Comments, July 24, 1998.

<sup>59</sup> Lusher March 1998 interview.

<sup>60</sup> 55 Fed. Reg. at 50,242-50,243.

<sup>61</sup> *Id.* at 50,243.

<sup>62</sup> Lusher March 1998 interview.

<sup>63</sup> 55 Fed. Reg. at 50,243.

<sup>64</sup> See DOJ Comments, July 24, 1998.

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<sup>54</sup> The Americans with Disabilities Act Training and Technical Assistance for People with Disabilities.

<sup>55</sup> 42 U.S.C. § 12,206(d)(1),(2) (1994).

<sup>56</sup> Lusher March 1998 interview.

<sup>57</sup> Lusher December 1997 interview.

The Department of Justice conducted training on title II requirements for staff in other Federal agencies who have significant contact with persons with disabilities or are involved in ADA enforcement. The initial plan included staff in the U.S. attorneys' offices, the Rehabilitation Services Administration, and the civil rights offices of other Federal agencies.<sup>65</sup> In addition to training staff in the U.S. attorneys' offices, the DRS staff has trained Federal employees at the Park Service, GSA, Transportation, Labor, and other agencies.

### More Recent ADA Implementation Efforts

Between fiscal year 1994 and 1997, the professional staff engaged in technical assistance has grown to 16 full-time professionals. Attorneys support the technical assistance effort by serving as attorney-of-the-day to answer complex questions from the technical assistance staff, drafting and reviewing some technical assistance materials, and by participating in the ADA speakers' bureau. One full-time clerical staff person and 3 to 4 half-time stay-in-school students provide support to the DOJ technical assistance and outreach efforts.<sup>66</sup>

The responsibility for ADA technical assistance remains within the Disability Rights Section in Washington, D.C. Resources were supplemented with assistance and outreach by the U.S. attorneys' offices throughout the United States. These offices were used to assist in specific outreach programs, such as the "911" emergency response effort to local police departments nationwide.<sup>67</sup>

### Use of Varied Communications Methods

After title II and other provisions of the ADA became effective, DOJ staff continued their implementation efforts for the ADA. During this time, many of the initiatives that had been proposed in the Technical Assistance Plan and in the formulation stage before 1993 were completed. The following are some examples of the varied technical assistance efforts carried out by DOJ to communicate the ADA requirements:

- A toll-free ADA information line was set up to provide information and free publications to the public about the ADA requirements. It operates with both 24-hour automated service and ADA specialists staffing it 8 hours per day except Thursday when it is staffed for 5 hours. There are telephone numbers for voice and TDD. Spanish-language service is also available. The ADA information line received 76,000 calls in fiscal year 1995, 88,000 calls in fiscal year 1996, and more than 160,000 calls in fiscal year 1997.<sup>68</sup>

- Fourteen *ADA Enforcement Status Reports* were developed; they provide information on the Department of Justice's enforcement, technical assistance, and certification activities for the ADA since 1993.<sup>69</sup> These reports are widely distributed to libraries and organizations involved in ADA enforcement and are available on DOJ's Internet home page.

- Publications were developed to deal with ADA-related issues for specific segments of society, including six publications in a simple question and answer format providing ADA information on the following topics: State and local governments, telephone emergency response (911) centers, child care centers, HIV/AIDS, law enforcement, and hiring police officers.<sup>70</sup>

- A publication was created in a simple question and answer format titled, *ADA Myths and Facts*, which provided basic information for State and local governments and businesses to dispel common misconceptions about the ADA's requirements.<sup>71</sup>

- An ADA home page was created. The home page provides information about: the ADA information line, ADA technical assistance program, ADA enforcement efforts, activities to provide certification of State and local building codes that meet ADA accessibility standards, and proposed changes in ADA regulations and requirements. The Department's Web site also provides access to ADA regulations and technical assistance materials. Information can be viewed online or down-

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<sup>65</sup> 55 Fed. Reg. 50,243.

<sup>66</sup> Lusher March 1998 interview.

<sup>67</sup> Lusher December 1997 interview.

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<sup>68</sup> DOJ ADA Technical Assistance Program, January 1993 to June 1997, attachment B, page 1, prepared by DRS, CRD, DOJ, 1997 (hereafter cited as DOJ ADA Technical Assistance Program).

<sup>69</sup> *Ibid.*, attachment B, p. 2.

<sup>70</sup> *Ibid.*, p. 3.

<sup>71</sup> *Ibid.*

loaded. Links are also provided to other Federal agencies' electronic bulletin boards or Internet sites that have ADA information. As of late fiscal year 1997, the ADA home page was receiving between 30,000 and 100,000 hits per week.<sup>72</sup> Information on the home page is accessible to the public in a large number of public libraries.

- There were several written communications to the centers for independent living on available ADA information materials.
- A publication, "Strategies for Teaching Universal Design," was distributed to libraries of 200 schools of architecture. A letter was sent to the deans of these schools informing them that the publication had been sent to their libraries.<sup>73</sup>
- Through grants to organizations in the disability rights movement, DOJ has developed a number of educational videotapes such as: *Access for Deaf Americans*, a 65-minute videotape produced by the National Center for Law and Deafness explaining the ADA in sign language, with voice-over and subtitles; *Explaining the ADA*, a series of five videotapes produced by the Access Video Fund, explaining the background of the ADA, definitions, and the requirements for telecommunications, employment, State and local governments, public accommodations and transportation; and *My Country*, a one-hour documentary produced by the Access Video Fund, in which conductor James DePriest (nephew of Marion Anderson) profiles three people with disabilities whose lives have been shaped by the struggle for equal rights.<sup>74</sup> The latter video, which is of high production quality, effectively communicates to the audience that ADA-mandated disability rights are civil rights. The documentary has been shown on Public Broadcasting System stations and will be distributed to the centers for independent living, the disability business technical assistance centers, and the representatives of participating agencies on the Technical Assistance Coordinating Committee.<sup>75</sup>
- Public service announcements (PSAs) for radio and television were developed in conjunction

with the Department's Office of Public Affairs. The PSAs feature Attorney General Reno outlining the basic requirements of the ADA and publicizing the availability of ADA information in public libraries and the toll-free ADA information line.<sup>76</sup> After several years, the radio PSA continues to be aired on radio stations. Subsequently, a second PSA was developed featuring President Clinton. The PSA publicizes the ADA and the toll-free ADA information line and was distributed to 4,000 radio stations.<sup>77</sup>

This use of a variety of communications media has enabled the Department of Justice to reach large segments of the population. DRS staff attempted, in the early implementation efforts, to deal with the broad range of issues related to ADA and to reach a large audience at the business, governmental, and grassroots levels. More recently, the DRS staff is targeting State-based organizations to deal with issues at the grassroots level because it believes this will be a more effective method for promoting ADA compliance at the local level through the technical assistance program.<sup>78</sup>

### **Extensive Efforts to Reach a Broad Audience**

DOJ has also made extensive efforts to disseminate the ADA technical assistance materials and information to a large, diverse group of organizations and entities to ensure that the material is widely accessible to covered organizations and individuals. For example, since January 1993, DOJ had distributed more than 30 million publications and information pieces throughout the United States.<sup>79</sup> In addition to the information line, publication distribution system, and the ADA home page on the Internet, DOJ has carried out the following outreach efforts to reach large segments of the public to educate them about the ADA:

- An ADA information file was placed in 15,000 public libraries throughout the country. The file contains 95 publications developed by DOJ, other

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<sup>72</sup> Ibid., p. 1.

<sup>73</sup> Overview of ADA Technical Assistance Efforts, (FY 91-FY 93; prep. For IG), undated.

<sup>74</sup> DOJ ADA Technical Assistance Program, attachment D, p. 1.

<sup>75</sup> Lusher December 1997 interview.

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<sup>76</sup> DOJ ADA Technical Assistance Program, attachment B, p. 5.

<sup>77</sup> DOJ ADA Technical Assistance Program, p. 6.

<sup>78</sup> Lusher December 1997 interview.

<sup>79</sup> DOJ ADA Technical Assistance Program, attachment B, p. 3.

Federal agencies, and ADA grantees. Several of the publications in the file are in Spanish.<sup>80</sup>

- A packet of 33 ADA publications related to titles II and II was distributed to 6,000 local chambers of commerce nationwide.<sup>81</sup>

- Four hundred and thirty centers for independent living were provided with a collection of ADA materials and videotapes and current information about ADA publications and information services available from the Federal Government. DOJ continues, on a regular basis, to provide the centers with status reports on technical assistance materials.<sup>82</sup>

- An ADA compliance guide and other educational materials were sent to mayors of 1,100 medium and large cities. The material was included with a transmittal letter from the Assistant Attorney General for Civil Rights encouraging the mayors to use the materials as guidance in meeting their ADA compliance responsibilities.<sup>83</sup>

- A letter and educational material from the Assistant Attorney General for Civil Rights were sent to mayors of the Nation's 250 largest cities, notifying them of their responsibility to ensure that their 911 emergency response system effectively serves people with disabilities who use TDDs or computer modems.<sup>84</sup>

- *Commonly Asked Questions About the ADA and Law Enforcement, Questions and Answers: The ADA and Hiring Police Officers*, and a Civil Rights Act publication were sent to 9,500 law enforcement agencies, with a transmittal letter from the Acting Assistant Attorney General for Civil Rights notifying them of their responsibility as Federal grant recipients to comply with the ADA, section 504 of the Rehabilitation Act, and title VI of the Civil Rights Act.<sup>85</sup>

- Some 13,000 technical assistance publications were distributed at ADA town meetings sponsored by the National Council on Disability, which were conducted in each State to bring businesses and the disability community together to discuss the ADA.<sup>86</sup>

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<sup>80</sup> Ibid., p. 4.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., p. 5.

- More than 185,000 ADA Questions and Answers booklets were distributed nationally through the Federal Consumer Information Center in Pueblo, Colorado.<sup>87</sup>

- Technical assistance was provided to 10 regional disability and business technical assistance centers (DBTACs), which are funded by the Department of Education, to assist them in responding to questions about specific requirements of the ADA. They were also given technical assistance materials to disseminate to the public.<sup>88</sup>

The dissemination of information to 15,000 public libraries was one of the accomplishments that the Department of Justice staff believes was very successful.<sup>89</sup> The effort was initiated in 1993, through a grant to the Kansas State Library and the Chief Officers of State Libraries Agencies (COSLA). There have been three different mailings of ADA information files to the public libraries since the project was implemented. The materials included relevant ADA-related laws and regulations; the *Technical Assistance Manual and Highlights and Supplements*, some of which were in Spanish; Question and Answer publications, several of which were also in Spanish; the ADA enforcement status reports; materials dealing with business and consumers; ADA technical guidance for health care and medical facilities; technical assistance information for hotels and motels; ADA and child care; technical assistance information for other businesses and business-related resources; information on communication access; technical guidance for State and local governments; information on aging issues and disability; design guides; and resource lists and general information on ADA.<sup>90</sup>

COSLA has also sent out a checklist for librarians of all of the technical assistance materials that should be retained in the ADA files.<sup>91</sup> An onsite review was conducted by Commission staff of five local libraries in the Washington Metropolitan area to determine how these materials were retained and displayed. The results were uneven. In a local community library in Fairfax

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid., attachment B, p. 2.

<sup>89</sup> Lusher December 1997 interview.

<sup>90</sup> *Learn About the ADA in Your Local Library*, prepared by DRS, CRD, DOJ, attachment F, 1997.

<sup>91</sup> Lusher December 1997 interview.

County, Virginia, no ADA technical assistance materials were available. In the regional library for Fairfax County, the only technical assistance information on the ADA available was the Technical Assistance Manual. None of the updates was included. The librarian said that the ADA and disability materials were available at a library in another part of the county that provided access services for people with disabilities. At two Montgomery County, Maryland, libraries, the situation was different. At a local library, the manual was available and some, but not all, of the other ADA materials that had been distributed. A nearby special needs library had all three ADA information files and the manual; the material was readily accessible and the staff was familiar with the materials. In Washington, D.C., at the main Martin Luther King, Jr., Memorial Library, a special library section deals with persons with disabilities. This collection was the most comprehensive of all five libraries visited. In each of the libraries, members of the public also could access the Internet. This would permit them to access and download information on the ADA from the Justice Department's ADA home page and other agencies that also had Web sites providing ADA-related information. The COSLA grant for distribution of materials to the 15,000 public libraries has expired, and DRS staff does not plan to renew it. In the opinion of DRS staff, the program has served its purpose of successful dissemination of ADA materials to a wide audience.<sup>92</sup>

### **Specific Title II Technical Assistance and Outreach Efforts**

The Disability Rights Section staff, through the technical assistance program, has worked to establish an effective outreach program to identify, inform, and work with those affected by title II of the ADA. According to DOJ's statistics, title II affects 80,000 State and local government entities and 49 million persons with disabilities.<sup>93</sup> The following are examples of efforts to reach out to targeted groups on the ADA:

- Outreach was conducted to targeted audiences to inform them of rulemaking and the opportunity to participate by providing comments to DOJ, in

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<sup>92</sup> Lusher March 1998 interview.

<sup>93</sup> DOJ ADA Technical Assistance Program, attachment B, p. 5.

conjunction with proposed rules published in June 1994 and November 1995.<sup>94</sup>

- A series of outreach projects was initiated, in conjunction with the U.S. attorneys' offices, for supplying people with materials and sample letters to provide ADA information to selected types of government agencies or businesses within their districts.<sup>95</sup> One example of this effort was the distribution of a publication dealing with compliance for emergency response systems at the State and local levels. The U.S. attorneys' offices used the publication as part of a two-pronged effort that included compliance reviews to encourage compliance without the need for litigation. Staff said this approach had been very effective.<sup>96</sup>

- Material was distributed publicizing the availability of ADA technical assistance through the National Conference of State Legislatures to more than 90,000 individuals, including State Governors, lieutenant governors, attorneys general, legislators, policy analysts, and other State and local officials.<sup>97</sup>

- Letters were sent to 1,053 small and medium cities after a settlement agreement with Los Angeles on making the 911 emergency response number accessible to hearing-impaired callers. Included in the mailing were a copy of the settlement agreement and a title II action guide funded through a Department of Education grant.

- DOJ participated as an exhibitor at 30 national conferences, with staff providing onsite technical assistance to conference attendees, answering questions and providing informational materials on the ADA.<sup>98</sup>

- DOJ staff participated as presenters, answered questions and disseminated materials at state-wide conferences and meetings to establish networks of State and local governments to improve ADA compliance efforts. This is an example of a more recent effort by DOJ to target technical assistance to specific audiences.<sup>99</sup>

- Through a grant to the U.S. Conference of Mayors, a *Directory of Local ADA Officials* was

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<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Lusher December 1997 interview.

<sup>97</sup> DOJ ADA Technical Assistance Program, attachment B, p. 6.

<sup>98</sup> Ibid.

<sup>99</sup> Lusher December 1997 interview.

developed. The 47-page pamphlet provided a resource list of ADA coordinators around the country.<sup>100</sup> According to the representative of the U.S. Conference of Mayors, this was a very popular publication that is still requested, but unfortunately it is now out of print. The representative recommended updating it and making a new distribution to cities.<sup>101</sup>

- A 75-page booklet, *Implementing the Americans with Disabilities Act: Case Studies of Exemplary Local Programs*, was distributed. It summarized efforts being made by cities around the country to comply with the ADA.<sup>102</sup> This was also very well received by municipal officials, but like the resource list, this booklet is out of print despite the continuing need for the information.<sup>103</sup>

### Technical Assistance and Outreach to Minority and Rural Communities

At a November 4, 1997, quarterly meeting of the National Council on Disability, some members expressed concerns about the level of effort and effectiveness of the Department of Justice's ADA outreach program to minorities and people living in rural areas.<sup>104</sup> A council member who raised her concern about the outreach efforts to more isolated communities said in an interview that she believed few complaints had been filed by minorities with disabilities. She attributed this to the possibility that they were not aware of their rights under the ADA.<sup>105</sup>

These concerns about technical assistance efforts to people with disabilities in minority and rural communities, as expressed by several members in attendance at the National Council on Disability's quarterly meeting, were raised

with DRS. DRS staff responded with a paper that described DOJ's outreach to minority and rural communities.<sup>106</sup> The paper described a wide variety of efforts to reach out to potentially underserved groups. These activities included the following:

- The ADA information line is available in Spanish.
- Several ADA publications developed by DOJ and its grantees have been translated into other languages for minority populations. The languages include: Arabic, Armenian, Chinese, Dine (Navajo), Hindi, Khmer (Cambodian), Korean, Russian, Spanish, Tagalog, and Vietnamese.<sup>107</sup> The publication, *The Americans with Disabilities Act Questions and Answers*, a 32-page booklet jointly produced by DOJ and EEOC, provides an overview of the ADA's requirements, is available in Spanish, Korean, Tagalog, and soon in French, Chinese and Vietnamese.<sup>108</sup>
- Two publications produced under a grant to the California Foundation on Employment and Disability, Inc., were prepared in 11 other languages: *Doing Business in Compliance with the Americans with Disabilities Act of 1990*, a 28-page booklet with information for small businesses about the requirements of the ADA; and *Entitlement to Access*, a 24-page booklet with information for consumers about the requirements of the ADA.<sup>109</sup>
- The Civil Rights Division also has participated in conferences and events designed to reach out to organizations that represent minority interests. These include: the White House Initiative on Historically Black Colleges and Universities; Black Deaf Association; Blacks in Government; Center for Urban Systems and Technology; Disabled in Action/Atlanta; District of Columbia Partnership for Assistive Technology; National Council of La Raza; League of United Latin American Citizens; National Association for the Advancement of Colored People (NAACP); National Association of Black Journalists; National Association of Black Meeting Planners; National Rehabilitative Initia-

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<sup>100</sup> Technical Assistance Materials Produced by Department of Justice Grantees That Apply to Title II of the ADA, attachment D, 1997.

<sup>101</sup> Laura Waxman, Assistant Executive Director, Criminal and Social Justice, Department of Health and Human Services, U.S. Conference of Mayors, telephone interview, Jan. 23, 1998 (hereafter cited as Waxman interview).

<sup>102</sup> Technical Assistance Materials Produced by Department of Justice Grantees That Apply to Title II of the ADA, Attachment D, 1997.

<sup>103</sup> Waxman interview.

<sup>104</sup> National Council on Disability meeting in Washington, DC, Nov. 4, 1997, summary.

<sup>105</sup> Audrey McCrimmon, Illinois Department of Human Services, telephone interview, Dec. 1, 1997.

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<sup>106</sup> DOJ, ADA Outreach and Service to Minority and Rural Communities, December 1997.

<sup>107</sup> Ibid.

<sup>108</sup> DOJ, ADA Materials in Spanish and Other Languages, December 1997.

<sup>109</sup> Ibid.



tive; National Urban League; Organization of Chinese Americans; and the Southern Christian Leadership Conference.<sup>110</sup> The Division had an exhibit at these conferences and staff was available to respond to questions from participants. The DOJ staff has also made presentations on ADA to several organizations that represent minority interests.<sup>111</sup>

- The DRS recently has made an effort to reach out to Native American groups. In 1997, a letter was sent to over 500 Native American tribal government offices enclosing ADA technical assistance materials, inviting them to become ADA information access points and providing information on how to get additional materials. The letter invited the tribal governments to contact DRS with their concerns about the ADA. Staff has attended conferences and made presentations at the Federal Bar Association's Indian Law Conference and the National Congress of American Indians.<sup>112</sup>

- The Civil Rights Division also participates in the cultural diversity initiative sponsored by the President's Committee on the Employment of People with Disabilities (PCEPD). Under this initiative, PCEPD works with the NAACP, National Urban League, Aspira, and other organizations to design and implement unique ways to disseminate information about disability rights to underserved communities, provide leadership training for disability leaders from minority communities, and sponsors a cultural diversity symposium at PCEPD's annual conference.<sup>113</sup>

- The staff has used mass media to reach underserved communities. This includes PSAs, which were distributed to a large number of television and radio stations throughout the Nation.<sup>114</sup> The distribution of the ADA technical assistance materials to 15,000 public libraries nationwide also was an attempt to reach a geographically dispersed audience.<sup>115</sup>

- A 1997 article was published in *Parade Magazine* on the ADA information line and how to obtain *A Guide for Small Businesses* and *A Guide to Disability Rights Laws* and reached 80 million readers.<sup>116</sup>

- Every 3 months, the DRS holds a teleconference with centers for independent living to discuss a wide variety of topics, such as complaint filing procedures, types of cases the Section is pursuing, the ADA mediation program, and other items of interest. The centers are provided with copies of the quarterly status reports and other publications. Some of the centers are designed specifically to serve rural communities and others serve primarily minority communities. The centers also serve as a good source of feedback for officials involved in ADA implementation.<sup>117</sup>

- Two ADA information dissemination efforts mentioned earlier also reached very diverse and large segments of the population. These included several mass mailings through the IRS business mailing, which reaches 6 million businesses; and the ADA pamphlet and card for ordering free information, which was placed in 7,600 grocery stores nationwide that serve an estimated 120 million shoppers weekly.<sup>118</sup>

- Through the ADA technical assistance grant program, the staff has worked with trade associations and others to develop ADA materials and projects tailored to meet the needs of specific constituencies. These have included owners and managers of hotels and motels, restaurants, grocery stores, and small businesses; builders and contractors; students and professors of design education programs; historic preservation boards and commissions; medical professionals, child care and older persons service providers; mayors of medium and large cities; small towns and townships; police officers; court personnel; persons with disabilities; and community and professional mediators. Under the recent State-based grant program, DRS staff is working with State-based organizations to help State and local government officials and small business owners at the grassroots level become aware of the

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<sup>110</sup> DOJ, ADA Outreach and Service to Minority and Rural Communities, December 1997.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> DOJ ADA Technical Assistance Program, attachment B, p. 4.

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<sup>116</sup> DOJ, ADA Outreach and Service to Minority and Rural Communities, December 1997.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

ADA's requirements and the resources available to assist them in complying.<sup>119</sup>

• In recent years, grant applicants have been required to describe their plan for reaching diverse segments of the population. DRS now requires that applicants provide evidence that their outreach and publicity efforts will reach potential participants from all geographic locations of the target area (nationwide or statewide), from both urban and rural areas, and from minority communities.<sup>120</sup> Initially this was not a specific requirement for grant applicants.<sup>121</sup>

DRS staff are also participating in a task force of the President's Committee on Employment of People with Disabilities which is trying to reach out to the disabled minority community through dissemination of technical assistance materials.<sup>122</sup> In the last few years, DOJ has placed greater emphasis in its technical assistance efforts on reaching out to persons with disabilities in underserved communities.

Several persons representing minority groups were interviewed to get their views on how effective DOJ had been in its outreach to these groups. The director of the Research and Training Center for Access to Rehabilitation and Economic Opportunity at Howard University, who is a member of the President's Committee, had told the Commission in May 1994 that she advocated dissemination of information on ADA in many different languages and formats, and through grassroots organizations such as churches and community-based organizations. She said that these special outreach efforts were needed in the minority community to educate them about the protections of the ADA.<sup>123</sup> In a November 1997 interview, she said that many of her concerns about reaching out to the minority community had been addressed and that for the most part the Department of Justice had done a fairly good job in disseminating information on the ADA to all groups. She specifically cited the PSAs recorded by Attorney General Reno and the toll-free information line as being effective in

reaching large segments of the population. The director of the Research and Training Center did note that there needed to be more diversity in the people who appear in the informational and educational videos that have been prepared by DOJ on the ADA. One group that has not been targeted for technical assistance materials, she said, is people with low reading skills, and many of the educational materials are beyond their ability to comprehend.<sup>124</sup> DREDF was funded to work with The Arc to develop a simplified explanation of the ADA. It was later used by The Arc to train adults with mental retardation. The Arc has developed additional materials for audiences that have difficulty in comprehension under several DOJ grants.<sup>125</sup>

An employment advisor who focuses on minority and cultural diversity issues at the President's Committee said that both the Department of Justice and EEOC had made a concentrated effort to reach out to members of minority groups in their ADA technical assistance programs. Although there had been significant progress in outreach to the minorities with disabilities, he said there was a need for improvement. Specifically, he noted that many of the informational materials such as videos do not feature members of the disabled minority community or minorities in other roles.<sup>126</sup>

The assistant director, Department of Affiliate Development, National Urban League, is also a member of the President's Committee. In his opinion, the technical assistance materials prepared by DOJ and EEOC were of good quality. At the National Urban League, he said they had found the affiliates that had staff members with disabilities were more involved in outreach to the disabled minority community. Further, these affiliates had found that it was more effective to refer a disabled minority person who was seeking information to a local community advo-

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Lusher December 1997 interview.

<sup>122</sup> Ibid.

<sup>123</sup> USCCR, Executive Summary, Briefing on the Americans with Disabilities Act, May 6, 1994, p. 2.

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<sup>124</sup> Sylvia Walker, Vice Chairperson, President's Committee on the Employment of People with Disabilities, and Director, Research and Training Center for Access to Rehabilitation and Economic Opportunity, Howard University, telephone interview, Nov. 19, 1997.

<sup>125</sup> DOJ Comments, July 24, 1998, p.11.

<sup>126</sup> Claudie Grant, Employment Advisor, Office of Plans, Projects, and Services, President's Committee on Employment of Persons with Disabilities, telephone interview, Nov. 19-20, 1997.

cacy group for technical assistance than to a Federal agency. In 1997, the National Urban League organized a national clearinghouse for technical assistance on disability issues.<sup>127</sup>

Several other organizations representing the minority community were contacted. Some, like the NAACP and the National Council of La Raza, indicated that they had not conducted any evaluation of the effectiveness of DOJ's or EEOC's ADA technical assistance program's outreach efforts to the minority community. La Raza suggested that the National Center for Latinos with Disabilities in Chicago, Illinois, be contacted. The executive director said the organization focuses solely on the disabled Hispanic community. She said that she had not seen any technical assistance materials prepared by DOJ or EEOC. She noted that it would be helpful to get technical assistance and educational materials on the ADA in Spanish.<sup>128</sup> Since DOJ prepares many of its technical assistance materials in Spanish, the problem must be in the dissemination efforts.

Generally, the comments received in interviews and meetings about DOJ's ADA technical assistance efforts have been positive. For example, at a meeting of the National Institute on Disability and Rehabilitation Research's ADA technical assistance program project directors on March 2, 1998, one of the project directors congratulated the head of DOJ's ADA technical assistance program on the effort and noted that she had no complaints. This statement was greeted with widespread applause.<sup>129</sup> Region I DBTAC staff said that the DOJ enforcement status reports were extremely helpful as was the ADA Web site.<sup>130</sup> The Region III DBTAC staff

said the Internet is used effectively but the Web site could have more timely information.<sup>131</sup> Region V staff stated that DOJ had developed several quality technical assistance materials, but supplies have been depleted or copyrights on the materials make it difficult to reproduce the publications.<sup>132</sup> The Region VIII DBTAC staff said that DOJ had been a bottleneck in gaining approval or creating new guidance materials. They specifically noted that there needed to be more attention given to technical assistance materials for title II entities. The Region X staff noted some of the same problems with copyrights and costs associated with some of the technical assistance materials produced under DOJ grants, but said that the technical assistance "materials produced by DOJ staff have been uniformly excellent."<sup>133</sup> Furthermore, other comments received by the Commission indicate that DOJ's ADA technical assistance has been "excellent with inadequate funding and staffing"<sup>134</sup> and the technical assistance materials provided by DOJ have been "very helpful."<sup>135</sup> One disability professional wrote that "we have had technicians at DOJ go the extra mile and get a legal opinion or interpretations which is always invaluable and very much appreciated. Overall we would say that the experiences with the technical assistance staff on the help line at DOJ has been very positive."<sup>136</sup> Most of the comments the Commission received about DOJ's technical assistance hotline were positive, but several disability professionals indicated that it was difficult to get through on the line.<sup>137</sup> One disability profes-

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<sup>127</sup> Robert Walters, Assistant Director, Department of Affiliate Development, National Urban League, Inc., telephone interview, Jan. 15, 1998.

<sup>128</sup> Maria Elena Rodriguez-Sullivan, Executive Director, National Center for Latinos with Disabilities, telephone interview, Nov., 1997.

<sup>129</sup> National Institute on Disability Rehabilitation Research, ADA Technical Assistance Program Project Directors' Meeting in Arlington, VA, Feb. 24-25, 1998, summary.

<sup>130</sup> Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by David Esquith, National Institute on Disability and Rehabilitation Research (OCRE files), p. 3.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, State of Tennessee Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 1.

<sup>135</sup> Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, enclosure, p. 4.

<sup>136</sup> Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Health and Welfare Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, enclosure, p. 13.

<sup>137</sup> Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 6, 1998, enclosure, p. 3; Amy

sional wrote that although the technical assistance materials produced by DOJ are very helpful and "DOJ and EEOC have done a good job at disseminating materials to disability groups, . . .there still seems to be a need to reach local public entities who are still in need of a great deal of assistance."<sup>138</sup>

### **Future ADA Technical Assistance Efforts**

DOJ's commitment to the ADA technical assistance program remains strong as evidenced by its fiscal year 1999 appropriation request to make permanent the 10 term positions that provide support to the information line and the clearinghouse function.<sup>139</sup> This will permit DOJ to attract and retain skilled staff for this important technical assistance and outreach program.<sup>140</sup> The approach to providing technical assistance is evolving. As previously discussed, DOJ plans to focus on more user-friendly publications in the future. Publications that are shorter, less technical, and more focused on a specific topic will be emphasized. There are no plans to issue updates to the Technical Assistance Manual although some of the information dealing with accessibility standards will be rewritten in less technical language and then disseminated in a brochure.<sup>141</sup>

DRS staff plan to rely less on the use of grants to develop technical assistance publications in the future. Technical assistance materials will be for the most part developed inhouse. Staff has compiled a list of topics for the development of future outreach materials. DRS staff indicated that technical assistance and outreach are important to Acting Assistant Attorney General for Civil Rights Bill Lann Lee, who wants to use the ADA technical approach for enforcement of other civil rights laws,<sup>142</sup> so technical assistance will continue to be an important component of DOJ's efforts to enforce the ADA in the future.

Over the next 5 years, DOJ expects to continue building on its basic services—the ADA information line, ADA home page, ADA speakers bureau, and the development and dissemination of new publications. This will include additional design guides, ADA technical assistance plans, Commonly Asked Questions, and publications similar to the ADA guide for small businesses, the next of which will be targeted to small towns and townships. The Department will expand its efforts to educate people at the local level, especially minority and rural populations. DOJ will undertake new initiatives to educate the public about the new standards the Department will adopt for children's facilities, legislative and judicial facilities, and penal facilities, and the completely revised ADA standards that will be adopted after the Access Board completes its revisions of the ADA guidelines in 1999.<sup>143</sup>

The Department also plans to use computer technology to provide alternative formats for technical assistance materials. CD-ROMs, with ADA regulations, technical assistance documents, and new illustrated materials, will be developed. The CD-ROM will permit DOJ to provide material in alternate formats (e.g., text, large print, and WordPerfect for Braille) on the same disk as the other material. It is anticipated that the first CD-ROM will include all the current title II and title III regulations and technical assistance materials to the extent feasible. As new multimedia segments are developed, DOJ will include them on new CD-ROMs, along with any changes in regulations and the ADA standards.<sup>144</sup>

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Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, enclosure, p. 5 (hereafter cited as Maes letter).

<sup>138</sup> Maes letter, enclosure, p. 3.

<sup>139</sup> Lusher March 1998 interview.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

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<sup>143</sup> DOJ Answers, Apr. 20, 1998.

<sup>144</sup> Ibid.

## 6 Findings and Recommendations

The ADA is the first of a new generation of civil rights laws in which Congress assigned Federal agencies not only the duty to enforce, but also to inform all parties of their responsibilities and rights under the law. The U.S. Department of Justice (DOJ) has been responsible for the implementation and enforcement of title II, subtitle A, of the ADA since enactment of the act in 1990. To perform its responsibilities under the act, over the years the Civil Rights Division has reallocated staff and restructured itself to concentrate expertise into the Disability Rights Section (DRS), the section currently and primarily responsible for performing the ADA-related activities of the Department of Justice.

Given its limited resources and extensive responsibilities under the ADA, DRS deserves positive recognition for several aspects of its ADA enforcement to date. Perhaps the greatest strength of DRS' ADA implementation, compliance, and enforcement efforts is its technical assistance and outreach and education program, which is extremely effective and praised widely by agency stakeholders. To apprise covered entities of their responsibilities and covered individuals of their rights under the ADA, DRS has a toll-free information telephone line and Internet Web site, both of which are used heavily. In addition, DRS has developed numerous user-friendly technical assistance documents, usually in question and answer format, that provide answers to many of the questions that arise under title II, subtitle A, of the ADA. Through this system, DRS has provided valuable information to a significant number of people. Still, DRS has been criticized for providing inconsistent information, for taking too long to respond to requests for in-

formation, and for failing to reach certain segments of the population, such as small and rural communities.

Despite limited resources, DRS has made valiant efforts to deal with its ADA complaint workload, with mixed success. Although staff responsible for the ADA grew from 22 in 1992 to 70 in 1997, between these same years DRS received more than 10,000 complaints. To meet this intense public demand for assistance on ADA-related issues, DRS focused its efforts in specific key areas with significant success. To address a backlog in complaints, DRS streamlined its investigative activities to improve complaints processing. However, DRS officials readily admit that they cannot fulfill the requirement in the title II regulations that DOJ investigate and attempt to resolve every title II complaint it receives. Currently, fewer than 15 DRS staff members are trained and assigned as investigators for ADA complaints received from the entire United States. Although it has decreased both its case backlog and the amount of time cases typically take to resolve, clearly DRS needs additional staff to effectively investigate and enforce ADA cases.

The Disability Rights Section's use of alternative dispute resolution or mediation techniques to resolve complaints of discrimination under title II is commendable. For many cases, mediation results in an expedited resolution of the case to the satisfaction of both parties, without the unnecessary use of DRS resources for investigation, negotiation, or litigation. Reliance on mediation, although sometimes criticized by agency stakeholders, has freed up scarce resources that DRS uses effectively in litigation

and technical assistance and outreach and education activities. However, it is important for DRS to ensure that it refers the appropriate cases to mediation and holds in its inventory complaints that are likely to result in improvements for large numbers of individuals with disabilities, either because the respondent's actions directly affect many individuals with disabilities or because the case raises important issues of law that need to be resolved.

Stakeholders have often criticized DOJ for mediating or resolving complaints rather than litigating them to establish case precedent and develop the law. DRS officials point out, in their defense, that the title II regulations require DOJ to attempt to negotiate a resolution to every complaint before considering litigation. Furthermore, in many issue areas, DOJ cannot litigate a case without a referral from one of the other designated Federal ADA agencies, and these agencies have referred few cases to DOJ, despite DRS' interest in cases that it believes are important to litigate. Within the confines of these constraints, DRS has attempted to litigate in areas that are important and affect large number of individuals with disabilities. DRS litigation has brought about positive changes in many areas: clarifying curb cuts, ending unnecessary segregation of persons in institutions, ensuring accessibility to anonymous voting for persons with mobility and sight impairments, and eliminating improper mental health inquiries in professional licensing procedures. DRS has won important court rulings defining what types of disabilities, services, and contexts are covered by, or trigger obligations to comply with, the ADA. DRS also has successfully obtained consent decrees that have had a major role in clarifying ADA coverage.

DRS has not adequately monitored the ADA implementation, compliance, and enforcement efforts of the seven other designated Federal ADA agencies. This is a significant weakness of the DRS ADA program. Because of lack of resources, DRS has not assigned staff to that function, and interactions between DRS and the designated Federal ADA agencies are generally informal and are usually initiated by the agencies when they need assistance. Given that the designated agencies have not referred cases to DOJ in title II areas where it would be important for the Federal Government to engage in

litigation to develop the law, it is evident that stronger leadership and coordination by DOJ is necessary.

Another failing of the DRS implementation program is that it does not develop and publish indepth policy guidance documents to clarify the meaning of the law and explain the reasoning behind the positions it takes in controversial areas. Instead, DRS's policy development is limited to its enforcement and technical assistance activities, such as investigation of complaints and negotiation of settlement agreements; litigation of complaints; filing of *amicus curiae* briefs, and development and dissemination of technical assistance materials. In addition, although DRS maintains that its regulations provide sufficiently specific guidance and additional formal policy guidance is unnecessary, disability rights advocates and other agency officials have indicated otherwise, that more guidance is needed. The divergent rulings among Federal courts on title II issues reinforce the need for DRS to develop and publish formal title II policy guidance.

Finally, DRS has been criticized frequently for setting its own agenda and being unresponsive to stakeholders' concerns and priorities. For instance, many in the disability community have faulted DRS for focusing a lot of attention on accessibility of hotels and stadiums, and less attention on other areas that they believe affect much larger numbers of individuals with disabilities. Although DRS has only limited control over its own agenda, which depends in large measure on which complaints are filed with the agency or referred to DOJ by the Federal agencies designated to enforce the ADA, its responsiveness to stakeholders could be improved. For instance, the development of formal policy guidance would be one area where DRS could set its agenda based on stakeholders' views. In addition, although DRS has informal contacts with stakeholders and its Chief is receptive to calls from stakeholders, the Section would benefit from establishing a formal mechanism for hearing stakeholder advice and opinion.

Given its available resources, DRS's efforts under title II of the ADA are highly effective. Many of DRS's failings would be overcome if the office were provided additional resources. The U.S. Attorney General has requested that Congress provide a funding increase of 13.7 percent for fiscal year 1999 to allow DRS to continue and

expand its vigorous enforcement of the ADA. This much-needed increase would represent a sound investment in and renewed commitment to the elimination of disability-based discrimination.

## **Chapter 2. Overview of Enforcement of Title II Budget and Staffing**

**Finding:** DRS has been consistently underfunded and understaffed. This lack of funding has prohibited the agency from fully realizing its goals and fulfilling its mission. Currently, DRS has a staff of 15 investigators, 23 staff attorneys, and 6 architects. This is insufficient, particularly the small number of investigative staff for the thousands of ADA complaints DOJ receives each year and in staff for monitoring and coordination of the designated Federal agencies. The Attorney General has asked Congress for a 13.7 percent increase in funding for fiscal year 1999. This additional funding, \$1.27 million, would enable DRS to hire additional attorneys, investigators, mediators, and architects. These funds have been earmarked for the following upgrades: (1) \$507,000 for four attorneys and four investigators, as well as funds for architects, and others who serve as prelitigation consultants to increase enforcement efforts; (2) \$263,000 in increased funding for two attorneys and three specialists to help other Federal agencies enforce section 504 of the Rehabilitation Act and title II of the ADA; and (3) \$500,000 in additional funding to expand the mediation program. However, this proposed allocation of funds will not sufficiently address the problem. For example, the addition of only four investigators will not be enough for DRS to resolve the many ADA complaints it receives annually. DRS has maximized the effectiveness of its limited resources; therefore, Congress should allocate this additional funding for the agency. In fact, the Commission finds that a 13.7 percent increase is insufficient to address its problems in resolving complaints in a more timely, efficient manner.<sup>1</sup>

**Recommendation:** The Commission emphatically supports the Attorney General's request for additional funding. However, the Attorney General should request (and Congress should appropriate) more funds for additional investigative and legal staff, expansion of the

mediation program, improved monitoring and coordination of the other designated Federal ADA agencies, staff training efforts, and technological upgrades.

## **Use of Computer Technology for Technical Assistance**

**Finding:** DRS uses computer technology effectively to provide information on title II of the ADA and on how to file complaints under the statute. Although DRS does not have its own home page, it is possible to obtain information about DRS from the home page of the Civil Rights Division.<sup>2</sup>

**Recommendation:** DRS should continue to use computer technology creatively to ensure that stakeholders have access to the necessary information to vindicate their rights and fulfill their responsibilities under title II of the ADA. For instance, DRS should develop capability for any individual with a title II complaint to communicate the complaint to DRS over the Internet. DRS should establish a system that allows staff to respond to questions from the public through e-mail.

## **Staff Training**

**Finding:** DRS generally has provided its staff with effective training on the ADA. DRS gives staff training high priority, and DRS staff has input into the training provided. Although DRS has a very strong training program for its investigators, it has provided little training, formal or informal, to assist its trial attorneys in improving their litigation skills.<sup>3</sup>

**Recommendation:** DRS should continue to provide ongoing on-the-job training to its staff on title II of the ADA. In addition, however, DRS should ensure that its trial attorneys are afforded formal training to enhance their litigation skills.

## **Department of Justice's Strategic Planning**

**Finding:** The DOJ strategic plan for 1997-2002 guides its budget and sets forth its mission, long range goals, strategies for meeting goals, and indicators to measure performance. DOJ's strategic plan includes a summary of resources, systems, and processes that are critical to goal achievement and a somewhat brief description of

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<sup>1</sup> See chap. 2, pp. 11-13.

<sup>2</sup> See chap. 2, p. 13.

<sup>3</sup> See chap. 2, pp. 13-14.

how its goals and objectives will be achieved. Although the plan mentions ensuring the civil rights of people with disabilities as one of its priorities with respect to its goal of protecting civil rights of all Americans, the plan does not include specific goals and strategies for this priority or make specific reference to the ADA.<sup>4</sup>

**Recommendation:** The Commission commends DOJ for making civil rights of persons with disabilities one of its top priorities in its strategic plan. However, DOJ should include in its future strategic plans specific strategies and goals to protect the civil rights of people with disabilities. For example, at a minimum the plans should mention the statutes or other Federal laws that protect these civil rights, in this case, the ADA. In addition, the plans should specify what the current problems are for the disability community and the mechanisms DOJ will develop to address them. Also, performance indicators should include outcomes of ADA discrimination complaints, resolutions, mediation, and investigations and litigation.

### **Coordinating and Monitoring Federal Agencies' Title II Enforcement Efforts**

**Finding:** DRS makes only minimal efforts to fulfill its responsibility to coordinate and monitor the ADA implementation, compliance, and enforcement efforts of the other designated Federal ADA agencies. Communication between DRS and the designated agencies takes place on an informal, ad hoc basis. To date, DOJ has not entered into memoranda of understanding with any of the designated agencies or issued guidelines on coordination. DOJ does not adequately track the cases it refers to the other designated agencies. For instance, DRS does not require the designated agencies to provide feedback on the referred cases until after they are closed, and only a small percentage of the cases has been closed. Furthermore, DOJ has no mechanism in place for tracking ADA complaints that are received directly by other Federal agencies. DRS has not done even minimal monitoring of the other designated ADA agencies. According to DRS, monitoring and evaluating the designated agencies' resources devoted to ADA enforcement efforts is difficult, because these agencies do not maintain separate budgets for this statute.

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<sup>4</sup> See chap. 2, pp. 16-17.

The lack of monitoring, coordination, and communication has hindered effective title II enforcement in a number of ways. First, the designated agencies have referred few title II cases to DOJ for litigation. Under title II, DRS does not have independent authority to handle cases that fall to the designated agencies; it can do so only by referral. However, the agencies have not referred many cases to DRS.<sup>5</sup> Expanded communication between the respective enforcement staffs could foster information sharing and facilitate referral of cases. Second, the lack of communication between DRS and the other designated agencies may mean that building accessibility complaints are not being addressed adequately. Many accessibility complaints fall under the jurisdiction of the designated agencies, which have rarely contacted DRS staff for advice or assistance.

The Attorney General has asked Congress for funds to increase or improve coordination activities, specifically, for two attorneys and three specialists to fulfill DOJ's coordination responsibilities to other Federal agencies as they enforce title II of the ADA.<sup>6</sup>

**Recommendation:** As the lead agency charged with enforcing title II, subtitle A, of the ADA, DRS should provide more leadership and guidance to and develop enhanced communications and information sharing with the Federal agencies designated to enforce the ADA. The DRS Chief should hold regular, biennial meetings with responsible officials in the designated agencies to ensure that they are well informed of the ADA enforcement issues DRS has identified and to exchange information about what the agencies are doing to enforce the ADA. DRS should enter into memoranda of understanding or issue guidelines on coordination with the designated agencies. DRS should track title II complaints it refers to the designated agencies as well as complaints filed directly with those agencies. DRS should require the designated agencies to provide a quarterly status report on all title II complaints in their inventories. In addition, this status report should contain budget and staffing information about the agency's ADA operation. Finally, Congress should appropriate

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<sup>5</sup> See chap. 2, pp. 19-22.

<sup>6</sup> See chap. 2, pp. 12-13.



the funds requested by the Attorney General to improve DRS coordination activities.

### Investigations

**Finding:** The title II regulations state that DOJ must investigate and attempt to resolve every complaint it receives. DOJ officials acknowledge that they cannot investigate every complaint. The Attorney General's requested budget increase, which includes four additional investigators, will not be sufficient to address the lack of investigative staff.<sup>7</sup>

**Recommendation:** The Attorney General should request additional funds to reflect the need for more investigators. Specifically, DRS should estimate the number of incoming and pending cases and request funds to increase investigative staff accordingly.

### Alternate Dispute Resolution/ Mediation Process

**Finding:** A primary emphasis of DRS' title II complaints process, as required by the title II regulations, is resolving discrimination complaints by voluntary means rather than litigation. DRS is innovative in using alternative dispute resolution (ADR) techniques, such as mediation, to resolve complaints voluntarily, and DOJ's 1997-2002 Strategic Plan emphasizes the Department's intention to use alternative dispute resolution where appropriate to avoid litigation. Mediation has the advantage of resolving complaints quickly to the satisfaction of both parties, with considerably less expenditure of scarce resources than litigation. DOJ provides complainants with a brochure that explains the ADR process. Although some parties decline the option of alternative dispute resolution, many title II claims of discrimination are resolved through these informal methods. During 1998, DRS expects to develop policies and procedures for alternative dispute resolution.<sup>8</sup>

**Recommendation:** The Commission commends DRS for its innovative use of alternative dispute resolution. In addition, DRS should continue to provide user-friendly informational brochures to inform parties to a complaint about alternative dispute resolution techniques and how they differ from the traditional complaints

investigation process. However, since alternative dispute resolution is a central component of the Department's title II complaints process, DOJ/DRS should issue policies and procedures for alternative dispute resolution as expeditiously as possible.

### Litigation

**Finding:** Although DOJ is authorized, under the title II regulations, to initiate litigation that arises from its own investigations and upon referral from the seven designated Federal agencies, some members of the disability community have criticized DRS for litigating too seldom and mediating too often. These critics generally believe that DRS should direct more resources toward establishing legal precedent that will be binding on parties in subsequent cases.<sup>9</sup>

**Recommendation:** DRS should develop a balanced enforcement strategy to ensure that cases that are important for developing legal precedent are litigated, while others are mediated. Furthermore, DRS should seek input from stakeholders in developing this strategy, including their views on which areas and issues need to be litigated. DRS also should make efforts to inform stakeholders about its enforcement strategy and the rationale behind it.

**Finding:** Although DRS has written *amicus* briefs and has intervened as a colitigant in pre-existing private litigation, a review of DRS' quarterly status reports shows that DOJ has initiated litigation against public entities under title II in only three cases. One reason for this is that State and local governments tend to comply with title II voluntarily before DRS seeks approval to litigate. Another reason is that designated agencies have not referred title II cases to DOJ.<sup>10</sup>

**Recommendation:** DRS should be more aggressive in initiating litigation against public entities (State and local governments) under title II, particularly in cases such as accessibility in courthouses and other public buildings. DRS should improve its coordination of and communication with the Federal designated ADA agencies so they will refer meritorious cases, particularly those on provision of integrated settings in public healthcare, to DOJ for litigation.

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<sup>7</sup> See chap. 2, p. 13.

<sup>8</sup> See chap. 2, pp. 26-28.

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<sup>9</sup> See chap. 2, p. 29.

<sup>10</sup> See chap. 2, p. 30.

### Analysis of Complaint Processing Data

**Finding:** DRS does not have the same database capability as the U.S. Equal Employment Opportunity Commission. Its database system, CMS, is outdated and runs on software that only allows DRS to generate "canned" or preset reports. The database cannot be used for trend analysis. Furthermore, DRS' complaints database appears to contain numerous errors. Some of the variables listed in the dataset do not contain values. In some instances, nearly three-fourths of the complaints have data fields that are empty.<sup>11</sup>

**Recommendation:** DRS should develop an up-to-date database system that enables it to track complaints and do trend analyses. In addition, DRS should implement a quality control system to ensure that the data entered into the database are complete and accurate. DRS also should encourage the designated Federal ADA agencies to use the same database system for their ADA complaints, so that a uniform system exists for all ADA complaints.

### Chapter 3. Assessment of Title II Enforcement and Policy Development Policy Development

**Finding:** DOJ/DRS develops ADA policy primarily through its technical assistance and enforcement activities, such as litigation and *amicus* briefs. DRS then disseminates this policy in the form of technical assistance that is in a format the general public can understand more easily. These methods of developing policy do not provide an opportunity for disability advocacy groups to participate in the policy development process, whereas if formal guidance documents were drafted and published, the public could offer comment.

Disability rights advocates who question the efficacy of the DRS ADA litigation program point to (1) DRS litigation activities that do not adequately respond to issues faced by persons with disabilities, such as insurance concerns; (2) no DRS role, as litigant or *amicus*, in cases involving mental illness; and (3) little activity on issues relating to individuals with mental disabilities. (DOJ has filed only one *amicus* brief on a case involving mental disability.) Finally, advocacy groups contend that they have more access

to and act in an informal advisory capacity to the Equal Employment Opportunity Commission than to the Department of Justice.<sup>12</sup>

**Recommendation:** DRS should establish a mechanism through which its stakeholders and members of the general public can offer comment on proposed ADA policy and its litigation strategy. Specifically, DRS should provide an opportunity for public input on both the resources DRS dedicates to litigation and the issues it litigates. In addition, DRS should issue formal policy documents developed through a process that allows public comment. DRS also should explore the possibility of establishing a formal advisory board representative of persons with disabilities and other stakeholders to provide input to DRS staff as to which cases to litigate. Finally, DRS should be more aggressive in its policy implementation and litigation activities under title II. For example, DRS should issue policy guidance and conduct more litigation related to people with mental disabilities. DRS should file more *amicus* briefs in cases involving mental disabilities.

### Enforcement of ADA Administrative Requirements

**Finding:** DOJ issued regulations to implement title II, subtitle A, of the ADA that set forth specific administrative procedures public entities must follow to comply with title II. These administrative requirements include providing notice to the public to ensure that persons with disabilities are aware of their rights, conducting a self-evaluation of current policies and practices, establishing transition plans to comply with the ADA, and establishing ADA contact persons and grievance procedures. However, it is evident that many towns and municipalities, particularly small, rural governments, have not taken any action to comply with the ADA. For instance, courts in one State have not established ADA grievance procedures and major State agencies have not designated the ADA coordinators or contact persons required by title II.<sup>13</sup>

**Recommendation:** DRS should make available sample transition and self-evaluation plans to provide guidance to State and local governments on their responsibilities under title II.

<sup>11</sup> See chap. 2, pp. 30-31.

<sup>12</sup> See chap. 3, pp. 39-40.

<sup>13</sup> See chap. 3, pp. 40-42.

DRS also should undertake other steps to improve its enforcement of title II's administrative requirements. For example, DRS should promote uniform policies and procedures for State courts by participating more actively in judicial conferences conducted by State supreme courts. To ensure that more public entities designate ADA coordinators, DRS should require local entities to report annually the names of their ADA coordinators to the State ADA coordinator. DRS should verify that State and local governments have designated ADA coordinators, perhaps through collaboration with the Protection and Advocacy System.

### **Accessibility** **Program Access**

**Finding:** One of the major technical assistance ADA challenges DRS faces under title II is that many public entities do not understand program accessibility, even though the concept has existed since the enactment of section 504 of the Rehabilitation Act of 1973. To address this lack of knowledge about program accessibility, DRS has developed a grant for small towns and another grant for title II entities. DRS also plans to produce a document for small towns that is similar to the ADA guide for small businesses, to help small towns become aware of DRS and other resources. However, at least one representative of small towns has criticized the draft document as too legalistic to be useful.<sup>14</sup>

**Recommendation:** DRS should produce and disseminate a guide targeted to educating local government officials about their responsibilities under title II of the ADA. This effort should be coordinated with DRS' efforts to verify that State and local governments have designated ADA coordinators. All guides and other technical assistance information should be sent directly to ADA coordinators.

### **Architectural Access**

**Finding:** DOJ has taken the position that, because architects draw plans and design buildings, they are responsible for ensuring that their designs comply with the ADA. In the building industry, the view is not so clearcut on accountability. Many architects apparently believe that building owners, not architects, should

be liable when compliance is not met, because owners often do not allow them to design accessible buildings and take their business elsewhere if architects do not follow their instructions.<sup>15</sup>

**Recommendation:** DRS should communicate clearly its position that architects are responsible for designing buildings that are accessible to persons with disabilities and in compliance with the ADA. In addition, DRS should continue its ongoing outreach and technical assistance activities, such as the production and dissemination of written technical assistance materials and speeches, workshops, conferences, and other public media. DRS also should work with academic institutions, such as schools of architecture, to ensure that ADA requirements are included in their curricula.

### **Effective Communication**

**Finding:** DRS has not provided clear and comprehensive guidelines for effective communication requirements under title II of the ADA. Some State and local courts have refused to provide sign language interpreters for persons with hearing impairments, or have charged fees for interpreters' services. Part of the reason for this may be lack of understanding of ADA requirements among public entity officials. It also may be due to public entities' failure to designate and/or support ADA coordinators.<sup>16</sup>

**Recommendation:** DRS should adopt a three-pronged approach to addressing State and local government agencies' failure to provide effective communication to individuals with disabilities. First, DRS should develop policy guidance and do more litigation in this area. Second, DRS should continue to develop and disseminate outreach and education materials for local government entities to inform them of their responsibilities under the ADA. Finally, public entities should ensure that ADA coordinators are in place and educated about their role.

**Finding:** Although DRS investigates a higher percentage of the title II complaints relating to effective communication than of the title III complaints in this area submitted to DOJ, DRS has not been as active in initiating litigation on title II issues. Furthermore, at least

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<sup>14</sup> See chap. 3, p. 45; see also chap. 2, p. 22.

<sup>15</sup> See chap. 3, pp. 45-46.

<sup>16</sup> See chap 3, pp. 53-54.

one disability advocate wrote that DRS has been responsive in providing assistance to disability rights advocates in title III cases, but has not been as active in title II cases. DRS participation in title III cases has led to quick compliance by commercial entities. Similar Federal attention in title II cases likely would reduce instances of noncompliance.<sup>17</sup>

**Recommendation:** DRS should be more aggressive in initiating title II lawsuits, particularly since DOJ is the only Federal agency authorized to litigate against State and local government entities. DRS should involve itself more fully through litigation and policy guidance in shaping the development of title II law.

### **Public Employment**

**Finding:** DOJ has taken the position that title II of the ADA applies to public employment and specifically included a provision on employment in its title II regulation. DRS also has produced technical assistance materials and participated in litigation to support this position. Several courts have held title II does cover public employment issues despite the fact that the ADA statute itself does not mention employment under title II.<sup>18</sup> The Commission supports DOJ's position and recognizes the need for clear resolution of this issue.

**Recommendation:** DRS should participate in judicial training conferences throughout the United States to educate judges regarding the applicability of title II to public employment. This participation should include formal speaking presentations and the dissemination of written materials. DRS should select cases to litigate and establish caselaw in this area that courts will be bound to follow.

**Finding:** DOJ has not provided clear guidance on the relationship between titles I and II in public employment. Both title I, the employment provisions, and title II, public entity provisions, apply to employees of public entities. However, key DOJ technical assistance materials do not explain clearly when public entity employees' complaints should be filed under title I or title II.<sup>19</sup>

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<sup>17</sup> See chap. 3, p. 56.

<sup>18</sup> See chap. 3, pp. 59-61.

<sup>19</sup> See chap. 3, pp. 60-61.

**Recommendation:** Through technical assistance and policy materials, DOJ should explain more clearly the relationship between titles I and II in public employment. DOJ should explain under which circumstances a public employee would appropriately file a claim under title I and under which circumstances the claim would be filed more appropriately under title II. For instance, DOJ could provide examples of scenarios in its technical assistance materials.

**Finding:** Employment discrimination under title II is a very important area of ADA law and policy, in large part because so many people work for State or local governments and the many facilities and services they provide. DOJ has included public employment in its title II regulations, it has issued guidance in the form of policy letters and technical assistance, and it has filed a few *amicus* briefs. However, DOJ has not issued a formal policy guidance that would benefit legal, investigative, and administrative staff in DRS. Furthermore, DOJ has not taken an active role in litigation on this issue.<sup>20</sup>

**Recommendation:** As the only Federal agency authorized to litigate employment cases against State and local government entities, DOJ should play a more active role in litigating public employment cases under title II. DRS should disseminate policy developed through such litigation to the general public in the form of outreach and education materials. Coordination of EEOC and DOJ activities should be enhanced by creating more interaction between DRS enforcement staff and EEOC investigators and attorneys. For example, DRS attorneys, whose expertise is mainly in disability law, could learn about employment law issues from EEOC attorneys. Because this is such an important area, DRS should incorporate an employment law component into its training program.

### **Chapter 4. Title II Policy and Enforcement in Specific Contexts Law Enforcement and Emergency Services**

**Finding:** DOJ has addressed carefully many important issues regarding the treatment of individuals with disabilities by law enforcement and emergency services personnel. DOJ has done this through its regulations, *amicus* briefs,

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<sup>20</sup> See chap. 3, pp. 59-61.

policy letters, and technical assistance materials. DOJ and its grantees have provided many technical assistance materials, such as brochures, pamphlets, and short videos. Although these documents are helpful to front-line law enforcement officers and emergency services personnel, law enforcement and emergency services policy makers and administrators should be provided with more comprehensive policy guidance on title II law enforcement issues.<sup>21</sup>

**Recommendation:** DRS should issue a comprehensive policy guidance on title II issues for law enforcement and emergency services. This document should review relevant caselaw and synthesize the information already provided in the diverse documents DRS has issued on this topic. This document should be distributed to public entity ADA coordinators and law enforcement and emergency services agency administrators.

**Finding:** DOJ has not sufficiently addressed law enforcement and emergency services employment issues. One such issue is alcoholism among law enforcement and emergency services personnel. DOJ has not provided guidance to law enforcement and emergency services agencies to better inform them of hiring and personnel policies and contribute to an alleviation of discrimination against employees.

Furthermore, DOJ has not adequately addressed the question of reasonable accommodation. Public entities have not made much progress in adapting working conditions for individuals with disabilities who are qualified to work. In addition, although DOJ has joined in private litigation and has submitted *amicus* briefs, it has not *initiated* litigation against law enforcement or emergency services agencies that have been charged with discriminating against employees with disabilities.<sup>22</sup> This is a serious omission given that DOJ is the only Federal agency that can initiate litigation against State and local government entities.

**Recommendation:** DOJ should develop and publish additional technical assistance guidance for title II implementation to promote better hiring policies and improve treatment of workers who acquire a disability during employment.

DOJ should provide these materials to policy makers and administrators in law enforcement and emergency services agencies. Furthermore, DOJ should play a more active role in litigating cases involving law enforcement and emergency services personnel who have experienced employment discrimination based on disability.

### Prisons

**Finding:** Inmates with disabilities often suffer from disability-based discrimination and oppression and generally do not have equal access to correctional institutions' physical structures or to rehabilitative, educational, and work programs offered other inmates. Many prisons are not designed to be accessible to individuals with physical disabilities. Qualified inmates with disabilities often are excluded from prison programs that might gain them earlier release or enhance their chances of surviving on the outside after their release, because officials in correctional institutions do not provide reasonable accommodations as required by the ADA.<sup>23</sup>

**Recommendation:** DRS should ensure, through vigorous enforcement of title II of the ADA as well as targeted technical assistance, outreach, and education, that inmates with disabilities are provided equal access in correctional institutions' physical structures and to programs for prisoners and are not subject to violence or discrimination based on their disabilities.

DRS should provide technical assistance and training to officials and staff of State and local correctional institutions to ensure that they know their responsibility to provide reasonable accommodations, from modifying physical structures to providing assistive devices to altering program requirements, to qualified inmates with disabilities. DRS should make a special effort to disseminate to corrections officials information on strategies for providing reasonable accommodations, such as information on individually tailored auxiliary aids and services and devices that facilitate effective communication cost effectively. DRS should work closely with advocacy groups and other organizations to ensure that corrections officials are informed of the most current assistive devices and services and how they can be used in a correctional setting. DRS technical assistance materials should explain

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<sup>21</sup> See chap. 4, pp. 65–73.

<sup>22</sup> See chap. 4, pp. 77–78.

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<sup>23</sup> See chap. 4, pp. 78–83.

that providing such reasonable accommodations may enable inmates with disabilities to reduce their need for assistance from staff and benefit from corrections programs, services, and activities to the same extent as their peers without disabilities. In addition, DRS should investigate complaints of unequal treatment of prisoners with disabilities, obtain relief when discrimination occurs, and if necessary litigate cases of discrimination to demonstrate its intent to enforce the law.

State and local entities responsible for prisons and jails should follow the accessibility guidelines for correctional institutions developed by the U.S. Architectural and Transportation Barriers Compliance Board to eliminate architectural and other structural barriers and enable visually impaired and wheelchair-bound inmates, staff, and visitors to navigate their way to and from cells, hygiene facilities, cafeteria, and other areas, as well as throughout the hallways. Similarly, they should ensure that prisons and jails are equipped with emergency warning systems with flashing lights so that hearing-impaired inmates and staff can be alerted to evacuate the facility during an emergency.

**Finding:** Individuals with cognitive deficits, hearing impairments, and HIV face particular difficulties and challenges that require reasonable accommodations in correctional facilities. The frequent "invisibility" of these disabilities distinguishes them from visible physical disabilities. Inmates with disabilities are targets for physical violence; and inmates with certain disabilities and diseases, such as those who are infected with HIV, have required protection from staff who hold prejudices against them.<sup>24</sup>

**Recommendation:** DRS should fund workshops at correctional associations' meetings that provide sensitivity training about the special needs of individuals with disabilities. Grants could be given to teach corrections officials how to handle and be patient with inmates with specific disabilities. Similarly, training should be provided to inmates without disabilities to assist their peers with disabilities. The training should be developed in consultation with disability advocacy groups and Federal agencies that administer programs for and are concerned with indi-

viduals with disabilities. Furthermore, DRS should work more closely with State and local ADA coordinators who will then be better able to ensure that jail and prison staff who verbally or physically assault any inmate are disciplined.

**Finding:** Statistics on the number of individuals with disabilities in the Nation's prisons are sparse. The need for more statistics is clear. Statistics are extremely important in developing policy and planning its implementation, such as required architectural/accessibility changes. Corrections officials, for instance, can use data on the numbers and characteristics of inmates with disabilities to plan for changes in the disabled inmate population and construct new or modify existing facilities accordingly. In addition, statistics can be useful to determine whether inmates with disabilities are serving disproportionately longer sentences than inmates without, since often inmates with disabilities are denied access to rehabilitative programs that can allow them to earn credit that can shorten their sentences.<sup>25</sup>

**Recommendation:** DOJ should collect and make readily available data that show past trends and future projections of the number of inmates with specific cognitive, sensory, and mobility disabilities, as well as multiple disabilities. These data should be accessible in printed and electronic formats. DOJ should publish the data annually, tabulated by State and by demographic characteristics such as race, color, national origin, age, and geographical region.

### **State Licensing Activities**

**Finding:** Title II does not set forth testing standards related to State licensing activities, but title III does. DOJ's position is that title III's testing standards "are useful as a guide for determining what constitutes discriminatory conduct by a public agency in testing situations under both titles I and II." In *Rosenthal v. New York Board of Law Examiners*, the court relied on title III regulations even though it was a title II case, because title III regulations discuss professional licensing and testing procedures that title II regulations do not.<sup>26</sup>

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<sup>24</sup> See chap. 4, p. 78-79.

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<sup>25</sup> See chap. 4, p. 78.

<sup>26</sup> See chap. 4, pp. 89-91.

**Recommendation:** DRS should issue policy explaining the distinctions made by the courts when addressing State licensing procedures. DOJ should issue comparable regulations or policy guidance on testing requirements to provide the same kind of detail and comprehensiveness it has in its title III guidance.

### **Technology and Web Sites**

**Finding:** Cost can be a major barrier that impedes access to assistive technology for individuals with disabilities. According to a disability advocacy group, expenditures for adapted computers, communication devices, switches, and other technological aids that enable individuals with disabilities to participate in society can be substantial. In 1996, former Senator Robert Dole expressed concern that “thousands of the Nation’s disabled individuals” cannot afford assistive technologies, some of which cost thousands of dollars. Limited funding is available through various Federal programs.<sup>27</sup>

**Recommendation:** DRS should provide technical assistance to the State and local governments under its jurisdiction on making cost-effective purchases of certain assistive technology devices that can be used by disabled individuals who are active beneficiaries of particular programs and services. DRS could also offer grants to State and local governments to purchase auxiliary aids and services that can enable individuals with disabilities to access, participate in, and benefit from programs, services, and activities.

**Finding:** To date, DOJ has not taken a position in its policy guidance or technical assistance documents as to whether Web sites constitute services provided by State and local governments and, therefore, under title II, must be equally accessible to individuals with disabilities. DOJ has indicated that State and local governments may provide information on the Web sites through alternate formats such as mailing information in written, Braille, or large print format and that this is adequate to ensure the program access for persons with disabilities required by title II. These alternate formats do not afford the same advantages and conveniences as

Web sites, such as instant access to information.<sup>28</sup>

**Recommendation:** DOJ should develop and publish a policy guidance document clarifying that Web sites provided by State and local governments are services under title II of the ADA.

**Finding:** With the Internet expanding and with hundreds of new Web sites being added every day, the issue of Web site accessibility for individuals with disabilities will become more urgent as time goes by. Educational institutions and government entities increasingly rely on the World Wide Web to locate, collect, and disseminate information to the public. DRS has not taken any significant action to ensure that the issue of Web site accessibility for individuals with disabilities is addressed by State and local governments. In particular, DRS has not developed or issued any accessibility standards for Web sites.<sup>29</sup>

**Recommendation:** State and local governments should ensure that individuals with vision impairments or mobility impairments, as well as other individuals with disabilities, have equal access to all information and services they offer on the World Wide Web. DRS should become more active in its efforts to ensure equal access to State and local government Web sites for individuals with disabilities. To ensure that State and local governments’ efforts in this area conform to title II requirements, DRS should develop guidelines for State and local Web site accessibility. DRS should frame these guidelines in terms of what “access” means rather than by providing specific technology recommendations because Internet technologies are constantly growing and changing. DRS should hire experts to help develop the guidelines.

In addition, DOJ should take the lead in developing new and creative ways for people with disabilities to access the same computer technologies as people without disabilities. For example, DOJ should participate in the efforts of technology-related research organizations, disability advocacy groups, and other Federal agencies. Furthermore, DRS should provide technical assistance, outreach, and education on Web site acces-

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<sup>27</sup> See chap. 4, p. 108.

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<sup>28</sup> See chap. 4, pp. 109–12.

<sup>29</sup> See chap. 4, pp. 109–15.

sibility, through grant-funded training conferences for State and local government personnel.

### **Chapter 5. Title II Outreach, Education, and Technical Assistance**

**Finding:** The ADA technical assistance plan stated that the Attorney General may require the agencies responsible for implementing and enforcing the ADA to provide periodic reports on progress in meeting their mandate. DOJ has not implemented this provision, primarily because of internal computer-related problems and other technical assistance priorities. However, the technical assistance staff hopes that these problems have been resolved and that, in the near future, DOJ will be able to prepare and disseminate a report on ADA technical assistance and outreach efforts by the responsible Federal agencies.<sup>30</sup>

**Recommendation:** DOJ should issue a summary report of its technical assistance efforts and those of the designated Federal agencies in implementing the ADA over the last few years. Thereafter, DOJ should issue progress reports every 12 to 18 months.

**Finding:** Initially, DOJ's outreach and education and technical assistance staff did not make an extensive effort to reach underserved communities, such as individuals with disabilities living in rural and minority communities. More recently, DRS staff has placed a greater emphasis on reaching these communities with information on their rights under the ADA. Staff also are participating in a task force at the President's Committee on Employment of People with Disabilities that is designed to focus on outreach and technical assistance to the disabled minority community.<sup>31</sup>

**Recommendation:** DOJ should evaluate the effectiveness of its outreach, education, and technical assistance to underserved areas such as rural or minority communities. The agency should give consideration to establishing an advisory committee to assist staff in the evaluation. DOJ should develop a plan that would focus on reaching these underserved groups. DOJ should issue a report on the results of that evaluation and the plans to meet the needs of the underserved in the disability community.

**Finding:** DRS appears to have made good use of its staff resources in carrying out its outreach, education, and technical assistance program in support of the ADA. Of particular note are the resources allocated to the staffing of the ADA information line and providing support to the clearinghouse function. Calls to the toll-free line average 250 to 350 per week, but when there is publicity about the ADA, the number can increase dramatically. For example, after a mailing to small businesses through the IRS quarterly mailing, the staff received over 100,000 telephone calls. In FY 1997, the staff received more than 120,000 calls, and the number has continued at a high level. DRS has requested that the initial allocation of 10 term appointment slots be made permanent in the FY 1999 budget request.<sup>32</sup>

**Recommendation:** DOJ should make DRS' 10 positions supporting the ADA information line and clearinghouse functions permanent. In addition to its toll-free information line fax on demand services, DOJ should also develop an Internet or e-mail service through which DOJ can respond to inquiries relating to disabilities. Finally, DRS should ensure that all staff has an opportunity to operate these various information services so they are familiar with and knowledgeable issues affecting people nationwide.

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<sup>30</sup> See chap. 5, pp. 117-18.

<sup>31</sup> See chap. 5, pp. 127-31.

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<sup>32</sup> See chap. 5, pp. 119, 123-27.



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