

# Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs

Cary LaCheen \*

*The formatting of this article is not identical to the version that was published in the Winter 2001 Issue of the Georgetown Journal of Poverty Law and Policy, and page numbers on which text appears are not the same in the two documents. Readers citing to the article in legal documents and law review articles should consult the print version for page numbers.*

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\* Senior Staff Attorney, Welfare Law Center, 275 7th Avenue, Suite 1205, New York, NY 10001, (212)633-6967, lacheen@welfarelaw.org (current); Instructor of Law, Lawyering Program, NYU School of Law (1987-2000); J.D., New York University School of Law (1988); B.A., Brown University (1981). Chapter 1 of the Manual was written by Mark Greenberg, Senior Staff Attorney, Center for Law and Social Policy. This article was written when the author was an Instructor in the Lawyering Program at NYU School of Law. The author would like to thank the Filomen D’Agostino & Max E. Greenberg Research Fund for its support of this work, and the Annie E. Casey Foundation for funding the distribution of this Manual to advocates nationwide. The author would also like to thank Peggy Cooper Davis, Andrea McCardle, Sandra Scott, the NYU School of Law Office of Information and Technology Services, and the entire Lawyering Program for their support. Finally, the author would like to thank the following people for their indispensable and varied assistance: Lewis Bossing, Claudia Center, Sam Davol, Chris Dudding, Matthew Diller, Allison Gardner, America Grau, Barry Ford, Ellen Saideman, Talib Sahir, Liz Schott, Herb Semmel, Bobby Silverstein, Adrienne Slater, and especially, Eileen Sweeney. Copyright Cary LaCheen, Mark Greenberg 2000.

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## INTRODUCTION

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>1</sup> which abolished the Aid to Families with Dependent Children (AFDC) program and made several other drastic changes in welfare programs, has presented a number of challenges to welfare advocates. As advocates search for strategies to protect their clients under a radically different system in which welfare is not a federal entitlement,<sup>2</sup> and states have enormous flexibility in how they design programs, civil rights laws are frequently mentioned as a possible source of protection for clients.

An alarming number of Temporary Assistance for Needy Families (TANF) applicants and recipients have disabilities. A 1996 survey by the Urban Institute using data from national health surveys found that between 27.4% and 29.5% of families receiving AFDC had either a mother or a child with a disability.<sup>3</sup> In another study using self-reported data from AFDC recipients in California, 43% of the respondents reported disabilities or chronic health problems in mothers or children.<sup>4</sup> Psychiatric disabilities, learning disabilities, mild mental retardation and addiction disorders are particularly common among welfare recipients.<sup>5</sup> Studies have found that 20% to 33% of welfare recipients have learning disabilities.<sup>6</sup> One study found that 30% of welfare recipients tested had learning disabilities and another 26% were mildly mentally retarded, which means that more than half of the welfare population had one of these disabilities.<sup>7</sup> The California study found that 36% of the respondents met the criteria for at least one mental health diagnosis.<sup>8</sup> Other studies have estimated that 6% to 23% of all welfare recipients have mental health issues when mental health issues are defined narrowly, and 13% to 39% have mental issues when broader definitions are used.<sup>9</sup> Estimates of substance abuse among welfare recipients range from 16% to more than 33%, depending on how questions are asked.<sup>10</sup> Regardless of how studies define disability, it is likely that when all of these conditions are considered together, more than half of the families applying for or receiving TANF have at least one family member with a physical or mental limitation. For a variety of reasons, many of these individuals do not qualify for or are not receiving Supplemental Security Income (SSI).

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1. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 29, 42 U.S.C.A.).

2. See 42 U.S.C.A. § 601(b) (West 2000).

3. See PAMELA LOPREST & GREGORY ACS, THE URBAN INSTITUTE, PROFILE OF DISABILITY AMONG FAMILIES ON AFDC 16 (rev. ed. 1996) [hereinafter PROFILE OF DISABILITY].

4. See MARCIA K. MEYERS ET AL., CENTER FOR POLICY RESEARCH, SYRACUSE UNIVERSITY, WORK, WELFARE AND THE BURDEN OF DISABILITY: CARING FOR SPECIAL NEEDS CHILDREN IN POOR FAMILIES 17 (1996) [hereinafter WORK, WELFARE AND THE BURDEN OF DISABILITY].

5. See EILEEN P. SWEENEY, CENTER ON BUDGET AND POLICY PRIORITIES, RECENT STUDIES MAKE CLEAR THAT MANY PARENTS WHO ARE CURRENT OR FORMER WELFARE RECIPIENTS HAVE DISABILITIES AND OTHER MEDICAL CONDITIONS (2000) [hereinafter RECENT STUDIES], available at <http://www.cbpp.org/2-29-00wel.htm> (summarizing studies documenting the prevalence of these disabilities in current and former TANF and AFDC recipients).

6. See *id.*, at 3.

7. See MARTIN GERRY & CANDACE SHIVELY, NAT'L TECHNICAL ASSISTANCE CTR. ON WELFARE REFORM & KANSAS DEP'T OF SOC. AND REHABILITATIVE SERVICES, CRITICAL ISSUES: IMPLEMENTING WELFARE REFORM: THE KANSAS LEARNING DISABILITY INITIATIVE (1999) [hereinafter IMPLEMENTING WELFARE REFORM], available at <http://www.welfare-policy.org/kansasld.htm>.

8. See WORK, WELFARE AND THE BURDEN OF DISABILITY, *supra* note 4.

9. See AMY JOHNSON & ALICIA MECKSTROTH, MATHEMATICA POLICY RESEARCH INC., ANCILLARY SERVICES TO SUPPORT WELFARE TO WORK (1998) [hereinafter ANCILLARY SERVICES], available at <http://aspe.hhs.gov/isp/ancillary/mh.htm>.

10. See U.S. DEPARTMENT OF LABOR, SERVING CUSTOMERS FACING SUBSTANCE ABUSE OR DISABILITIES, IDEAS THAT WORK, ISSUE 6 (1999), available at <http://wtw.doleta.gov/ideasthatwork/issue6.htm>.

The prevalence of disabilities in TANF clients raises a number of issues for clients, advocates, and policy makers. People with disabilities may be more likely to need particular programs, program modifications, and supportive services in order to work or participate in education and training programs or fulfill other federally defined “work activities.” These programs and supports may not be available. Existing programs may be segregated, or TANF agencies may make stereotyped assumptions in program assignments. Barriers to obtaining benefits, including obstacles in the application process itself, are also an issue for many people with disabilities. When people cannot work because of disability, there is the question of whether programs must modify work requirements and time limits. People with disabilities may be particularly prone to sanctions because appropriate programs and supports are not provided, sanction notices are not understandable, and disabilities restrict individuals from complying with procedures required to avoid sanctions.

Many TANF applicants and recipients have disabilities that have not been diagnosed. One study identified 70% of the welfare recipients tested as having learning disabilities, mild mental retardation or other special learning needs that had not been previously identified by the public school system.<sup>11</sup> The most prevalent disabilities among TANF recipients are also those that frequently go undiagnosed, because they are not visible or are stigmatized, because of lack of adequate medical and mental health care, or for other reasons. This raises a host of additional issues, including: whether TANF programs have an obligation to screen and assess applicants and recipients to identify disabilities; the timing of assessments; how disability is defined in TANF programs; and whether TANF programs have an obligation to individuals whose disabilities have not been diagnosed.

The Americans with Disabilities Act (ADA)<sup>12</sup> has been mentioned as a likely source of protection for TANF clients. However, many welfare advocates feel less than fluent in the complexities of the ADA and how it might apply to TANF programs. In addition, many disability rights advocates are not familiar with PRWORA. Advocates in both groups have expressed an interest in learning more about the area of law with which they are less familiar. This Manual is an attempt to assist in that process.

This Manual addresses the legal obligations under the ADA of TANF programs and private programs under contract with TANF. For this reason, it primarily focuses on Title II of the ADA, which applies to state and local governments, agencies, and departments of state, and organizations under contract with state and local governments to provide services to clients of state and local government and their agencies. There are many issues that may arise for clients of the TANF program under other Titles of the ADA, including Title I, which governs employment, and Title III, which applies to privately operated places of public accommodation. For the most part, however, they are not addressed in this Manual. Advocates should not overlook these issues when they arise, and should turn elsewhere for information and guidance.

#### *A. How to Use the ADA*

There is a great deal of inconsistency in the ADA case law. To some extent this is inevitable, given the nature of Title II concepts. However, it is also the result of other factors, including the fact that the ADA is a relatively new statute, and there is much court and practitioner confusion. This inconsistency can be frustrating, but it also presents an opportunity for creative advocacy. This Manual provides examples of how courts have approached particular issues, and attempts to

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11. See MELINDA GIOVENGO ET AL., WASHINGTON STATE DIVISION OF EMPLOYMENT AND SOCIAL SERVICES LEARNING DISABILITIES INITIATIVE, FINAL REPORT iv (1998) (report on file with author).

12. See Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C.A. §§ 12101-213 and scattered sections of 47 U.S.C.A.) (West 2000).

distinguish easy arguments from more difficult ones, but it is not an exhaustive discussion of the case law. Do not assume that there is uniformity in the case law on every issue or that you are precluded from making particular legal arguments because the cases discussed in the Manual reject it.

### *B. The Philosophy of the Manual*

This Manual discusses the statutes, regulations, and agency and court interpretations of the ADA. This does not mean that it advocates using litigation to address every, or even most, issues. Litigation cannot do everything. Many legal claims, if successful, will give people with disabilities the same poor-quality programs and services that TANF recipients without disabilities receive, and nothing more. When government agencies operating programs are resistant to change, litigation may be necessary, but cooperative efforts to improve programs and procedures is always preferable because, if successful, they will improve services for everyone.

The ADA is not just a means of enforcing legal rights; it is also a guide for designing and operating state and local government programs. The ADA embodies core concepts by which all programs should abide, such as the right to individualized treatment, the right to equal and meaningful access to services, and the right to reasonable program modifications. Conveying this message to TANF programs and getting programs to adopt and apply these core concepts may accomplish more than litigation. Advocates should also urge TANF programs to see that ADA compliance is consistent with, and arguably necessary to, accomplishing the goals of PRWORA. Many people with disabilities will not be able to work or achieve economic independence without program modifications and supports.

### *C. Your Goals*

Welfare and disability advocates want to improve TANF programs for everyone not just people with disabilities. ADA enforcement will often change the way services are provided to everyone, even though it applies only to people with disabilities, people with a “record of” or “regarded as” having disabilities, and people who are discriminated against based on their association with an individual with a disability. Sometimes this will occur because the nature of the modification requires a change in program design or implementation that will affect everyone. Sometimes it will occur because it is impractical for programs to implement changes for people with disabilities alone. At other times it will occur because advocates will be able to persuade programs to extend particular changes to everyone. When making policy arguments, advocates can argue that a program modification is desirable for everyone, but legal constraints will sometimes require that arguments be made only on behalf of individuals protected by the ADA.

### *D. How to Use this Manual*

The Manual is divided into three parts: Part One summarizes PRWORA and the ADA, including Title II ADA prohibitions and requirements, planning requirements, and ADA enforcement issues (i.e., the Eleventh Amendment). Part Two discusses core ADA Title II concepts in greater detail and discusses how each concept might apply to TANF programs. Part Three addresses a number of specific questions that frequently arise under TANF, such as whether TANF programs are required to provide education, training, and other programs to

people with disabilities and whether it would be a reasonable modification under the ADA to extend benefits to TANF recipients beyond a state's lifetime benefit limit. Readers should consult chapters on specific TANF issues in conjunction with Part Two, which provides the framework for answering specific questions about how the ADA applies to TANF programs.

## PART I: AN OVERVIEW OF TANF AND TITLE II OF THE ADA

### CHAPTER 1: AN OVERVIEW OF TANF

#### *A. An Introduction to TANF\**

The 1996 welfare law enacting the Temporary Assistance for Needy Families (TANF) block grant is often described as having changed welfare by adding time limits and work requirements and increasing state flexibility. While the law did make changes in each of these areas, the nature of the 1996 changes was more fundamental. The 1996 law repealed a federal-state entitlement program (Aid to Families with Dependent Children) and replaced that program with a federal block grant for states. A state's block grant may be used to operate a cash assistance program (subject to an array of federal requirements) and may also be used for a broad range of other state activities. In return for receiving the block grant, each state has maintenance of effort (MOE) obligation. The MOE obligation is a requirement to spend a specified amount of state funds for benefits and services to low-income families, but the state has broad discretion in deciding how to spend those funds.

Administrators and advocates sometimes speak of “the TANF block grant” and “the TANF program” as if they are the same thing, but they are not. Using its TANF block grant, each state chooses to operate a TANF cash assistance program for needy families. TANF cash assistance is only one activity funded with TANF block grant funds, and a state may spend some or all of its TANF or MOE funds for services and activities outside of the TANF cash assistance program.

This chapter begins with a brief description of Aid to Families with Dependent Children, the program that was repealed when Congress enacted TANF. The chapter then describes the legal and fiscal framework for TANF, and the choices and requirements states face in designing and operating their TANF cash assistance programs and other TANF- and MOE-funded services and activities. Before discussing issues in the operation of the basic cash assistance program (e.g., time limits, work requirements and services, sanctions), the text begins with an overview of state choices in spending TANF and MOE funds. An appreciation of state flexibility in use of federal and state funds is important in understanding state flexibility in the design and operation of TANF cash assistance programs. This is *not* a complete discussion of all aspects of the TANF structure, but is intended to offer an overview of the key concepts of the TANF framework.

#### *B. Before TANF: The AFDC Program*

Aid to Families with Dependent Children (AFDC) was originally enacted in the Social Security Act of 1935 and operated until 1996 when it was repealed by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Until 1996, AFDC was the nation's principal income support program for families with little or no other income.

AFDC was a federal-state cooperative program, in which no state was required to participate, though all states elected to do so. Federal law established a set of program requirements. If a state complied with those requirements, the federal government would pay half or more of the cost for assistance payments made to eligible families and half of all program administrative costs. States, in turn, had a legal responsibility to provide assistance to families who satisfied federal and state eligibility requirements. As a condition of receiving federal funds, the state was required to submit a plan describing key aspects of its program, and states

\*Chapter 1 of this manual was written by Mark Greenberg, Senior Staff Attorney, Center for Law and Social Policy, 1616 P Street, NW, Suite 150, Washington, DC 20036.

were required to operate their programs in compliance with their state plans except, as noted below, when particular state plan requirements were waived.

Program eligibility rules under AFDC involved a complex mix of federal requirements and state options. Federal law set the basic framework: states were required to provide cash assistance to “needy families” who were “deprived of parental support or care;” i.e., families below state-determined income eligibility levels in which a parent was deceased, absent from the home, incapacitated, or met a federal definition of being “unemployed.” In some areas, federal law was highly prescriptive, with detailed definitions of what counted as income or who must be included in the assistance unit. At the same time, states had broad discretion to set program cash assistance levels and this effectively determined who was eligible for assistance.

In the latter years of the AFDC Program, the federal government and states became increasingly concerned with encouraging or requiring workforce participation by families receiving assistance. Limited authority to impose participation requirements had existed for many years, but two major developments - enactment of the Family Support Act in 1988, and the expansion of the federal waiver process beginning in 1992 - resulted in significant expansions of program participation requirements and in some instances, the availability of employment-related services for families receiving assistance.

The Family Support Act (FSA)<sup>13</sup> required each state to establish a Job Opportunities and Basic Skills Training (JOBS) Program.<sup>14</sup> JOBS resulted in an expansion of both program participation requirements and of employment-related services for AFDC recipients.

#### (i) Participation Requirements

In AFDC, individuals were exempt or non-exempt from required participation in work or work-related activities. To be exempt meant that the state could not require the individual to participate and could not impose a grant reduction for failure to participate. An exempt person could volunteer to participate, but states often placed little emphasis on encouraging exempt persons to volunteer, and sometimes denied services to exempt persons on the basis of insufficient resources. If an individual was non-exempt, the state could require participation and could impose a “sanction,” generally reducing the family’s grant if the non-exempt person failed to participate without good cause. The FSA increased the numbers of families subject to participation requirements above that under prior law. But exemptions remained, however, for certain categories of families, including those in which the adult was ill, incapacitated, aged 60 or over, or caring for an ill or incapacitated household member.

#### (ii) Employment-Related Services

The law required that state JOBS Programs contain a range of activities (including basic education, job skills training, job readiness activities, and job placement and development efforts), along with a set of optional activities (including job search and work experience) that states could incorporate in their programs. States were required to conduct assessments of program participants and develop employability plans “in consultation with the participant” but individuals did not have a federal right to participate in any particular activity. The law required that states provide needed transportation and other support services for families participating in the JOBS Program and also required that states guarantee child care for families participating in JOBS, work or other approved education and training activities.

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13. See Pub. L. No. 100-485, 102 Stat. 2382 (1998) (amended by Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. §§ 601-87) (West, Supp. 2000).

14. For a detailed description of JOBS requirements and features, see MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, *THE JOBS PROGRAMS: ANSWERS AND QUESTIONS* (2d ed. 1992).

Partly due to limited funding and partly due to state choices in implementation, the JOBS Program in most states never involved most recipients in JOBS participation. For example, in fiscal year 1994, only an average of 13% of AFDC adults participated in JOBS in an average month.

The broadening of the federal waiver process resulted in further expansions of program requirements and, in some cases, expansion of services. Section 1115 of the Social Security Act<sup>15</sup> grants the Secretary of Health and Human Services broad discretion to “waive” provisions of Section 402 of the Act<sup>16</sup> for state demonstration projects. Section 402, in turn, contained the basic AFDC “state plan” provisions, including those relating to definitions of filing units, income, resources, etc. Beginning in 1992, the federal government began to freely grant waivers of AFDC state plan requirements for state “welfare reform” initiatives. While there were some differences between the Bush and Clinton administrations in the conditions under which waivers were granted, both administrations granted a substantial number of waivers of federal requirements provided that the waiver package was “cost-neutral” to the federal government and the state’s initiative was subject to an evaluation requirement. Waiver requests involved a wide array of program approaches,<sup>17</sup> which often involved modifying program income and asset rules and rules affecting two-parent family eligibility. The most common waiver packages also often included one or more of the following program modifications:

- 1) Increased Penalties for Violating Program Rules: Typically, states sought to either increase the length of sanctions for violation of JOBS-related requirements or to increase the magnitude of the sanction, e.g. implementing full-family sanctions instead of just reducing the family’s grant;
- 2) Reducing the Circumstances in which Family Members are Exempt from Jobs or Work-related Participation: A limited number of states attained waivers to remove exemptions for ill or incapacitated persons, but more typically, states sought exemptions to require participation from parents with younger children.
- 3) Time Limits and Work Requirements: Most states sought approval for some form of time limit, though states took different approaches to what happened after the time limit. In some cases, a family would be required to participate in work or a work-related activity after the time limit; in other cases, assistance would be terminated for either the parent or the entire family. States varied in their approaches as to who was subject to the time limit, who was exempt, and when a family reaching a time limit could qualify for an extension. Most time limit waivers occurred in the last years of the AFDC Program, and few families actually reached time limits by the time the AFDC Program ended.

In summary, key elements of the AFDC structure included:

- 1) a federal requirement to pay half or more of all costs of assistance to eligible families;
- 2) a requirement that participating states submit and comply with state plans and provide assistance to families who met federal and state eligibility requirements;

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15. 42 U.S.C.A. § 1315 (West 2000).

16. 42 U.S.C.A. § 602 (West 2000).

17. *See id.*

- 3) a complex mix of federal mandates and options affecting who actually received assistance, although there was a basic requirement to assist single parent families (and in some circumstances, two-parent families who had no other income);
- 4) the principle that some families were non-exempt and other families were exempt from program requirements, although the share of exempt families was declining over time;
- 5) a mandate that states implement a program of employment-related services, although the actual likelihood of an individual receiving services and the extent of individual choice in the services received was, at best, uneven;
- 6) penalties for violation of program rules without good cause, with the extent of severity of penalties increasing in the last years of the program; and
- 7) the early design, but limited experience, of time limits.

### *C. TANF and MOE: The Basic Framework*

PRWORA repealed the AFDC Program and enacted the Temporary Assistance for Needy Families (TANF) block grant.<sup>18</sup> States were permitted to begin implementing TANF as soon as the PRWORA was enacted, and all states were required to begin implementation by July 1, 1997.

With their block grants, all states have elected to operate a TANF cash assistance program,<sup>19</sup> but that is only one part of state use of block grant funds. Many of the rules affecting work requirements and time limits apply to the operation of a state's TANF cash assistance or other "assistance" programs funded with a TANF block grant. However, to understand the basic framework of TANF, it is helpful to begin by looking at the purpose of the law, then the allowable choices in spending federal TANF funds and state MOE funds, and then the consequences of receipt of "TANF assistance."

#### (i) Principal Sources of Law

TANF was enacted in Title I of the Personal Responsibility and Work Opportunity Reconciliation Act. Most provisions of the law relating to TANF were codified at 42 U.S.C. §601-79(b). On April 12, 1999, the U.S. Department of Health and Human Services issued federal regulations addressing many, but not all, aspects of the federal law.<sup>20</sup>

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18. PRWORA also made large and small changes in an array of other programs affecting low income families and individuals. For a general overview, see DAVID A. SUPER ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, THE NEW WELFARE LAW (1996), available at <http://www.cbpp.org/WECN813.HTM>.

19. The term "TANF cash assistance program" is not routinely used to distinguish a state's welfare program from the rest of its services and activities under the TANF block grant, but it is a useful concept and will be used in this chapter.

20. See Temporary Assistance for Needy Families Provisions (TANF) 64 Fed. Reg. 17,720 -931 (1999) (codified at 45 C.F.R. § 260). For discussions of the significance of the final TANF regulations, see MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, THE FINAL TANF REGULATIONS: A PRELIMINARY ANALYSIS (1999) [hereinafter PRELIMINARY ANALYSIS], available at <http://www.clasp.org/pubs/TANF/finalregs.html>; LIZ SCHOTT ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, HIGHLIGHTS OF THE FINAL TANF REGULATIONS (1999), available at <http://www.cbpp.org/4-29-99wel.htm>.

## (ii) The Purpose of TANF

The purpose language in the TANF statute is particularly important because (as discussed below) it has direct implications in affecting what constitutes an allowable expenditure of TANF funds. 42 U.S.C. § 601(a) provides:

The purpose of this part is to increase the flexibility of states in operating a program designed to—

- 1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- 2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- 3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- 4) encourage the formation and maintenance of two-parent families.<sup>21</sup>

## (iii) TANF funding

Under TANF, each state qualifies for a “family assistance grant” each year. Generally, each state qualifies to receive an amount that reflects federal spending from a base period (i.e., the most favorable of 1994 federal spending, 1995 spending or the 1992-94 average) under the programs that were repealed at the time TANF was enacted (i.e., the AFDC Program, the JOBS Program, and the Emergency Assistance Program).<sup>22</sup>

For most states, TANF grants stay constant from 1997 through 2002. The factors that could affect TANF funding for a state are:

- 1) A minority of states qualify for 2.5% adjusters each year because they were determined to be states with historically low federal welfare spending or above-average population growth.<sup>23</sup>
- 2) A state could qualify for a bonus or a penalty. There are two bonuses: a high performance bonus (which under preliminary guidance is based on employment entries, employment retention, and wage progression for families receiving TANF assistance) and an out-of-wedlock bonus (for states in which the share of out-of-wedlock births declines while the pregnancy termination rate also declines).<sup>24</sup> There are numerous potential penalties, including penalties for misexpenditure of TANF funds, failure to submit required reports, failure to meet work participation rates, and failure to comply

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21. *See also* 45 C.F.R. § 260.20 (1999).

22. *See* 42 U.S.C.A. § 603(a)(1)(B) (West 2000). State TANF grant amounts through fiscal year 1999 can be found in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TEMPORARY ASSISTANCE TO NEEDY FAMILIES PROGRAM (TANF): THIRD ANNUAL REPORT TO CONGRESS § II TABLE 2:6 (2000) [hereinafter THIRD ANNUAL TANF REPORT] available at <http://www.acf.dhhs.gov/programs/opre/annual3.doc>.

23. *See* 42 U.S.C.A. § 603(a)(3) (West 2000).

24. *See id.* at §§ 603(a)(2), (a)(4) (West 2000).

with time limit provisions. This chapter provides additional detail about some, but not all, potential penalties for states.<sup>25</sup>

3) A TANF Contingency Fund of \$2 billion is available for states to draw upon federal funds, subject to state matching funds, during a period of economic downturn if the state's expenditures in the TANF program reach a specified historical state spending level.<sup>26</sup>

4) A \$1.7 billion federal loan fund is available to states.<sup>27</sup>

In addition, the 1997 Balanced Budget Act created a \$3 billion program of Welfare-to-Work grants that were made available in 1998 and 1999. These funds were divided into formula grants and competitive grants. Most (approximately 75%) of these funds were allocated to states as formula grants. Each state must, in turn, distribute at least 85% of its formula grant to local Private Industry Councils unless the state attains federal approval to provide the funds to other entities. A state must satisfy maintenance of effort and matching requirements to qualify for a formula grant. Not all states opted to receive their formula grants. Twenty-five percent of the Welfare-to-Work funds is being distributed through competitive grants to Private Industry Councils, political subdivisions of a state, or private entities; the states themselves are not eligible for the competitive grants. Both formula and competitive grants must be spent on "hard-to-employ individuals" and "individuals with long-term dependence characteristics" for activities in a defined list, including job readiness activities, employment activities, job placement services, post-employment services, job retention services and support services, and individual development accounts.<sup>28</sup>

At the time Congress was considering enactment of the TANF statute, many people were concerned about the potential implications of a funding structure in which federal funding would stay essentially flat for a six year period. However, since TANF funding to states was principally based on state AFDC assistance costs in 1994 or 1995, and since caseloads in most states have fallen sharply since that time, the fiscal structure has resulted in many states having significant fiscal resources above the level that they would have had under the AFDC funding formula. A state is not required to spend its full block grant each year, and funds not spent in a year remain available for assistance costs in future years. In addition, funds not spent on assistance may be used for an array of other permissible expenditures. As a result, TANF policy discussions in a number of states have increasingly focused on alternative choices for spending available TANF funds.

#### (iv) TANF State Plans and Restriction on Federal Authority

In order to receive a TANF block grant, a state must submit a state plan to the U.S. Department of Health and Human Services (HHS) and HHS must determine that the plan is "complete," i.e., contains the information required by law.<sup>29</sup> This is the only federal role concerning the state plan; the federal government does not have the authority to approve or

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25. TANF penalties, applicable penalty amounts, and procedures relating to penalty reductions, findings of reasonable cause, corrective compliance and appeals from penalty decisions are located at 42 U.S.C.A. § 609 and 42 U.S.C.A. § 610.

26. *See* 42 U.S.C.A. § 603(b) (West 2000).

27. *See id.* at § 606.

28. The statutory authorization for Welfare-to-Work grants is located at 42 U.S.C.A. §603(a)(5), and implementing federal regulations were published in the Federal Register. *See* 20 C.F.R. § 645 (1999). More information about the Welfare-to-Work grants can also be found at <http://www.doleta.gov> (last visited Nov. 17, 2000).

29. *See* 42 U.S.C.A. § 602 (West 2000).

disapprove the state plan, and the federal government does not have legal authority to take action against a state solely because the state has acted in violation of its state plan. The federal statute expressly states:

LIMITATION ON FEDERAL AUTHORITY. No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.<sup>30</sup>

Thus, unless a state's conduct also violates some provision of the law that HHS is authorized to enforce, the federal government lacks authority to act simply because the state has violated its state plan.

(v) TANF-Funded Programs Subject to Laws Relating to Nondiscrimination

Notwithstanding the above restriction on enforcing provisions of the TANF statute, the federal law also provides that any program or activity receiving funds under TANF is subject to the Age Discrimination Act of 1975; Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; and Title VI of the Civil Rights Act of 1964.<sup>31</sup>

(vi) Allowable Expenditures of TANF Funds

There are three ways in which a state can spend its TANF funds:

(1) The state can transfer funds to other block grants. Up to a total of 30% of TANF funds can be transferred to the Child Care and Development Block Grant and to the Social Services Block Grant (Title XX), provided that no more than 10% can be transferred to Title XX, and Title XX transfers must be for services to children and their families below 200% of poverty. (Beginning in FY 2001, no more than 4.25% of TANF funds may be transferred to Title XX.) If funds are transferred to another block grant, they become subject to the rules of that other block grant and are no longer subject to TANF rules.<sup>32</sup>

(2) Unless otherwise prohibited, a state may spend TANF funds in any manner reasonably calculated to accomplish a purpose of TANF.<sup>33</sup> Thus, the four purposes of TANF listed above affect whether spending is allowable.

(3) Even if spending is not "reasonably calculated" to accomplish a TANF purpose, the state may, unless otherwise prohibited, spend TANF funds in any manner that the state authorized to use the funds under a set of programs (AFDC, JOBS, Emergency Assistance, AFDC Child Care, Transitional Child Care, At-Risk Child Care) on September 30, 1995, or at state option, August 21, 1996.<sup>34</sup>

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30. See 42 U.S.C.A. § 617 (West 2000).

31. See *id.* at § 608(d); 45 C.F.R. § 260.35 (1999).

32. See 42 U.S.C.A. § 604(d) (West 2000).

33. See *id.* at § 604(a)(1).

34. See *id.* at § 604(a)(2).

### (vii) Who May Be Helped with TANF Funds

Who the state can help with TANF funds depends on why the spending is allowable. Of the four purposes of TANF, the first and second purposes (providing assistance to needy families, and ending dependence of needy parents by promoting job preparation, work, and marriage) relate to needy families or needy parents, and thus, spending based on the first or second purposes must be for families or parents determined to be “needy.” Under HHS rules, the determination of need must be based on income and may also be based on resources.<sup>35</sup>

The third and fourth purposes of TANF (reducing out of wedlock pregnancies and promoting the formation and maintenance of two parent families) are not limited to needy families or persons, and thus expenditures reasonably calculated to accomplish these purposes are permissible even if not for low-income persons.

### (viii) The Concept of “Assistance”

When a state spends TANF funds for a benefit or service, the benefit or service may or may not fall within the TANF definition of “assistance.” The definition is important because many TANF provisions apply to the receipt of “TANF assistance.” For example:

1) Time Limits: The state may not use federal TANF funds to provide assistance to a family in which the adult head of household or spouse of the head of household has received federal TANF assistance for sixty months (subject to limited exceptions).<sup>36</sup>

2) Work Participation Requirements: If a family including an adult or minor parent head of household receives TANF assistance (whether federally funded or state funded), the family is considered part of the state’s caseload for purposes of TANF participation rate requirements.<sup>37</sup> The TANF 24-month work requirement is a requirement that a parent or caretaker receiving TANF assistance (whether federally funded or state funded) be engaged in work (as defined by the state) by the time that he or she has received TANF assistance for 24 months.<sup>38</sup>

3) Child Support: A family receiving TANF assistance (whether federally funded or state funded) is required to assign its child support to the state.<sup>39</sup>

4) Prohibitions: A set of prohibitions bar the state from providing TANF assistance (or in some cases, federally-funded TANF assistance) to certain groups of families and individuals.<sup>40</sup>

5) Data Collection: A set of data reporting requirements apply to those receiving TANF assistance (whether federally funded or state funded).<sup>41</sup>

Under final regulations issued April 12, 1999, some of a state’s TANF benefits and services are likely to be considered “assistance” and others are likely to be considered “no assistance.”

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35. See Temporary Assistance for Needy Families Provisions (TANF), 45 C.F.R. §260 (1999).

36. See 42 U.S.C.A. § 608(a)(7) (West 2000); 45 C.F.R. § 264.1 (1999).

37. See 42 U.S.C.A. § 607(b)(1)(B); 42 U.S.C.A § 607(b)(2)(B); 45 C.F.R. § 261.22; 45 C.F.R. § 261.24 (1999).

38. See 42 U.S.C.A. § 602(a)(1)(A)(ii) (West 2000); 45 C.F.R. § 261.10 (1999).

39. See 42 U.S.C.A. § 608(a)(3).

40. See generally 42 U.S.C.A § 608 (West 2000).

41. See 42 U.S.C.A. § 611; 45 C.F.R. § 265 (1999).

Assistance is defined to include: “[C]ash, payments, vouchers, and other forms of benefits designed to meet a family’s ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).”<sup>42</sup> The definition also includes:

- 1) needs-based payments to individuals in any work activity whose purpose is to supplement the money they receive for participating in the activity;<sup>43</sup> and
- 2) supportive services such as transportation and child care provided to non-employed families, unless within one of the exclusions from assistance listed below.<sup>44</sup>

If a benefit falls within the definition of assistance, the benefit counts as assistance even when receipt of the benefit is conditioned on participation in work experience, community service or other work activities.<sup>45</sup>

Under final regulations, “assistance” does *not* include:

- 1) Non-recurrent short-term benefits that: are designed to deal with a specific crisis situation or episode of need; are not intended to meet recurrent or ongoing needs; *and* will not extend beyond four months;
- 2) Work subsidies (i.e., payments to employers or third parties to help cover the costs of employee wages, benefits, supervision, and training);
- 3) Support services such as child care and transportation provided to families who are employed;
- 4) Refundable earned income tax credits;
- 5) Contributions to and distributions from Individual Development Accounts;
- 6) Services such as counseling, case management, peer support, child care information and referral, transitional services, job retention, job advancement, and other employment-related services that do not provide basic income support; and
- 7) Transportation benefits provided under a Job Access or Reverse Commute project to an individual who is not otherwise receiving assistance.<sup>46</sup>

Thus, if a state elects to use TANF funds for a benefit like refundable earned income credits for needy families, such spending is considered non-assistance, and the families benefiting are not subject to TANF time limits, work or participation requirements or other requirements unless they also receive benefits falling within the definition of TANF assistance.<sup>47</sup>

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42. 45 C.F.R. § 260.31(a) (1999).

43. *See* 45 C.F.R. § 260.31(a)(2)(ii) (1999).

44. *See* 45 C.F.R. § 260.31(a)(3) (1999).

45. *See* 45 C.F.R. § 260.31(a)(2)(ii) (1999).

46. *See* 45 C.F.R. § 260.31(b) (1999).

47. Under the final regulations, the assistance/non-assistance distinction applies to many, but not all, aspects of TANF. For more detail, see PRELIMINARY ANALYSIS, *supra* note 20, at 3-11.

#### (ix) Maintenance of Effort Obligation

A state will receive a TANF penalty if it fails to meet its maintenance of effort (MOE) obligation.<sup>48</sup> The MOE obligation is a requirement to spend at least a certain amount of state money on benefits and services for low-income families each year. As discussed in more detail below, a state can choose to satisfy its maintenance of effort obligation by spending state money in its TANF program, or it can satisfy the obligation by spending the money in separate state programs outside of TANF, or through any combination of the two. The state's maintenance of effort obligation is 80% (or, if the state meets TANF participation rates, 75%) of the amount that the state spent in 1994 for a set of federal programs.<sup>49</sup>

#### (x) Allowable Expenditures of MOE Funds

There are detailed requirements concerning when a state expenditure counts toward MOE.<sup>50</sup> Generally, MOE expenditures must be for "eligible families" and must be for an allowable purpose.

The phrase "eligible families" is not limited to families receiving TANF assistance. Under final regulations, to be eligible the family must be one that the state could assist in its TANF program. This means the state is either not prohibited from using federal funds or could permissibly use state funds to assist the family.<sup>51</sup> In addition, the family must be "needy," defined as meeting the income standards and the resource standards (if the state elects to have resource standards) determined by the state and contained in the state's TANF plan.<sup>52</sup>

MOE expenditures must be for an allowable purpose. Generally, the allowable purposes for which expenditures can count toward MOE requirements are cash assistance, child care assistance, educational activities designed to increase self-sufficiency, job training and work, any other use of funds reasonably calculated to accomplish a TANF purpose, and administrative costs (not to exceed 15%). Certain qualifications apply to each of the allowable purposes.<sup>53</sup>

#### (xi) Key Choices in Structuring MOE Spending

A state has three choices for how to spend its MOE funds:

- 1) **Commingled funds:** The state may commingle its MOE funds with federal TANF funds in a single program. For example, if the state commingles state and federal funding for assistance for 100 cases, and 60% of the money in the program comes from federal funding, and 40% comes from state funding, all 100 of those cases will receive assistance that is partially federally-funded and partially state-funded. If the state elects to commingle state and federal funds, then all families receiving "assistance" with commingled funds are subject to the requirements generally applicable to federal TANF assistance.

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48. See 42 U.S.C.A. § 609(a)(7)(West 2000); 45 C.F.R. § 263.1(a) (1999).

49. MOE levels can be found at <http://www.acf.dhhs.gov/news/welfare/staloc/moetable.htm> (last visited Nov. 17, 2000).

50. See generally 42 U.S.C.A. § 609(a)(7)(B) (West 2000); 45 C.F.R. §§ 263.1 - 263.9 (1999); see also MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, THE TANF MAINTENANCE OF EFFORT REQUIREMENT (1998), available at <http://www.clasp.org/TANF/moerev.htm#top>.

51. See 45 C.F.R. § 263.2(b)(1999).

52. See 45 C.F.R. § 260.40 (1999).

53. See 42 U.S.C.A. § 609(a)(7)(B)(I) (West 2000); 45 C.F.R. § 263.2 (1999). The preamble to the final regulations also states that any MOE expenditure must be reasonably calculated to accomplish a purpose of TANF. See Temporary Assistance Needy Families Provisions (TANF), 64 Fed. Reg. 17,720, 17,820 (Apr. 12, 1999).

2) Segregated state funds within TANF: Alternatively, a state might spend state funds in a program that also receives federal TANF funds, but segregate some or all of such state spending so that the assistance provided to certain families, together with the administrative costs relating to those families, is paid for entirely with state funds. For example, if 60% of the money in a state's TANF cash assistance program involves federal funding, 40% involves state funding, and the state has one hundred cases, the state might structure its TANF cash assistance program so that sixty of its cases are federally-funded and forty are state-funded. The distinction is important because federal time limits only apply to federally funded cases, and some prohibitions on assistance are only applicable to use of federal funds.

3) Separate State Programs: Alternatively, a state might use state funds to create or expand a separate state program that receives no federal TANF funds. Families in a separate state program are not subject to the requirements that apply to families receiving TANF assistance (e.g., time limits and work requirements). However, a state may, of course, impose its own requirements.<sup>54</sup>

The differences in funding choices become important because they mean, for example, that a state may develop its own approach to time limits, work requirements, and more generally, the mix of services and requirements for particular populations. The state will often have broad flexibility in implementing its choices depending on how it chooses to structure its spending of state funds.

#### (xii) The TANF Cash Assistance Program

Technically, a state is not required to use its TANF funds to operate a TANF cash assistance program, but Congress and others must have assumed that all states would elect to do so, and many of the requirements of the federal TANF statute are written to apply to the operation of the state's TANF assistance program.

When using federal TANF funds, "assistance" may only be provided to a family that includes a child residing with a parent or relative or to a pregnant woman.<sup>55</sup> However, it is up to the state to determine virtually all of the basic elements of family eligibility, including:

- 1) which persons among those residing with the child will be considered part of the TANF family assistance unit (among those not prohibited from receiving assistance);
- 2) the income eligibility level at which a family will be considered "needy;" and what sources of income will be counted in determining eligibility and benefit levels;
- 3) whether to apply a resource requirement, and if so, what that requirement will be;
- 4) the benefit levels to be provided to eligible families;

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54. For a discussion of choices in structuring state spending written prior to publication of the final TANF regulations, see STEVE SAVNER & MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, THE NEW FRAMEWORK: ALTERNATIVE STATE FUNDING CHOICES UNDER TANF (1997) available at <http://www.clasp.org/pubs/TANF/fnlfsnd.html>. Under the final regulations, the principal changes affecting the earlier analysis are the new definition of "assistance" and the removal of elevated risk of penalties for states implementing separate state programs. See PRELIMINARY ANALYSIS, *supra* note 20, at 3-14.

55. See 42 U.S.C.A. § 608(a)(1) (West 2000).

5) which benefits an eligible family will qualify to receive.

The TANF statute does not impose any direct limits on how a state makes its decisions in the above areas but does provide that a state's TANF plan must "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process."<sup>56</sup>

Once a state determines the rules concerning eligibility and assistance, the state is not legally required to provide assistance to eligible families as a matter of federal law. The PRWORA provides that "[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."<sup>57</sup> Note that this does not preclude a state from establishing an entitlement as a matter of state law. Moreover, it remains unclear how a court would interpret the "no entitlement" language of TANF in the context of due process challenges to state policies and practices.

In contrast to AFDC, there is no requirement of "statewideness" in TANF; there is no requirement that the same program be implemented in a uniform way across the state.<sup>58</sup> In addition, there is no requirement that the program be implemented by a single state agency, so different agencies could be responsible for different components of the program. And, there is no requirement that any component of the program be administered by the state or local government, so the program or particular components of the program could be administered by non-profit or for-profit entities pursuant to contracts or other arrangements with the state or local government.

#### (xiii) State Option to Continue Waivers

One potential source of flexibility in operating state TANF cash assistance programs flows from the state option to continue previous waivers. As noted above, many states had waivers under Section 1115 of the Social Security Act at the time TANF was enacted. The law provides that if a state had an approved waiver, the state may elect to continue that waiver until the waiver expires, and need not comply with inconsistent provisions of the TANF statute until expiration of the waiver.<sup>59</sup> HHS regulations outline circumstances under which HHS will consider provisions of the TANF law to be inconsistent with a state's approach to work requirements or time limits under the state's waiver. A state continuing such a waiver will be able to apply its waiver policies rather than the inconsistent TANF requirements until expiration of the waiver.<sup>60</sup>

#### (xiv) TANF Prohibitions on Assistance

The federal TANF statute contains certain prohibitions that bar states from providing assistance to particular categories of persons or families. In some instances, the prohibition only bars the provision of federally funded TANF assistance and, in other instances, the prohibition also bars the state from providing state-funded TANF assistance. The TANF time limits (discussed below) are framed as prohibitions on assistance.<sup>61</sup> Other principal prohibitions bar provision of assistance for families without a child, families in which an individual is not

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56. 42 U.S.C.A. § 602(a)(1)(B)(iii) (West 2000).

57. 42 U.S.C.A. § 601(b) (West 2000).

58. *See* 42 U.S.C.A. § 602(a)(1)(A)(i) (West 2000).

59. *See* 42 U.S.C.A. § 615(a)(1)(A) (West 2000).

60. *See generally* 45 C.F.R. § 260 (c) (1999).

61. *See infra* Part I.C.xxi.

cooperating in establishing paternity or obtaining child support (for which the state must reduce or terminate assistance), families who have not assigned certain support rights to the state, teen parents who are not living in adult-supervised settings or attending school (subject to limited exceptions), and certain categories of legal immigrants and undocumented immigrants. In addition, a State is prohibited from providing TANF assistance to individuals convicted of certain drug-related felonies, unless the State opts out of this requirement.<sup>62</sup>

#### (xv) TANF Diversion and Processing of Applications

Under the prior AFDC program, a set of federal regulations required that states accept applications for assistance, process applications within a specified period of time, provide written notice of disposition of a request for assistance, and allow for a fair hearing when a request for assistance was denied. A state may make use of similar state-based requirements under TANF, but the federal TANF statute does not impose such requirements. Specifically, there is no federal requirement that states accept or process applications for assistance, provide written notice of disposition, or allow applicants fair hearing rights. To find that provisions offer some protections, a court could require a state plan set forth “objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment.”

One increasingly common state and local procedure under TANF involves “diversion”—efforts to divert a potential applicant family from receiving assistance. A wide range of practices fall within the framework of diversion, including counseling about alternative community resources, a mandate that an individual complete some number of job search contacts before an application is approved, provision of lump sum benefits, or other forms of help to address immediate crises, and active discouragement seeking to deter individuals from filing applications. Thus, diversion may involve efforts to dissuade and discourage applicants by burdening the process of seeking assistance. Such latter efforts may violate provisions of other federal laws (e.g., Food Stamp and Medicaid processing requirements) but are not prohibited by the TANF statute.

#### (xvi) Assessment of TANF Recipients

A state is required to make an initial assessment of the skills, prior work experience, and employability of each recipient of assistance who is at least age 18 or who has not completed high school (or equivalent) and is not attending secondary school. The state may make any required assessment within 30 days (or 90 days, at state option) of the date an individual becomes eligible for assistance.<sup>63</sup> A state may but is not required to develop an Individual Responsibility Plan based on the assessment.<sup>64</sup>

While the federal legal requirements are limited, a state could choose to conduct more comprehensive assessments, assess applicants or recipients at earlier stages, or do assessments of all applicants or recipients. The state could choose to ensure that program activities are appropriately determined on the basis of these assessments.

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62. See generally 42 U.S.C.A. § 608 (West 2000). For more detail on specific TANF prohibitions, see MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT (1996), available at <http://www.clasp.org/pubs/TANF/tanffederal.htm>.

63. See 42 U.S.C.A. § 608(b) (West 2000); 45 C.F.R. § 261.11 (1999).

64. See 45 C.F.R. § 261.12 (1999).

### (xvii) Screening and Identification of Victims of Domestic Violence

A state may elect to certify in its state TANF plan that it has established and is enforcing procedures to:

- 1) screen and identify individuals receiving assistance who have a history of domestic violence, while maintaining confidentiality;
- 2) refer such individuals to counseling and supportive services; and
- 3) waive program requirements such as (but not limited to) time limits and child support cooperation in cases where compliance with the requirements would make it more difficult for individuals to escape domestic violence or unfairly penalize individuals who are or have been victimized by such violence or are at risk of further domestic violence.<sup>65</sup>

While any state can elect to make such a certification, HHS has also indicated that if a state's policies and practices meet certain specified requirements, the state will be considered to have "federally recognized" good cause domestic violence waivers. If a state has federally recognized good cause domestic violence waivers and fails to meet TANF work participation requirements or time limits because it has granted such waivers, the state will be considered to have "reasonable cause" for failure to meet the federal requirements.<sup>66</sup> To be federally recognized, the good cause domestic violence waivers must:

- 1) identify the specific program requirements that are being waived;
- 2) be appropriately granted based on need, as determined by an individualized assessment by a person trained in domestic violence and redetermined no less often than every six months;
- 3) be accompanied by an appropriate services plan that is developed by a person trained in domestic violence and reflects the individualized assessment and any revisions indicated by the redetermination;
- 4) be designed to lead to work (consistent with the other provisions relating to domestic violence).<sup>67</sup>

### (xviii) Work and Participation Requirements For Families Receiving Assistance

Many state TANF cash assistance programs place a strong emphasis on job search requirements for applicants and recipients of assistance.<sup>68</sup> Programs are often guided by a "work first" philosophy, in which there is only limited access to education and training activities, and programs emphasize the importance of accepting any available job.<sup>69</sup> There may be few or no

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65. See 42 U.S.C.A. § 602(a)(7) (West 2000).

66. See 45 C.F.R. § 260.58 .

67. See 45 C.F.R. § 260.55.

68. See JULIE STRAWN, CENTER FOR LAW AND SOCIAL POLICY, WELFARE-TO-WORK PROGRAMS: THE CRITICAL ROLE OF SKILLS (1999); GOVERNMENT ACCOUNTING OFFICE, WELFARE REFORM: STATES' EXPERIENCES IN PROVIDING EMPLOYMENT ASSISTANCE TO TANF CLIENTS, No. GAO/HEHS-99-22 (1999).

69. See *id.*

exemptions from work-related requirements, and the circumstances under which “good cause” will be recognized for failure to comply with program requirements may be limited. Each of these program orientations is permitted, and in some respects encouraged by the TANF statute. However, a state has substantial discretion in determining which activities are required, when the activities are required, what employment-related services are offered, and how the program addresses circumstances of noncompliance or circumstances in which individuals have significant barriers affecting the ability to obtain employment or participate in program activities. In contrast to AFDC, there are no mandated federal exemptions in TANF; thus a state is free to require participation in activities by any or all categories of applicants or recipients. This does not mean that the state is barred from developing its own exemption categories or ensuring that individuals are in appropriate activities,<sup>70</sup> but it does mean that there is no federal “right” to be exempt from program mandates.

TANF has four work and participation requirements that potentially affect families receiving TANF assistance (whether federally-funded or state-funded): community service after two months; the twenty-four month work requirement; the overall participation rate; and the two-parent participation rate.<sup>71</sup> In addition, a state is free to impose its own additional requirements. There is often confusion about the TANF work and participation requirements. It is important to understand the details of each applicable requirement in order to understand what requirements the state is and is not mandated to impose.

First, the state plan provisions of the law provide that unless the state opts out, the state must require a nonexempt parent or caretaker to participate in community service employment after two months of receiving assistance, with minimum hours per week and tasks to be determined by the state.<sup>72</sup> Most states have elected to opt out of this requirement. A state that has not opted out has broad discretion in determining what constitutes community service employment and in setting minimum hours and tasks. It is probably unclear how a state implementing this provision determines whether a parent or caretaker is nonexempt; it is unclear whether Congress intended to allow states discretion to determine exemptions or whether Congress intended that the provision apply to any family subject to federal participation rate provisions.<sup>73</sup>

Second, a state’s TANF plan must require a parent or caretaker receiving assistance under the TANF program to “engage in work” (as defined by the state) after receiving 24 months of assistance (or earlier, if the state determines that the adult is ready at an earlier point).<sup>74</sup> In contrast with the participation rate provisions,<sup>75</sup> states have very broad discretion in determining what counts as being “engaged in work” for purposes of the twenty-four month requirement. The determination was expressly left to each state, so the state has flexibility in determining both what counts as work and in determining how many hours per week or month will be sufficient. There does not appear to be any limitation, which would, for example, prevent a state from counting participation in education, training, or job readiness activities as satisfying this requirement. In addition, there is no explicit penalty for a state’s failure to comply with this requirement.<sup>76</sup>

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70. 42 U.S.C.A. § 608(a)(7)(C) (West 2000).

71. 42 U.S.C.A. § 602(a)(1)(A)(ii) (West 2000) (requiring recipients to engage in “work activities” after 24 months of assistance); 42 U.S.C.A. § 606(a) (establishing participation rates).

72. *See* 42 U.S.C.A. § 602(a)(1)(B)(iv) (West 2000); 45 C.F.R. § 261.10(b) (1999).

73. *See infra* Part I.1.C.xviii.

74. *See* 42 U.S.C.A. § 602(a)(1)(A)(ii) (West 2000); 45 C.F.R. § 261.10(a)(1) (1999).

75. *See infra* Part I.1.C.xviii.

76. It remains unclear whether the federal government might assert that a state misspent TANF funds if the state provided assistance to a parent or caretaker who was subject to this provision and not engaged in work. However, a strong argument can be made that Congress was very explicit in identifying those instances in which the state was prohibited from using TANF funds to provide assistance, and there is no prohibition against providing assistance to a family in which the parent or caretaker has received assistance for 24 months and is not engaged in work.

At the day-to-day level, the two work-related provisions that have the greatest effect on state behavior are likely to be the TANF overall participation rate and two-parent family participation rate. Technically, the participation rate provisions do not directly impose requirements on individuals; rather, each is a requirement under which the state risks a federal fiscal penalty if it fails to attain a particular participation rate each year.<sup>77</sup> The federal law specifies for each participation rate:

- 1) the maximum required work participation rate for the year;
- 2) a methodology for adjusting the maximum rate downward if the state's caseload has fallen since 1995 for reasons other than changes in eligibility rules (generally referred to as the "caseload reduction credit;")
- 3) the number of hours that an individual must participate in one of a set of specified activities to count toward the rate;
- 4) the specified activities that will count as participation for purposes of the participation rates.

Detailed rules affect the determination of the applicable rates, hourly requirements, and countable activities.<sup>78</sup> The following chart lists the maximum applicable rates and required hours of participation needed to count towards the required rates.

<b>Overall and Two-Parent Families Maximum Participation Requirements Under TANF (before Caseload Reduction Credits)<sup>79</sup></b>				
For two-parent families receiving federally funded child care assistance, a special rule generally requiring participation by both parents applies for purposes of the two-parent rate.				
Fiscal Year	Overall Participation Rate	Hours Required to Count Toward Overall Rate	Two-Parent Families Participation Rate	Hours Required to Count Toward Two-Parent Families Rate
1997	25%	20	75%	35
1998	30%	20	75%	35
1999	35%	25	90%	35

77. See 42 U.S.C.A. § 609(a)(3) (West 2000).

78. See 42 U.S.C.A. § 607 (West 2000); 45 C.F.R. § 261 (1999).

79. The following are exceptions to the hourly requirements in the table:

- 1) Single parents of children under age six may count toward the overall rate in any year by being engaged in work for 20 hours a week;
- 2) Married recipients or single heads of households under age twenty can count toward rate by engaging in school completion without being subject to express hourly requirement.

2000	40%	30	90%	35
2001	45%	30	90%	35
2002 and after	50%	30	90%	35

A state's actual required participation rate may be substantially lower than the maximum participation rate, as a result of the application of the caseload reduction credit. The caseload reduction credit provides that each year, a state's participation rate shall be adjusted downward based on the number of percentage points by which the state's caseload in the prior year was less than its caseload in 1995 for reasons other than federal or state changes in program eligibility rules. For example, suppose a state has had no changes in eligibility rules since 1995, and that its 1999 caseload was 35% below its 1995 caseload. In 1999, if the maximum overall participation rate is 40%, that state's adjusted participation rate would be reduced by 35 percentage points, i.e., to 5%. Federal TANF regulations outline the process for a state to apply for a caseload reduction credit, in which the state must describe the extent of caseload decline since 1995, list eligibility rule changes since that time, and estimate the effect of eligibility rule changes on the state's caseload.<sup>80</sup>

Once the state's application participation rate is determined, a state wishing to avoid fiscal penalties must ensure that a number of TANF recipients sufficient to meet the applicable participation rate are engaged in countable activities for at least the required number of hours each week. Generally, in fiscal year 1999, for purposes of the overall rates, the hourly requirements are twenty-five hours a week for parents or caretakers with children age six and above and twenty hours a week for single parents or caretakers of a child under age six. In satisfying participation rates, some activities can count toward any hours of participation, and some activities can count only toward hours of participation after the first twenty hours. A listing of countable activities appears as Appendix 1 to this Manual, noting specific details or limits that apply to particular activities. In general the following activities can count toward any hours of participation:

- 1) unsubsidized employment;
- 2) subsidized private-sector employment;
- 3) subsidized public-sector employment;
- 4) work experience;
- 5) on-the-job training;
- 6) job search and job readiness assistance;
- 7) community service programs;
- 8) vocational educational training; and
- 9) providing child care services to an individual who is participating in a community service program.

In addition, the following activities can count towards hours of participation after the first twenty hours:

- 1) job skills training related directly to employment;
- 2) education directly related to employment; and

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80. See 45 C.F.R. §§ 261.40 - 261.44 (1999).

3) satisfactory attendance at secondary school or a course of study leading to a certificate of general equivalence.<sup>81</sup>

The specific details of countable activity requirements significantly limit the circumstances under which education or training can count toward satisfying participation requirements. The principal way in which education or training could count toward the first twenty hours of participation is by being considered “vocational educational training.” However, as of fiscal year 2000, no more than thirty percent of those counting toward a state’s participation rates may do so either by being engaged in job skills training or by being a parent under age twenty engaged in education. In addition, involvement in employment preparation activities such as substance abuse or mental health treatment does not count toward participation rates at all, unless the state can include it within one of the listed countable activities such as job readiness. However, job readiness activities are generally countable toward participation rates only up to six weeks per year.

One feature of the federal work participation rates that is particularly relevant to people with disabilities is that two-parent families, in which one parent has a disability, are treated as single-parent rather than two-parent families for participation rate purposes.<sup>82</sup> There is no federal definition of “disability” for TANF purposes, so a state may use its own reasonable definition. The ability to exclude such families from the count of two-parent families can be significant because the participation rates and hourly requirements are substantially higher for two-parent families than for the overall participation rate, so the ability of states to categorize such families as single-parent families may allow states somewhat more flexibility in designing service strategies and developing requirements more responsive to individual circumstances.<sup>83</sup>

Some people believe that TANF prohibits states from allowing access to education or training or other activities that do not count toward participation rates. This is not accurate. It is important to recognize that:

- 1) The participation rate provisions do not restrict allowable TANF spending. A state can, for example, spend TANF funds on education programs whether or not such programs result in countable activities.
- 2) A state may be able to meet the applicable participation rate while only involving a limited share of adults receiving assistance in activities that count toward the participation rate. The state is free to allow other adults to participate in other activities.
- 3) Even those individuals counted toward the state rates can be allowed by the state to engage in other activities, and the state is able to use TANF funds to pay for those activities. As a practical matter however, the state may be hesitant to do so unless it is confident of meeting the required rates.
- 4) The TANF participation rates apply to families that include an adult or caretaker receiving TANF assistance. They do not affect those only receiving non-assistance, and if a state is concerned that the listed activities are inappropriate for a particular category of recipients, the state is free to assist those families in a separate state program funded with MOE dollars.

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81. *See* 45 C.F.R. § 261.31 (1999).

82. *See* 42 U.S.C.A. § 607(b)(2)(C) (West 2000).

83. *See* 42 U.S.C.A. §§ 607(a)(1), (2) (West 2000).

TANF participation rates do not compel the state to require program participation from any particular individual. For example, the rates do not require the state to mandate twenty-five hours of participation when such a mandate is unreasonable in a particular case. However, the participation rate is calculated based on a “denominator” of all families that include an adult or caretaker relative receiving assistance, allowing exceptions only for single parents with a child under age one (at state option) and for families in which an adult is under sanction (for not more than three months in a one year period). Therefore, if a state has 100 adult recipients, and ten have disabilities or are caring for disabled family members, the state could choose to excuse those ten people from participation rate-related requirements, but they would still be included in the denominator when calculating the state’s participation rate. It is unclear whether the state could “exempt” those families from the twenty-four month work requirement, though the state would be free to identify individually appropriate activities for purposes of the twenty-four month provision.

#### (xix) Childcare and Supportive Services for Participation in Work-Related Activities

A state may use its TANF funds to provide supportive services for participants in work activities or for other parents and family members who need access to such services. However, there is no statutory requirement mandating that a state provide needed supportive services to participants or potential participants. Similarly, a state may use TANF funds or other available funds for child care of family members participating in work-related activities, but the federal law does not require the state to guarantee or otherwise provide child care. Instead, there is a limited protection against sanctions in situations in which needed child care is unavailable.<sup>84</sup>

#### (xx) Penalties for Failure to Comply with Work Requirements

For purposes of TANF participation rates, the law states that if an individual refuses to engage in required work, the state must at least reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the state), and the state may choose to terminate the family’s assistance, “subject to such good cause and other exceptions as the State may establish.”<sup>85</sup> The law prohibits a state from reducing or terminating assistance when the single parent of a child under age six is unable to meet work requirements due to the unavailability of child care.<sup>86</sup> However, apart from the child care protection, it is up to each state to determine whether to incorporate good cause protections and which ones to incorporate.

A state may be subject to a federal fiscal penalty if it fails to impose sanctions on recipients as required by the above provision.<sup>87</sup> The preamble to the final TANF regulations also indicates “this penalty applies both to a state’s failure to sanction when it should have and to its imposition of a sanction when it should not have imposed one.”<sup>88</sup> Thus, a state may be at risk of a federal penalty if it wrongfully imposes sanctions.

In addition, if a state is subject to a penalty for failure to comply with the sanction provisions of TANF, HHS has specified two criteria that will be considered in determining whether the maximum fiscal penalty is imposed: whether the state has established a control mechanism to ensure that grants are appropriately reduced for refusal to engage in required work, and the percentage of cases for which grants have not been appropriately reduced.<sup>89</sup> The preamble to the

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84. 42 U.S.C.A. § 607(e)(2) (West 2000).

85. 42 U.S.C.A. § 607(e) (West 2000); 45 C.F.R. § 261.14 (1999).

86. *See* 42 U.S.C.A. § 607(e)(2) (West 2000); 45 C.F.R. § 261.15 (1999).

87. *See* 42 U.S.C.A. § 609(a)(14) (West 2000); 45 C.F.R. § 261.54 (1999).

88. Temporary Assistance for Needy Families Provisions (TANF), 45 C.F.R. §260 *et seq.* (1999).

89. *See* 45 C.F.R. § 261.55 .

final regulations explains that a control mechanism “should ensure that recipients are informed of their rights to fair hearings and advised of the process for invoking that right. In addition, we encourage states to consider adding procedures to advise recipients of their rights to pursue other remedies that might be available under State and local laws.”<sup>90</sup>

#### (xxi) TANF Time Limits

Since there is no federal entitlement to TANF assistance, a state is free to impose a time limit affecting some or all families, and the state is free to set that time limit at 60 months or less.<sup>91</sup> However, if the state wishes to reduce the number of families subject to a time limit or wishes to continue assistance or other benefits after a time limit, the state may also do so. This flexibility occurs because the time limit provisions of the TANF statute do *not* require states to terminate assistance to families after a time limit; rather, federal law restricts the circumstances under which federal TANF funds may be used to provide assistance. Generally, the law prohibits a state from using federal TANF funds to provide assistance to a family that includes an adult who has received federally funded TANF assistance for sixty months. The state may allow exceptions to the prohibition for up to 20% of families receiving assistance.<sup>92</sup> However, the federal restrictions do not apply to a state’s use of state MOE funds or other state funds, and a state may make use of MOE funds to develop the approach to time limits that the state wishes to implement.

For example, if a state wishes to have a time limit, but provide exemptions for particular categories of recipients, the state may make use of segregated state funding in the TANF cash assistance program for those groups exempt from the time limit. If, for example, the state wishes to provide that groups such as families employed 20 hours or more a week, parents in post-secondary education, or parents with severe disabilities are exempt from the time limit, the state may accomplish this goal by funding their TANF assistance with segregated state funds.

Similarly, if the state wishes to have a broadly applicable time limit, but identify a set of circumstances in which extensions are made available, the state can fund those cases in which extensions are provided with segregated state funds, in addition to taking advantage of the allowable 20% exceptions with federal funds.

Finally, if a state wishes to provide that instead of terminating all assistance at a time limit, the state will instead provide a subsidized job after a time limit, the state can also effectuate this approach. This is because a subsidized job would be considered no assistance, and the federal prohibition only bars the state from using federal TANF funds to provide assistance.

In addition, the TANF time limits only run during months in which an adult or minor parent receives assistance. A state might, for example, provide that in families in which a parent is receiving disability benefits, the parent is not considered a member of the TANF assistance unit. In such a case, there would be no time limit running against the family. For many years, under AFDC rules, parents receiving SSI benefits were not counted as part of the AFDC assistance unit. A state may extend this policy to TANF, and might also extend its applicability to other forms of disability benefits.

Note that a state’s policies concerning time limit exemptions and extensions may or may not have any implications for the availability of employment-related services for family members. Under the federal law, a state has no legal responsibility to provide employment-related services

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90. 64 Fed. Reg. at 17,794.

91. 42 U.S.C.A. § 608(a)(7)(A) (West 2000); 42 U.S.C.A. § 608(a)(7)(E) (West 2000).

92. Stated more precisely, the time limit runs in each month in which an adult head of household or spouse of the head of the household, or minor parent head of household or spouse of head household receives federal TANF assistance. The allowable 20% exceptions may be provided by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty. *See* 42 U.S.C.A. § 608(a)(7)(C)(1) (West 2000); 45 C.F.R. § 264.1 (1999).

to families reaching or subject to a time limit, so the fact that a family is subject to the time limit does not necessarily mean that the family will receive needed employment services. Thus, a state could choose to make certain families exempt from the time limit while still ensuring that those families receive needed employment services. As a practical matter, a state may be more likely to direct employment-related services to families subject to the time limits, but legally, the issue of whether a family is subject to the time limit and the issue of whether the family receives needed employment services are separate issues.

(xxii) Conclusion

The TANF statute provides only very limited protections for low-income families. At the same time, states have broad discretion in many of the basic design and operational issues affecting their programs. In many instances, a troubling state practice may not violate the TANF statute, nor be directly required by the TANF statute. Moreover, if a state wishes to structure policies and programs to provide greater help to particular categories of families in circumstances where particular TANF requirements appear inappropriate, the state will often have substantial flexibility to do so. States have potentially significant resources available through their TANF block grants and MOE obligations. Constructive policy implementation will often depend on states and advocates understanding the extent of state discretion under the TANF framework.

## CHAPTER 2: AN OVERVIEW OF TITLE II OF THE ADA

### A. *The Americans with Disabilities Act*

The Americans with Disabilities Act (ADA)<sup>93</sup> is a broad remedial civil rights law enacted to address the historic and pervasive discrimination against people with disabilities in all areas of public life. Until the ADA was passed, people with disabilities lacked the type of uniform federal protection already extended to individuals who experience discrimination on the basis of race, sex, religion, national origin, and age.

In enacting the ADA, Congress declared that “discrimination against people with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”<sup>94</sup> It also recognized that discrimination comes in many forms: outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication barriers; overprotective rules and policies; failure to make modifications in policies, existing facilities, and practices; exclusionary qualification standards and criteria; and segregation and relegation to lesser programs, services activities, benefits, jobs, and other opportunities.<sup>95</sup> Congress noted the tremendous cost of this discrimination to people with disabilities, including inferior status in society, relegation to a position of political powerlessness based on characteristics beyond their control and stereotypes and assumptions not indicative of true ability,<sup>96</sup> and denial of the opportunity to compete on an equal basis.<sup>97</sup> Equality of opportunity, full participation, independent living, and economic self-sufficiency were all identified as goals of the Act.<sup>98</sup>

To achieve these goals, Congress provided “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>99</sup> The ADA is extremely broad in scope: Title I covers private employment;<sup>100</sup> Title II covers state and local government programs and services, including public transportation;<sup>101</sup> Title III covers privately owned places of public accommodation such as restaurants, movie theaters, retail businesses, private schools, health and social service establishments, and other businesses open to the public;<sup>102</sup> Title IV covers telecommunications;<sup>103</sup> and Title V contains miscellaneous provisions, including provisions relating to the application of the ADA to insurance, the relationship between the ADA and state laws prohibiting discrimination on the basis of disability, and prohibition on retaliation for filing charges or invoking rights under the ADA in any other manner.<sup>104</sup> Many parts of the ADA were modeled on existing civil rights laws. The definition of disability and much of the substantive provisions of Titles I, II, and III are modeled on regulations implementing Section 504 of the Rehabilitation Act. For this reason, case law under Section 504 is often considered relevant in ADA cases. The ADA contains a provision making clear that it should be interpreted in a manner that gives at least as much protection to people with disabilities as Section 504.<sup>105</sup>

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93. See Pub. L. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213 and scattered sections of 47 U.S.C.).

94. 42 U.S.C.A. § 12101(a)(3) (West 2000).

95. See 42 U.S.C.A. § 12101(a)(5) (West 2000).

96. See 42 U.S.C.A. § 12101(a)(7) (West 2000).

97. See 42 U.S.C.A. § 12101(a)(9) (West 2000).

98. See 42 U.S.C.A. § 12101(a)(8) (West 2000).

99. 42 U.S.C.A. § 12101(b)(1) (West 2000).

100. See 42 U.S.C.A. §§ 12111-12117 (West 2000).

101. See 42 U.S.C.A. §§ 12131-12165 (West 2000).

102. See 42 U.S.C.A. §§ 12181-12189 (West 2000).

103. See 47 U.S.C.A. §§ 152, 221, 225, 611 (West 2000).

104. See 42 U.S.C.A. §§ 12201-12213 (West 2000).

105. See 42 U.S.C.A. § 12201(a) (West 2000).

One of the chief goals of the ADA was to eliminate discrimination and other barriers in employment. During the hearing process that led to the ADA's passage, Congress heard extensive testimony about "the staggering levels of unemployment and poverty of people with disabilities",<sup>106</sup> and the high percentage of unemployed people with disabilities on public benefits.<sup>107</sup> This testimony is referred to extensively in the Committee Reports. Both the House and the Senate reports discuss a Lou Harris poll that found that two-thirds of unemployed people with disabilities of working age said they wanted to work.<sup>108</sup> The ADA goal of increasing employment of people with disabilities is consistent with many of the goals of PRWORA and state TANF programs.

Unfortunately, despite the passage of the ADA, unemployment and underemployment of people with disabilities is still a major problem. An updated Lou Harris poll conducted in 1998 found that only 29% of adults with disabilities were working full or part-time, as compared to 79% of those without disabilities. Further, 72% of those with disabilities who were not employed said they would prefer to work.<sup>109</sup> In advocating on behalf of TANF clients with disabilities, advocates should not lose sight of this problem. The results of the study suggest that exempting large groups of people with disabilities from work and other program requirements may not be the best solution for people with disabilities. In the long run, these exemptions may contribute to isolation and exclusion of people with disabilities and make economic independence more difficult to achieve.

### *B. Title II of the ADA*

The Title II prohibition on discrimination contained in the statute is brief. It reads: "[s]ubject 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 services, programs or activities of a public entity."<sup>110</sup> The ADA requires the Department of Justice (DOJ) to promulgate regulations implementing Title II,<sup>111</sup> and it is these regulations that contain the specific prohibitions and requirements of Title II. With a few important exceptions, Title II provides that the regulations must be consistent with the Department of Justice Section 504 "coordination regulations."<sup>112</sup> To date the Supreme Court has not ruled on the validity of the ADA Title II regulations.

#### (i) The Scope of Title II

Title II applies to the programs and services of a "public entity," which 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, and the National Railroad Passenger Corporation and any commuter authority."<sup>113</sup>

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106. H.R. REP. NO. 101-485(II), at 32 (1990); *see also* S. REP. NO. 101-116, at 9 (1989).

107. *See* H.R. REP. NO. 101-485(II), at 33, 44.

108. *See* H.R. REP. NO. 101-485(II), at 31 (1990); S. REP. NO. 101-116, at 9 (1989).

109. *See* 1998 NATIONAL ORGANIZATION ON DISABILITY/LOUIS HARRIS SURVEY OF AMERICANS WITH DISABILITIES, available at <http://www.nod.org/presssurvey.html>.

110. 42 U.S.C.A. § 12132 (West 2000). Title II also contains requirements for city and state public transportation systems that are not relevant to TANF programs.

111. *See* 42 U.S.C.A. § 12134(a) (West 2000).

112. *See* 42 U.S.C.A. § 12134(b) (West 2000).

113. 42 U.S.C.A. § 12131(1) (West 2000).

Public entities are bound by many of the prohibitions in Title II, regardless of whether they provide a service directly or “through contractual, licensing or other arrangements.”<sup>114</sup> In other words, state and local governments and agencies remain accountable for the accessibility, design, administration and other aspects of their programs even when they do not provide services directly but contract or license these services out to others.<sup>115</sup> However, Title II does not apply to every privately operated program just because it is licensed by a state or city agency. To be subject to Title II, a program or service must be a program or service of a state or local government.<sup>116</sup> State lotteries, for example, have been held by many courts to be state programs, and thus the services of retailers licensed to sell lottery tickets have been held to be subject to Title II.<sup>117</sup> The fact that the state issues a liquor license to a privately owned and operated restaurant does not bring the restaurant within the ambit of Title II.<sup>118</sup> A state agency that issues liquor licenses operates a licensing program, not a restaurant program, and so it is the licensing program that is subject to Title II, not the restaurant.<sup>119</sup>

When a private agency receives some, but not all, of its funding from a state or local government program, it may not be clear whether the private agency is operating as a state or local government entity. Program descriptions, contract language, and other documents will be relevant to determining whether the private program is implementing or a part of a public entity’s program. The catchall phrase “other arrangements” in “contractual, licensing or other arrangements” suggests that this requirement was meant to be read broadly.

#### (ii) Who’s Protected

The ADA protects people with disabilities. The ADA defines “disability” as: (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,” (2) “a record of such an impairment,” or (3) “being regarded as having such an impairment.”<sup>120</sup> ADA regulations give examples of impairments,<sup>121</sup> but the list is illustrative and not exclusive.<sup>122</sup> The ADA definition of disability is a functional one, based on the degree of limitation caused by impairment. One person with diabetes may qualify as a person with disability under the ADA<sup>123</sup> while another person with diabetes does not.<sup>124</sup> Unlike the definition

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114. 28 C.F.R. § 35.130(b)(1)(i)-(vii), § 35.130(b)(3)(i)-(iii) (1999). Specifically, Title II prohibitions denying opportunity to participate; providing unequal, separate or different benefits; providing an opportunity to participate that is not equal; providing separate or different benefits except when necessary to provide benefits that are as effective; providing significant assistance to an agency that discriminates; denying an opportunity to participate in planning boards; using criteria or methods of discrimination that have a discriminatory purpose or effect or perpetuate discrimination of others; and otherwise limiting rights and privileges in the enjoyment of programs and services, all apply to public entities when they provide services under contract. See *id.*

115. See, e.g., *Anderson v. Dep’t of Pub. Welfare*, 1 F. Supp.2d 456 (E.D. Pa. 1998) (assuming private HMOs providing services under the Medicaid program through provider agreements were a program or service under Title II); *Tyler v. City of Manhattan*, 14 F. Supp.2d 1429 (D. Kan. 1994) (holding state lottery is a Title II program and retailers licensed by the lottery commission to sell tickets are part of a state program under Title II).

116. See, e.g., *Reeves v. Queens City Transportation*, 10 F. Supp.2d 1181, 1185 (D. Colo. 1998); *Tyler*, 14 F. Supp.2d at 1441-42.

117. See, e.g., *Tyler*, 14 F. Supp.2d at 1441-42; *Paxton v. State of West Virginia Dep’t of Tax and Revenue*, 451 S.E.2d 779 (S.C. Ct. App. 1994).

118. See *Tyler*, 14 F. Supp.2d at 1429.

119. See *Reeves*, 10 F. Supp.2d at 1185-86.

120. 42 U.S.C.A. § 12102(2) (West 2000).

121. See 28 C.F.R. § 35.104 (1999); 28 C.F.R. § 36.104 (1999); 29 C.F.R. § 1630.2(h) (1999).

122. See *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998) (holding that Congress intended the definition of disability in the ADA to be construed in accordance with Section 504 of the Rehabilitation Act, and that Department of Justice Section 504 regulations did not include a list of impairments “out of concern that any specific enumeration might not be comprehensive”).

123. See, e.g., *Horsewood v. Kids “R” Us*, 27 F. Supp.2d 1279 (D. Kan. 1998) (holding that an individual with diabetes was a person with a disability under the ADA where diabetes and resulting eye problems substantially limited

of disability used by the Social Security Disability (SSD) and Supplemental Security Income (SSI) programs,<sup>125</sup> the ADA has no listings of conditions or specific levels of severity for particular conditions that an individual must meet. The key issue is whether the individual has an impairment that results in a substantial limitation in a major life activity. There has been extensive litigation on the question of whether individuals with certain disabilities are covered by the ADA; indeed, it has been one of the most contentious issues under the law.<sup>126</sup>

The ADA also protects individuals who do not have a disability themselves but who have a known relationship or association with someone who does have a disability, when the nature of the discrimination is based on a known relationship.<sup>127</sup>

Some conditions are excluded from the definition of “individual with a disability.” Homosexuality, bisexuality, and other conditions labeled in the statute as “sexual disorders,” as well as kleptomania, pyromania, and compulsive gambling are not disabilities under the ADA.<sup>128</sup> Individuals “currently engaging in illegal drug use when the covered entity acts on the basis of such use” are also excluded from coverage under the ADA.<sup>129</sup> Individuals who have successfully completed or who are currently participating in supervised drug rehabilitation programs and are no longer engaged in illegal drug use are protected under the Act.<sup>130</sup> EEOC’s Technical Assistance Manual for Title I of the ADA<sup>131</sup> states that “current” means “recently enough to justify an employer’s reasonable belief that involvement with drugs is an ongoing problem,” and is not limited to “the day of use, or recent weeks or days.”<sup>132</sup> Most courts have interpreted “current use” broadly and held that individuals who have not used illegal drugs for weeks, a month or even more are “current” users.<sup>133</sup> In some employment discrimination cases, courts measure the recency of use from the date the individual is notified that she has been discharged, rather than the actual employment termination date,<sup>134</sup> making it even more difficult for

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seeing).

124. *See, e.g.,* Berg v. Norand Corp., 169 F.3d 1140 (8th Cir.), *cert. denied*, 120 U.S. 174 (1999) (holding that an individual with diabetes did not have a disability under the ADA where only limitation was inability to work more than 40 to 50 hours per week); Moore v. Time Warner, 18 F. Supp.2d 257 (W.D.N.Y. 1998) (holding that an individual with diabetes did not have a disability under the ADA where employee provided no evidence that he was substantially limited in a major life activity).

125. *See* 42 U.S.C.A. § 423(d)(1) (West 2000); 42 U.S.C.A. § 382(c)(3) (West 2000).

126. Consult Part II.5 for a more extensive discussion of this issue.

127. *See* 28 C.F.R. § 35.130(g) (1999); *see also* Niece v. Fitzner, 922 F. Supp. 1208, 1216 (E.D. Mich. 1996).

128. *See* 42 U.S.C.A. §§ 12211(a)-(b) (West 2000).

129. 42 U.S.C.A. § 12210(a) (West 2000).

130. *See* 42 U.S.C.A. §§ 12210(b)(1)-(2) (West 2000).

131. Many courts have held that guidance issued by an agency with authority to issue regulations and enforce the ADA is entitled to deference. *See, e.g.,* Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998) (Title II Technical Assistance Manual entitled to deference); Olson v. Dubuque Community Sch. Dist., 137 F.3d 609 (11th Cir. 1998) (EEOC ADA Enforcement Guidance entitled to deference); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997) (court relies on both DOJ ADA Title II Interpretive Guidance and DOJ ADA Title II Technical Assistance Manual); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996), *reh’g denied*, 103 F.3d 773 (11th Cir. 1997) (EEOC Interpretive Guidance on Title I of the ADA entitled to deference); *cf.,* Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) (EEOC ADA Interpretive Guidance entitled to deference but less than regulations). *But see* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (declining to defer to EEOC and DOJ Interpretive Guidance on the basis that Congress had not delegated rulemaking authority to either agency on the particular issue); EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) (EEOC Interpretive Guidance not entitled to deference because it is not a regulation and is unreasonable). As the ADA requires the agencies with enforcement authority to develop technical assistance manuals, *see* 42 U.S.C.A. § 12206(c)(3) (West 2000), at the very least this should weigh in favor of deference to these technical assistance manuals.

132. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 8.3 (1992) [hereinafter EEOC TITLE I TECHNICAL ASSISTANCE MANUAL].

133. *See, e.g.,* Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274 (4th Cir. 1997); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847 (5th Cir. 1999); Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995); Salley v. Circuit City Stores, Inc., 160 F.3d 1991 (3d Cir. 1998) (Section 504 case).

134. *See, e.g.,* Zenor, 176 F.3d at 855. *But see* Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir.

individuals to demonstrate that use is not current. It is a violation of the ADA, however, to deny current users of illegal drugs health care services or services provided in connection with rehabilitation on the basis of illegal drug use if the individual is qualified for the services.<sup>135</sup> Alcoholism is a disability under the ADA.<sup>136</sup>

To be protected under Title II, an individual must not only have a disability but must also be a “qualified individual with a disability,”<sup>137</sup> which is defined 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 the public entity.”<sup>138</sup> These concepts are discussed in Part Two.

### (iii) Prohibited Activities Under Title II

The Title II regulations contain four main standards: 1) a general prohibition on discrimination; 2) a standard for communication access; 3) a standard for accessibility to existing program facilities; and 4) a standard for new construction and alterations.

The general prohibition on discrimination in Title II states, “no qualified individual with a disability shall, by reason of such disability, be excluded from or denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.”<sup>139</sup> Discrimination is defined broadly to include:

Directly, or under contract, licensing or other arrangements:

- 1) denying a qualified individual with a disability an opportunity to participate in or benefit from an aid, program or service;<sup>140</sup>
- 2) providing an opportunity to participate in or benefit from the aid, benefit or service that is not equal or not as effective in providing an equal opportunity to obtain the same result or reach the same benefit;<sup>141</sup>
- 3) providing different or separate aids, services or benefits to an individual with a disability or class of individuals with disabilities than those provided to others except when necessary to provide benefits or services that are as effective as those provided to others;<sup>142</sup>
- 4) aiding or perpetuating discrimination by providing significant assistance to an agency that discriminates on the basis of disability;<sup>143</sup>
- 5) denying people with disabilities an opportunity to participate in planning or advisory boards;<sup>144</sup>

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1991) (Section 504 case).

135. See 42 U.S.C.A. § 12210(c) (West 2000).

136. See 28 C.F.R. § 35.104 (1999); 28 C.F.R. § 36.104 (1999); 29 C.F.R. § 1630.16(b) (1999).

137. 42 U.S.C.A. § 12131(2) (West 2000).

138. *Id.*

139. 42 U.S.C.A. § 12132 (West 2000); see also 28 C.F.R. § 35.130(a) (1999).

140. See 28 C.F.R. § 35.130 (b)(1)(i) (1999).

141. See 28 C.F.R. §§ 35.130(b)(1)(ii)-(iii)(1999).

142. See 28 C.F.R. § 35.130(b)(1)(iv) (1999).

143. See 28 C.F.R. § 35.130(b)(1)(v) (1999).

6) otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit or service;<sup>145</sup>

7) excluding people with disabilities from programs that are designed for people without disabilities; or<sup>146</sup>

8) using “criteria or methods of administration” that have a discriminatory effect, or that have the purpose or result of substantially impairing the goals of the program or service for people with disabilities, or that perpetuate discrimination of another public entity under common control.<sup>147</sup>

In addition, a public entity is prohibited from:

1) making site selections for facilities that have a discriminatory effect or that have the purpose or effect of substantially impairing the objectives of the service, program or activity for people with disabilities;<sup>148</sup>

2) using criteria in the selection of procurement contractors that have a discriminatory effect;<sup>149</sup>

3) administering licensing or certification programs in a manner that has a discriminatory effect or establishing criteria for the activities of licensees that subject people with disabilities to discrimination;<sup>150</sup>

4) using eligibility criteria that screen out or tend to screen out individuals or a class from full enjoyment of programs and services unless necessary for the provision of the service;<sup>151</sup>

5) placing surcharges to cover the cost of auxiliary aids or measures taken to provide program access; or<sup>152</sup>

6) requiring people with disabilities to accept accommodations they do not want.<sup>153</sup>

Public entities must:

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144. See 28 C.F.R. § 35.130(b)(1)(vi) (1999).

145. See 28 C.F.R. § 35.130(b)(1)(vii) (1999).

146. See 28 C.F.R. § 35.130(b)(2) (1999).

147. 28 C.F.R. §§ 35.130(b)(3)(i)-(iii) (1999).

148. See 28 C.F.R. §§ 35.130(b)(4)(i)-(iii) (1999).

149. See 28 C.F.R. § 35.130(b)(5) (1999); *Guckenburger v. Boston Univ.*, 974 F. Supp. 106, 137 (D. Mass. 1997) (holding that initial eligibility requirements for students with learning disabilities to get accommodations screened out people with disabilities from school programs).

150. See 28 C.F.R. § 35.130(b)(6)(1999).

151. See 28 C.F.R. § 35.130(b)(8)(1999); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1371 (D. Neb. 1993) (holding that college rule denying roommates to students with disabilities who used personal attendants, unless the roommate asks to room with the individual with a disability, was an eligibility requirement that screened out wheelchair user who used a part-time attendant from participation in roommate program).

152. See 28 C.F.R. § 35.130(f)(1999).

153. See 28 C.F.R. § 35.130(e)(1)(1999).

- 1) make “reasonable modifications” in policies, practices or procedures when necessary to avoid discrimination unless it can demonstrate that it would “fundamentally alter” the nature of the program or service;<sup>154</sup> and
- 2) administer programs and services in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>155</sup>

The regulations also make clear that it is not discrimination to provide benefits, services and advantages to people with disabilities or to a particular class of individuals with disabilities that are “beyond” those provided to others.<sup>156</sup>

#### (iv) Communication Access

Under Title II, public entities must take appropriate steps to ensure that communication with applicants, participants, and members of the public with disabilities are “as effective” as communication with others.<sup>157</sup> Specifically, public entities must:

- 1) Provide appropriate auxiliary aids and devices where necessary to afford an individual with a disability an equal opportunity to participate in and enjoy the benefits of a service, program or activity of a public entity.<sup>158</sup> Auxiliary aids and devices include qualified sign language interpreters, readers, open and closed captioning, telecommunication devices for the deaf (TDDs), and assistive listening devices;
- 2) Use TDDs or equally effective telecommunication systems to communicate with those with impaired speech or hearing when the public entity communicates by telephone with applicants and beneficiaries;<sup>159</sup>
- 3) Provide telephone emergency services, “including 911 services,” with “direct access” to people who use TDDs and computer modems;<sup>160</sup>
- 4) Ensure that interested persons, including people with vision and hearing impairments, can obtain information on the existence and location of accessible services, facilities and activities; and<sup>161</sup>

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154. 28 C.F.R. § 35.130(b)(7) (1999). Though program changes and supports for people with disabilities are often referred to as “reasonable accommodations,” this phrase appears nowhere in ADA Title II or Title II regulations. It is used in Title III, which prohibits discrimination against people with disabilities in places of public accommodation, and Title I, which prohibits discrimination against people with disabilities in employment.

155. 28 C.F.R. § 35.130(d) (1999). For various constructions of this provision, see *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.1995), *cert. denied*, 516 U.S. 813 (1995); *Charles Q. v. Houston*, No. CV-95-280, 1997 U.S. Dist. LEXIS 17308 (M.D. Pa. Sep. 30, 1997); *Kathleen S. v. Dep’t of Pub. Welfare*, 10 F. Supp.2d 460 (E.D. Pa. 1998), *settlement approved*, 17 Nat. Disab. L. Rep. 93 (E.D. Pa. Dec. 23, 1999).

156. See 28 C.F.R. § 35.130(c) (1999).

157. See 28 C.F.R. § 35.160(a) (1999).

158. See 28 C.F.R. § 35.160(b)(1) (1999); *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996).

159. See 28 C.F.R. § 35.161 (1999).

160. 28 C.F.R. § 35.162 (1999). This requirement should include emergency hotlines for public benefits. Even if it does not, one court has held that other Title II prohibitions require a broader range of telephone emergency services to provide direct communication access. See *Civic Ass’n for the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622 (S.D.N.Y. 1996) (holding Title II regulations on emergency telephone services were not the exclusive requirement on public entities’ emergency communication services, and granting declaratory and injunctive relief to a class of deaf individuals who would be disproportionately affected by a plan to remove fire boxes from city streets, because it eliminated the primary accessible means for deaf individuals to report fires from the streets).

161. See 28 C.F.R. § 35.163(a) (1999).

5) Place signage at all inaccessible entrances to each of its facilities directing individuals to accessible entrances, or to locations where they can obtain information about accessible facilities. The regulations require the use of the international symbol for accessibility at accessible entrances.<sup>162</sup> DOJ has indicated in guidance that signs must also be posted indicating the existence and location of TDDs near phone banks that do not have TDDs and elsewhere.<sup>163</sup>

#### (v) The Program Access Standard

In addition to the Title II reasonable modification requirement and the Title II requirements for new construction, Title II also requires existing programs to be operated so that individuals with disabilities are not excluded from participation because the public entity's facilities are physically inaccessible to or unusable by people with disabilities.<sup>164</sup> The relevant inquiry is whether each program, service or activity "when viewed in its entirety" is accessible to and usable by people with disabilities.<sup>165</sup> State and local governments can achieve program accessibility in a variety of ways, and need not make every building or facility accessible to or usable by people with disabilities, as long as the program is accessible in its entirety.<sup>166</sup> Public entities also have an obligation to keep features such as ramps, elevators, TDDs, and accessible bathrooms in working condition.<sup>167</sup>

#### (vi) New Construction and Alterations

Facilities or parts of facilities built by or for the use of public entities must be designed and built so that they are "readily accessible to and usable by" people with disabilities if construction began after January 26, 1992.<sup>168</sup> Alterations to facilities must, to the maximum extent feasible, be made so that the part altered meets this standard.<sup>169</sup> New construction and alterations must conform to one of two specific access design standards.<sup>170</sup> With one exception, they can depart from this standard only when equivalent access is provided.<sup>171</sup>

Newly constructed and altered roads must have curb ramps or sloped areas at intersections with curbs or other barriers,<sup>172</sup> and newly constructed or altered walkways must also contain curb ramps or sloped areas at intersections.<sup>173</sup>

#### (vii) Miscellaneous Provisions

Individuals cannot be compelled to accept accommodations, services or benefits.<sup>174</sup>

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162. See 28 C.F.R. § 35.163(b) (1999).

163. See 28 C.F.R. pt. 35 app. A § 35.163 (1999).

164. See 28 C.F.R. § 35.150(a) (1999).

165. See *id.*

166. See 28 C.F.R. § 35.150(b) (1999). The meaning of this language and other aspects of the "program access" standard are discussed in greater detail in Part II.9.

167. See 28 C.F.R. § 35.133(a) (1999).

168. 28 C.F.R. § 35.151(a) (1999).

169. See 28 C.F.R. § 35.151(b) (1999).

170. These standards are the Uniform Federal Accessibility Standards (UFAS) and Americans with Disabilities Act Accessibility Guidelines (ADAAG). They can be found in appendix A of 41 C.F.R. §101-19.6 and appendix A of 28 C.F.R. Part 36, respectively.

171. See 28 C.F.R. § 35.151(c) (1999) (exception pertains to requirement that particular buildings install elevators).

172. See 28 C.F.R. § 35.151(e)(1) (1999).

173. See 28 C.F.R. § 35.151(e)(2) (1999). Even if the welfare agency has no control over curb ramps near its offices, another state or local government agency will.

Title II regulations prohibit discrimination by state and local governments in all aspects of employment, and the requirements of Title I apply if the public entity is also covered under Title I.<sup>175</sup>

Title II of the ADA, and the other Titles, do not limit or invalidate state laws that provide greater or equal protection to people with disabilities.<sup>176</sup>

#### (viii) Exceptions and Defenses

Public entities do not have to make reasonable modifications in policies and practices when it would “fundamentally alter” the program.<sup>177</sup> Nor do they have to take action that would make programs accessible to and usable by people with disabilities,<sup>178</sup> or assure effective communication with applicants, participants and the public<sup>179</sup> if it would “fundamentally alter” the nature of the program or if it would result in “undue financial and administrative burdens.”<sup>180</sup> “Fundamental alteration” and “undue burden” are affirmative defenses that public entities must plead and prove.<sup>181</sup> Title II contains other defenses. In addition, public entities can provide separate programs when necessary to ensure equality for people with disabilities<sup>182</sup> and can use eligibility criteria that screen or tend to screen out people with disabilities when necessary to provide the program or service.<sup>183</sup>

### C. Title II Implementation and Enforcement

#### (i) Designation of Responsible Employee

Title II regulations require all public entities with more than 50 employees to designate a responsible employee to coordinate ADA requirements and investigate complaints, and make available to all interested individuals the name, address, and telephone number of the individual or individuals who are designated.<sup>184</sup> If both State and local government agencies administer a program and have more than 50 employees, both must satisfy this requirement. The purpose of this requirement is to ensure that individuals dealing with large bureaucracies can easily find a responsible person who is knowledgeable about the ADA and can communicate to others in the agency who may be unaware of their obligations.<sup>185</sup> DOJ has made clear that this requirement does not relieve an agency from its obligation to make sure that all agencies comply with the

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174. See 28 C.F.R. § 35.130(e)(1) (1999).

175. See 28 C.F.R. § 35.140 (1999); *Blesdoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Bracciale v. City of Philadelphia*, No. Civ. A-97-2464, 1997 U.S. Dist. LEXIS 16757 (E.D. Pa. Oct. 29, 1997). *But see Zimmerman v. Oregon Dep’t of Justice*, 170 F.3d 1169 (9th Cir. 1999) (Title II does not apply to employment discrimination by public entities).

176. See 42 U.S.C.A. § 12201(b) (West 2000).

177. See 28 C.F.R. § 35.130(b)(7) (1999).

178. See 28 C.F.R. § 35.150 (a)(3) (1999).

179. See 28 C.F.R. § 35.160 (1999).

180. See 28 C.F.R. §§ 35.150(a)(3), 35.164 (1999); *see also Olmstead v. L.C.*, 527 U.S. 581, 604 (1999). These concepts are discussed in greater detail in Part II.10.

181. *See, e.g., L.C. v. Olmstead*, 138 F.3d 893, 905 (11th Cir. 1998), *aff’d in part*, 527 U.S. 581 (1999) (the plurality adopts this allocation of burdens without discussion); *see also Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1339 n.10 (S.D. Cal. 1997); *Matthews v. Jefferson*, 29 F.Supp. 2d 525, 539 (W.D. Ark. 1998); *Kathleen S. v. Dep’t of Pub. Welfare*, 10 F. Supp. 2d 460, 471 (1998).

182. See 28 C.F.R. § 35.130(b)(1)(iv) (1999).

183. See 28 C.F.R. § 35.130(b)(8) (1999).

184. See 28 C.F.R. § 35.107(a) (1999).

185. See 28 C.F.R. pt. 35 app. A § 35.107 (1999).

ADA, but ensures that any failures by ADA employees can be “promptly corrected.”<sup>186</sup> To be effective, the ADA Coordinator “must have the authority, knowledge, and motivation to implement the regulations effectively.”<sup>187</sup>

#### (ii) Notice Requirements

Title II regulations require public entities to make available to applicants, participants, beneficiaries and “other interested persons” information about Title II and its applicability to the services, programs, or activities of the public entity. The information must be provided in a manner “as the head of the entity finds necessary” to inform individuals of the protections against discrimination assured by Title II.<sup>188</sup> Interpretive Guidance to the regulations mentions handbooks, manuals and pamphlets distributed to the public, posters in service centers and other public places, and TV and radio broadcasts as possible means of dissemination.<sup>189</sup> Notice must be effectively communicated to people with communication impairments,<sup>190</sup> by methods such as open and closed captioning public service announcements, audiotape, and Braille. Notices should include the name, telephone number and address of the agency’s ADA Coordinator.<sup>191</sup> In order to be effective, notice should be provided not once but on an ongoing basis.<sup>192</sup> Notice must be given in response to individual questions and requests, and “proactively,” when it has not been requested.<sup>193</sup> The ADA Title II Action Guide for State and Local Governments, which was prepared by Adaptive Environments Center and funded by the National Institute for Disability and Rehabilitation Research, recommends that notice also be included in applications for programs, services, and benefits.<sup>194</sup> Courts have held that these notice requirements are enforceable.<sup>195</sup>

#### (iii) Grievance Procedure

Title II regulations require public entities with more than 50 employees to adopt and publish grievance procedures providing for “prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.”<sup>196</sup> Information about the availability of grievance procedures should be included in ADA posters, brochures, announcements and by other methods. At least one court has held that individuals can sue to challenge the failure to have grievance procedures.<sup>197</sup> As claims related to compliance with this requirement have been raised in very

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186. *Id.*

187. ADAPTIVE ENVIRONMENTS CENTER, INC. & NATIONAL INSTITUTE ON DISABILITY AND REHABILITATION, ADA TITLE II ACTION GUIDE FOR STATE AND LOCAL GOVERNMENTS (1992) [hereinafter ADA TITLE II ACTION GUIDE].

188. 28 C.F.R. § 35.106 (1999); *see also* Clarkson v. Coughlin, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (discussing liability of corrections department for failure to make ADA information available to prisoners).

189. *See* 29 C.F.R. § 35.106 (1999).

190. *See* 28 C.F.R. § 35.106 (1999).

191. *See* ADA TITLE II ACTION GUIDE, *supra* note 187, at 39.

192. *See id.*

193. *See* Engle v. Gallas, No. 93-3324, 1994 U.S. Dist. LEXIS 7935 (E.D. Pa. June 10, 1994) (denying summary judgment where no evidence defendant gave plaintiffs proactive notice).

194. *See* ADA TITLE II ACTION GUIDE, *supra* note 187, at 38.

195. *See, e.g.,* Adelman v. Dunmire, 149 F.3d 1163 (3d Cir. 1996) (affirming a denial of a motion to dismiss in a case challenging the failure to provide reasonable accommodations in court proceedings and failure to provide information about ADA compliance and grievance procedures), *granting summary judgment*, 1997 U.S. Dist. LEXIS 3796 (E.D. Pa. Mar. 28, 1997); Clarkson v. Coughlin, 898 F. Supp. 1019, 1038 (S.D.N.Y. 1995); Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 884 F. Supp. 487 (S.D. Fla. 1994).

196. 28 C.F.R. § 35.107(b) (1999).

197. *See* Clarkson, 898 F. Supp. at 1045.

few cases,<sup>198</sup> there is no case law on what constitutes an acceptable grievance procedure, prompt resolution of claims, or adequate publication of the procedure.

The ADA Title II Action Guide for State and Local Governments recommends that agencies' ADA grievance procedures include:

- 1) a detailed description of the procedure for filing a grievance;
- 2) a two-step review process that allows for an appeal;
- 3) reasonable time frames for review and resolution of the grievance; and
- 4) good record-keeping for complaints and documentation of action taken to resolve grievances.<sup>199</sup>

When necessary, agencies must make reasonable modifications in grievance procedures for people with disabilities to enable them to have an equal opportunity to use the procedure. This includes providing assistance with completing grievance procedure forms when needed because of a disability and providing alternatives to written grievances, such as the ability to file oral grievances and grievances by phone, when necessary to enable people with disabilities to have meaningful access to the grievance procedure.

#### (iv) Compliance Monitoring

Title II regulations do not discuss or specifically require compliance monitoring by public entities. However, the need for public entities to engage in compliance monitoring logically follows from other Title II requirements. As a practical matter, compliance monitoring is the only way of ensuring that public entities comply with Title II. State and local government programs and services are often operated by immense bureaucracies at many different sites, by employees who come and go over time. Practically speaking, there is no other way that state and local government's can know whether programs and services are accessible to and usable by people with disabilities. Compliance monitoring has been ordered by courts as a remedial measure under Title II,<sup>200</sup> and has been a standard feature in Title II consent decrees.<sup>201</sup> At least one court has held that a public entity's failure to have policies and procedures to ensure ADA compliance did not violate the ADA.<sup>202</sup> Advocates should therefore do whatever they can to get public entities to voluntarily undertake compliance monitoring. They should also anticipate ADA violations when it does not occur.

When a public entity contracts with private agencies to provide services, compliance monitoring should include the programs and services provided under contract as well. In the words of the Title II Action Guide for State and Local Governments, "[e]nsuring that private agencies operating public programs comply with nondiscrimination requirements requires ongoing monitoring."<sup>203</sup> Arguably, compliance monitoring is even more essential when public services are contracted out because public entities will have little or no idea what contract agencies are doing unless they monitor the activities of these private organizations. In one case,

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198. *See id.*; *see also* Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994), *aff'd on other grounds*, 118 F.3d 1400 (10th Cir. 1997).

199. *See* ADA TITLE II ACTION GUIDE, *supra* note 187, at 41.

200. *See* Lightbourn v. Garza, 928 F. Supp. 711, 716 (W. D. Tex. 1996), *rev'd on other grounds sub nom.* Lightbourn v. County of El Paso, 118 F.3d 421 (5th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998).

201. *See, e.g.*, Putnam v. Oakland Unified Sch. Dist., 980 F. Supp. 1094, 1095 (N.D. Cal. 1997).

202. *See* Deck v. City of Toledo, 76 F. Supp.2d 816 (N.D. Ohio 1999).

203. ADA TITLE II ACTION GUIDE, *supra* note 187, at 62.

a court criticized a public entity for budgeting only one on-site ADA compliance inspection per year of private agencies under contract to provide services and for asking contractors whether they were complying with the ADA instead of conducting their own inquiry.<sup>204</sup>

The ADA Title II Action Guide suggests that public entities can satisfy the need for monitoring of contract agencies by:

- 1) requiring contractors to conduct their own evaluations of the accessibility of their programs and draft their own plans for ADA compliance;
- 2) including ADA requirements in every new request for proposals (RFPs);
- 3) reviewing ADA requirements when contracts and leases are negotiated, revised and renewed;
- 4) including ADA requirements in standard contracts;
- 5) inviting contractors to attend ADA trainings conducted by public entities;
- 6) canceling contracts that do not comply with access requirements within a specified period of time; and
- 7) checking ADA compliance when monitoring contract compliance and conducting ADA compliance reviews.<sup>205</sup>

While these activities will go a long way toward achieving compliance by contract agencies, advocates should take the position that public entities cannot delegate away all of their responsibility in this area, and must oversee at least some aspects of compliance monitoring by private agencies, to make sure that it is taking place and that monitoring procedures, evaluations, and plans are adequate.

In November 1999, the Department of Labor (DOL) issued interim regulations under the Workforce Investment Act (WIA),<sup>206</sup> prohibiting WIA-funded programs from discriminating on the basis of race, religion, sex, national origin, age, political affiliation, belief or disability.<sup>207</sup> The section of the regulations on disability discrimination is modeled on ADA Title II regulations, and thus sheds light on the federal government's current views about Title II compliance by programs closely related to TANF programs. The interim regulations require each Governor to submit a document to DOL, called a "Method of Administration," containing assurances that the state and WIA grant recipients will comply with non-discrimination requirements and containing a detailed description of how the state will do so. The Method of Administration must include assurances about and descriptions of the following:

- 1) the names of equal employment opportunity officers and each grantee who has an obligation to monitor compliance with non-discrimination requirements, develop and review non-discrimination policies, investigate non-compliance, monitor compliance, and report to state officials;

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204. *See Tugg v. Towey*, 864 F. Supp. 1201, 1210 (S.D. Fla. 1994).

205. *See ADA TITLE II ACTION GUIDE*, *supra* note 187, at 62.

206. *See Workforce Investment Act of 1998*, Pub. L. No. 105-220, 112 Stat. 936 (codified as amended at scattered sections of 29 U.S.C.A. (West 2000)). WIA supersedes the Job Training and Partnership Act and is the primary federal statute governing job training and placement programs.

207. *See 29 C.F.R.* pt. 37 (1999).

- 2) adequate training for these officers so they can fulfill their obligations;
- 3) publicity of non-discrimination policies and the complaint process, using language specified in the regulations;
- 4) record keeping by grantees so that compliance can be monitored;
- 5) confidentiality policies for such records;
- 6) oversight by the Governor to ensure that grant recipients keep records;
- 7) a complaint procedure with detailed notice to complainants about complaint resolution and the time frames specified in the regulations;
- 8) a system for determining whether grant recipients are likely to comply with non-discrimination mandates;
- 9) a compliance monitoring system that includes specific types of data analysis, review of grantees' policies, procedures for obtaining prompt corrective action, and documents showing compliance with the Method of Administration and Section 504 of the Rehabilitation Act;
- 10) a deadline for developing a Method of Administration and a requirement that the Method of Administration be updated whenever necessary, with notice to DOL of any updates; and
- 11) optional compliance reviews before a state provides a grant to a grantee and compliance reviews after grants are made.<sup>208</sup>

These interim regulations reflect an understanding that detailed written plans, investigative authority, compliance reviews, record-keeping, training, standards for evaluating compliance, and clear lines of responsibility are all necessary to ensure compliance by states and grantees with non-discrimination mandates. They provide a useful model for the types of measures advocates may want to urge TANF programs to adopt to ensure compliance with Title II.

#### (v) Deadlines and Enforcement

Title II went into effect on January 26, 1992.<sup>209</sup> Title II regulations gave public entities until January 26, 1995 to complete structural changes to achieve program access.<sup>210</sup> The term "structural changes" refers to architectural changes and some communication access changes, not changes in program policies and procedures.

Title II can be enforced by filing an administrative complaint with DOJ within 180 days of the discriminatory conduct or with one of the seven designated federal agencies identified in the Title II regulations<sup>211</sup> or by filing a lawsuit.<sup>212</sup> The Department of Health and Human Services

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208. See 64 Fed. Reg. at 61,730-31 (1999) (to be codified at 29 C.F.R. § 37.54).

209. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336 § 205, 104 Stat. 338 (1990).

210. See 28 C.F.R. § 35.150(c) (1999).

211. See 28 C.F.R. § 35.170(b) (1999).

212. See 42 U.S.C.A. § 12188(a)(1) (West 2000).

(HHS) is the designated agency for handling complaints involving programs, services, and activities relating to social services programs;<sup>213</sup> the Department of Labor (DOL) is the designated agency for labor programs;<sup>214</sup> and the Department of Education (DOE) is the designated agency for education programs.<sup>215</sup> Given the breadth of TANF-related programs and services, any one of these agencies, or another, could be the appropriate agency for filing a Title II charge related to TANF. If two or more designated agencies have apparent responsibility over a complaint, the DOJ must designate one of those agencies as the agency that will handle the complaint.<sup>216</sup>

The majority of courts addressing the issue have held that it is not necessary to exhaust administrative remedies by filing an administrative complaint with the Department of Justice<sup>217</sup> or other designated agency, or the EEOC if the claim against a public entity relates to employment under Title II,<sup>218</sup> or to use grievance procedures,<sup>219</sup> before filing a lawsuit, but a few have held otherwise.<sup>220</sup> The statute of limitations for filing a court action is the same as for an analogous claim under state law, such as a state or locality's human rights law if that law covers discrimination on the basis of disability.<sup>221</sup> Available relief includes declaratory and injunctive relief and compensatory damages,<sup>222</sup> although some courts have held that discriminatory intent is required for compensatory damages.<sup>223</sup> Some courts have held that punitive damages are available as well,<sup>224</sup> though a showing of discriminatory intent is necessary. In the context of disability discrimination, however, some courts have held that intentional discrimination does not require specific intent to discriminate. In the words of one court, it "may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the policy . . . or custom."<sup>225</sup> The Supreme Court held in a case brought under Title IX of the Civil Rights Act that the general rule is that federal courts have the power to award any appropriate relief in cases brought under

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213. See 28 C.F.R. § 35.190(b)(3) (1999).

214. See 28 C.F.R. § 35.190(b)(7) (1999).

215. See 28 C.F.R. § 35.190(b)(2) (1999).

216. See 28 C.F.R. § 35.190(d) (1999).

217. See, e.g., *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1334 (S. D. Cal. 1997), *aff'd mem.*, 172 F.3d 876 (9th Cir. 1999); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 818 n.12 (D. Kan. 1994).

218. See, e.g., *Winfrey v. City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997); *Bracciale v. City of Philadelphia*, No. Civ. A. 97-2464, 1997 U.S. Dist. LEXIS 16757 (E.D. Pa. Oct. 29, 1997).

219. See, e.g., *Matthews v. Jefferson*, 29 F. Supp.2d 525 (W.D. Ark. 1998).

220. See, e.g., *Decker v. Univ. of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997), *aff'd mem.*, 159 F.3d 1355 (5th Cir. 1998) (plaintiffs must exhaust EEOC procedures for Title II employment discrimination claims); *Mayes v. Allison*, 983 F. Supp. 923 (D. Nev. 1997) (plaintiff must file 30 day notice). In jurisdictions where courts have held that employment discrimination claims against public entities cannot be brought under Title II, see, e.g., *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169 (9th Cir. 1998), *petition for cert. filed*, 63 U.S.L.W. 3129 (Aug. 10, 1999), exhaustion will also be necessary.

221. See, e.g., *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980 (5th Cir. 1992) (applying analogous state statute of limitations to Rehabilitation Act claim). *But see McCullough v. Branch Banking & Trust Co.*, 35 F.3d 127 (3d Cir. 1994).

222. See, e.g., *Ferguson v. City of Phoenix*, 157 F.3d 668, 673 (9th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999); *Johnson v. City of Saline*, 151 F.3d 564, 572 (6th Cir. 1998); *Dadian v. Village of Wilmette*, No. 98-C-3731, 1999 U.S. Dist. LEXIS 6846, at \*3 (N.D. Ill. May 4, 1999).

223. See, e.g. *Ferguson*, 157 F.3d at 673; *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998), *cert. granted and opinion vacated on other grounds*, 527 U.S. 1031 (1999); *Matthews*, 29 F. Supp. 2d at 536; *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994).

224. See, e.g., *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144, 1152 (D. Haw. 1997), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999); *Purcell v. Pennsylvania Dep't of Corrections*, No. Civ. A. 95-6720, 1998 U.S. Dist. LEXIS 105, at \*13 (E.D. Pa. Jan. 9, 1998). Title II employment discrimination claims are governed by the Civil Rights Act of 1991, which permits awards of punitive damages when the plaintiff can demonstrate that the defendant engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C.A. §§ 1981a(a)(1)-(2)(b) (West 2000).

225. *Bartlett*, 156 F.3d at 331; see also *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (Section 504 case).

federal statutes, “absent clear direction to the contrary by Congress,”<sup>226</sup> suggesting a presumption in favor of a broad array of remedies. This case, however, did not involve punitive damages. The question of whether the Eleventh Amendment prohibits lawsuits seeking some types of relief against states under Title II of the ADA is discussed in Chapter 4.

#### *D. Section 504 of the Rehabilitation Act*

Section 504 of the Rehabilitation Act<sup>227</sup> prohibits discrimination against people with disabilities on the basis of disability in programs and services that receive federal financial assistance and by federal executive agencies and the United States Post Office. The ADA was enacted, in part, because Section 504 of the Rehabilitation Act was not sufficiently broad in scope, but Section 504 remains in effect, and advocates should continue to use it when appropriate. As the ADA does not cover the programs and services of federal agencies, claims against federal agencies must be brought under Section 504.

Section 504 requires each federal executive agency to promulgate its own Section 504 regulations, and the regulations of each agency are not identical. Therefore, it is always necessary to consult the regulations of the particular federal agency that operates or funds the program in question. The Department of Justice also has Section 504 “coordination regulations,”<sup>228</sup> intended to serve as a guide to other agencies. To the extent permitted by law, agencies’ Section 504 regulations should be consistent with the DOJ coordination regulations,<sup>229</sup> so advocates should consult those regulations as well. In 1992, Section 504 was amended to provide that the standards used to determine Section 504 claims of discrimination in employment are the same standards as those in the ADA.<sup>230</sup> Many courts rely on case law under Section 504 to interpret Title II of the ADA,<sup>231</sup> and there is much in the legislative history to support the view that Congress intended Title II to contain the same requirements as Section 504.<sup>232</sup> Nevertheless, in a few respects, Title II differs from Section 504 and some of the Section 504 regulations, and Title II provides more protection than some of the case law interpreting Section 504.<sup>233</sup> Thus advocates may be able to use the ADA even when Section 504 case law is not favorable.

Because many state and local government entities receive federal financial assistance, many discrimination claims against state and local government entities can be brought under Title II and Section 504. There is no prohibition on bringing claims under both statutes. Since not all Section 504 regulations are the same, and none are identical to ADA Title II regulations, there may be good reasons to bring both claims.

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226. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992).

227. *See* 29 U.S.C.A. § 794 (West 2000).

228. *See* 28 C.F.R. § 41 (1999).

229. *See* 28 C.F.R. § 41 app. at 680-81, Executive Order 12250, Leadership and Coordination of Non-Discrimination Laws (November 2, 1980).

230. *See* 29 U.S.C.A. § 794(d) (West 2000).

231. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 2196 (1998); *Washington v. Indiana High Sch. Athletic Ass’n Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999); *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996); *Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994).

232. *See* H.R. REP. NO. 101-485 (II), at 84-85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367-68; H.R. REP. NO. 101-485 (III), at 39, 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 475, 528.

233. One such difference is discussed in Part II.6.

### *E. Application of Title II to TANF Programs*

#### (i) Does the ADA Apply to TANF Programs?

Before the ADA can be applied to particular aspects of TANF programs, a threshold question must be addressed: does the ADA apply to TANF programs at all? The unequivocal answer is yes.

PRWORA specifically provides that the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other specified federal civil rights laws “shall apply to any program or activity which receives funds provided under this part.”<sup>234</sup> This, however, does not end the inquiry, because the Supreme Court has held that at least in some situations, a general federal anti-discrimination statute does not apply to conduct authorized by another, more specific federal law. In *Traynor v. Turnage*,<sup>235</sup> the Supreme Court held that the Rehabilitation Act did not invalidate a Veterans Administration (VA) regulation that classified some types of alcoholism as “willful misconduct,” thereby disqualifying some individuals with alcoholism from receiving extensions of time to use VA tuition assistance. The Court held that the Rehabilitation Act did not “expressly contradict” the more “narrow, precise and specific” “willful misconduct” exception.<sup>236</sup> There was evidence that Congress assumed this provision would be interpreted to apply to some people with alcoholism when the “willful misconduct” provision was enacted.<sup>237</sup> In addition, the Court noted the close timing of the two pieces of legislation the VA Act was amended in 1977, and the Rehabilitation Act was amended to apply to federal agencies in 1978 and concluded that Congress would have been explicit if it intended the Rehabilitation Act to invalidate the VA Act’s “willful misconduct” definition.<sup>238</sup> It also relied on the principle that repeals by implication are disfavored.<sup>239</sup>

The situation in *Traynor* could not be more different from the issue here. First, the major rationale for *Traynor*, that appeals by implication are disfavored, has no applicability here. Second, unlike *Traynor*, where the federal discrimination law was amended after the Veterans Act, the ADA was in existence prior to the enactment of PRWORA and has not been amended since passage. In addition, Congress went out of its way to make clear in PRWORA that PRWORA does not authorize states to engage in conduct that would violate the ADA. Thus, *Traynor* should not be an impediment to applying the ADA to TANF programs and services. Although PRWORA does state that “this part shall be interpreted to entitle any individual or family to assistance under any State program funded under this part,”<sup>240</sup> this language was included to make clear that Congress did not intend to continue the entitlement to benefits that existed under AFDC. It does not refer to the rights an individual may have under other laws, such as the ADA. Title II of the ADA applies to all state and local government programs, whether or not they are entitlement programs, and the question of whether a program or service is an entitlement is not even considered by courts in Title II cases.<sup>241</sup> Thus, this should have no bearing on ADA issues.

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234. 42 U.S.C.A. § 608(d) (West 2000).

235. 485 U.S. 535 (1988).

236. *Id.* at 548.

237. *See id.* at 546.

238. *See id.* at 547.

239. *See id.*

240. 42 U.S.C.A. § 601(b) (West 2000).

241. *See, e.g.,* Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 884 F. Supp. 487 (S.D. Fla. 1994) (finding Title II applies to city recreational programs); Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994) (finding Title II applies to county mental health services); Ellen S. v. Florida Bd. of Bar Exam’rs, 859 F. Supp. 1489 (S.D. Fla. 1994) (finding Title II applies to state bar admission process); Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993) (finding Title II applies to state college roommate program).

In August 1999, the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services issued guidance on the application of federal civil rights laws to TANF programs.<sup>242</sup> Thus HHS obviously shares the view that the ADA and Section 504 apply to many aspects of TANF programs design and implementation, including the program access requirement, the prohibition on unnecessary eligibility standards that screen out people with disabilities, the prohibition on unnecessary segregation, and the application of the ADA to private entities under contract with TANF programs. The Guidance gives a number of examples of issues that may violate the ADA, including program eligibility standards that screen out people with disabilities and the failure to ensure effective communication with individuals with hearing, speech, and vision impairments, and it provides examples of reasonable modifications in TANF programs.

(ii) Discrimination on the Basis of Association in the TANF Program

Many ADA claims on behalf of TANF applicants and recipients will come within the ADA's prohibition on discrimination on the basis of association with a person with a disability. For example, if a TANF program fails to make reasonable modifications for a parent or caretaker with a disability that are needed to satisfy work or other requirements and the entire family is sanctioned as a result, the children in the family would have a claim on the basis of association with a person with a disability.

Courts have interpreted the prohibition on discrimination on the basis of association with a person with a disability broadly in Title II cases involving access to government programs and services. For example, a couple seeking to become foster parents were permitted to challenge a policy of disclosing the disabilities of the children of prospective foster parents to the foster child's biological parents.<sup>243</sup> Parents and grandparents of children with hearing impairments were permitted to challenge the elimination of counselors fluent in sign language from a mental health program on the basis that they were being denied the services they needed to help their relatives with disabilities.<sup>244</sup>

In ADA employment discrimination cases, however, many courts have interpreted the prohibition on discrimination on the basis of association narrowly, holding, for example, that employees who miss work to care for sick relatives are not protected by Title I of the ADA. The rationale for these decisions, however, was not that the ADA's prohibition on associational discrimination did not apply, but rather that individuals who failed to comply with neutral time and attendance requirements were not "qualified individuals with disabilities" under the ADA because, by violating time and attendance requirements, they were unable to meet essential requirements of their jobs.<sup>245</sup> This should not be an issue in most Title II TANF claims alleging discrimination on the basis of association with a person with a disability in state and local programs. As discussed in Chapter 6, the burden for establishing that an individual is "qualified" is less onerous under Title II claims that do not involve employment than under Title I, and thus these cases should be distinguishable.

Moreover, courts have recognized that even under Title I, some aspects of employment, like fringe benefits, are intended not only for employees but also for family members, and courts have therefore allowed employees without disabilities to sue under the associational provision to

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242. See OFFICE OF CIVIL RIGHTS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CIVIL RIGHTS LAWS AND WELFARE REFORM OVERVIEW (1999) [hereinafter OCR TANF GUIDANCE], available at <http://www.hhs.gov/ocr/taintro.htm>.

243. See *Doe v. City of Centre*, 60 F. Supp.2d 417 (M.D. Pa. 1999), appeal argued (Sept. 27, 2000).

244. See *Tugg v. Towey*, 864 F. Supp. 1201 (S. D. Fla. 1994).

245. See, e.g., *Hilburn v. Murta Elecs. of N. Am. Inc.*, 181 F.3d 1220 (11th Cir. 1999); *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994).

challenge discrimination in employer-provided health benefits.<sup>246</sup> Thus even under Title I there is case law supporting the notion that individuals without disabilities may sue when rules have a discriminatory effect on family members with disabilities.

### (iii) Services Provided Under Contract in TANF Programs

Some TANF programs, such as the Wisconsin W-2 program, contract out administration to private organizations.<sup>247</sup> Others contract out particular parts of the program, such as the disability assessment process.<sup>248</sup> TANF services provided under contract are subject to many Title II requirements.<sup>249</sup> The fact that privately operated programs, such as day care centers,<sup>250</sup> job training programs, and private organizations conducting disability assessments are covered by Title III of the ADA as privately operated places of public accommodation does not exclude them from the reach of Title II, if they are operating under license, contract, or other arrangements with TANF programs.

Advocates should obtain and review contracts between welfare agencies and contractors to see whether these contracts mention contractors' obligations under Title II of the ADA and if so, how this obligation is defined. Boilerplate language that the private contracting organization "will comply" with the ADA is better than nothing, but is unlikely to result in ADA compliance, because contracting organizations have not committed to do anything specific. Contractors may not even know what ADA compliance means in the context of the particular program. Advocates should also seek a role in the contract drafting, negotiation, and renewal process.

It may not always be easy to determine when a private organization is delivering Title II services under contract and when it has received state and local government funds to operate its own, private program. The answer, however, is largely irrelevant, because any private organization that accepts federal TANF funds will be subject to Section 504 of the Rehabilitation Act.

It may also be unclear whether private-public "partnerships" in the TANF and Welfare-to-Work programs are public entities under Title II. The answer will largely depend on what those partnerships do. If they operate programs that deliver services to clients, they should be treated as public entities.

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246. *See, e.g.,* Morgenthal v. A.T.&T. Co., No. 97-CV-6443 DAB, 1999 U.S. Dist. LEXIS 4294 (S.D. N.Y. Apr. 6, 1999); Rome v. New York City Metro. Transp. Auth., No. 97-CV-2945 JG, 1997 U.S. Dist. LEXIS 23436 (S.D.N.Y. Nov. 18, 1997).

247. *See* Wis. Stat. Ann. § 43.143 (1)(a) (2000).

248. *See, e.g.,* Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319 (App. Div. 2d Dep't 1999) (describing disability assessment process in New York public assistance program, which is conducted by a private company).

249. *See* 28 C.F.R. §§ 35.130(b)(1), 35.130(b)(3) (1998); *see also* OCR TANF GUIDANCE, *supra* note 242, ("[w]elfare workers may not discriminate on these bases through contractors or by means of any other arrangement").

250. *See* 42 U.S.C.A. § 12181(7) (West 2000); *see also* Roberts v. KinderCare Learning Ctrs. Inc., 86 F.3d 844 (8th Cir. 1996); United States v. Happy Time Day Care Ctr., 6 F. Supp.2d 1073 (W.D. Wis. 1998); J.H. v ABC Care, Inc., 953 F. Supp. 675 (W.D. Md. 1996).

## CHAPTER 3 THE ADA'S PLANNING AND TRAINING OBLIGATIONS

### A. Planning for ADA Compliance

Planning by state and local government entities is essential for compliance with the ADA: as a practical matter, there is no way state and local governments can achieve ADA compliance without it. Given the critical role of planning in achieving ADA compliance, advocates should urge TANF programs to engage in planning and should seek to play a role in this process whenever possible. Raising ADA issues in this context allows advocates and policymakers to shape program modifications that may prevent problems and achieve program changes that may be difficult to obtain through litigation.

Title II regulations contain across-the-board planning obligations for all state and local government agencies. For the most part, these requirements have been ignored by state and local governments,<sup>251</sup> and the deadlines for submitting and implementing these plans have passed. Nevertheless, a strong argument can be made that state and local governments that never completed plans have a duty to do so now. At the very least, the ADA planning requirements provide a useful guidepost on the types of actions the Department of Justice views as necessary to achieve compliance with Title II. A summary of these requirements follows.

#### (i) ADA Transition Plans

Title II regulations require all state or local government entities with 50 or more employees that intended to undertake "structural changes" in facilities to achieve compliance with Title II to develop, by July 26, 1992, a transition plan setting forth the steps necessary to make those changes.<sup>252</sup> Transition plans are required whenever state or local government entities are required to make structural changes to comply with the ADA, and whenever they choose to do so, even though those changes may not have been required under Title II.<sup>253</sup> By "structural changes," the regulations appear to be referring to architectural changes, as opposed to changes in policies and practices.<sup>254</sup> The regulation gave an outer limit of three years from the transition plan deadline, i.e., until January 26, 1995, to complete the structural changes discussed in the plan.<sup>255</sup>

Depending on the structure of a state's TANF program and the number of employees at the state and local TANF agency, both the state and the local government may have an obligation to develop transition plans for a TANF program.

In developing a transition plan, the regulations require the public entity to provide an opportunity for interested persons, including individuals with disabilities and organizations

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251. See Wade Lambert, *Suits Loom Over Disability Law Deadline*, WALL ST. J., Jan. 25, 1995, at B1 (discussing the fact that many state and local government entities did not make the required changes by January 26, 1995, and that others did not even know what changes needed to be made. Lambert quoted one defense attorney who advised governments to withdraw any plans they had drafted because they were an acknowledgment that changes were necessary to make programs accessible and therefore exposed public entities to potential liability. The attorney was quoted as saying: "Better to have yanked it and have none").

252. See 28 C.F.R. § 35.150(d)(1) (1999).

253. See *Tyler v. City of Manhattan*, 857 F. Supp. 800, 813 (D. Kan. 1994).

254. Title 28 C.F.R. § 35.150(b)(1) provides that in achieving program access, "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 36.151." See also U.S. DEPARTMENT OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.2000 (1993) [hereinafter ADA TITLE II TECHNICAL ASSISTANCE MANUAL], available at <http://www.usdoj.gov/crt/ada/taman2.html> ("In many situations, providing access through structural methods, such as alteration of existing facilities and acquisition or construction of additional facilities, may be the most efficient method of providing program accessibility").

255. See 28 C.F.R. § 35.150(c) (1999).

representing individuals with disabilities, to participate by submitting comments,<sup>256</sup> and to make a copy of the plan available for public inspection.<sup>257</sup> At a minimum, plans must identify obstacles in the public entity's facilities that limit the accessibility of its programs; describe "in detail" the methods that would be used to make the facilities accessible; and specify the schedule for achieving compliance.<sup>258</sup> If the public entity anticipates that the implementation period would take more than a year, i.e., it would not be completed by July, 1993, the plan is required to identify steps that will be taken during each year of the transition period.<sup>259</sup> The agency is also required to identify the official responsible for plan implementation.<sup>260</sup> If the public entity drafted a transition plan, under Section 504 of the Rehabilitation Act,<sup>261</sup> it is only obligated to draft an ADA transition plan for policies and practices not included in the Section 504 plan.<sup>262</sup> If a public entity has responsibility or authority over streets, roads or walkways, the regulations require plans to include a schedule for providing curb ramps.<sup>263</sup>

#### (ii) ADA Self-Evaluation Plans

Title II regulations also require public entities, by January 1993, to evaluate their current services, policies and practices, and their effects, that "do not or may not meet the requirements [of Title II of the ADA]," and if modification of services, policies, and practices is needed to achieve compliance, make the necessary modifications.<sup>264</sup> Unlike transition plans, the regulations require self-evaluation plans to be developed by every public entity regardless of the number of employees it has. The regulations require public entities to provide an opportunity for the public to participate by submitting comments on self-evaluation plans,<sup>265</sup> and public entities with 50 or more employees are required to keep these plans on file for three years for public inspection, along with a list of the interested people consulted in developing the plan, a description of the areas examined, and the problems identified, and a description of any modifications made.<sup>266</sup> As with transition plans, agencies that already completed self-evaluation plans under Section 504 of the Rehabilitation Act are required to draft a self-evaluation plan and comply with the plan requirements only for those policies and practices that were not included in the agency's Section 504 plan.<sup>267</sup>

#### (iii) Which State and Local Government Entities Have an Obligation to Draft Plans?

Because Title II applies to state and local governments as well as departments, agencies and instrumentalities of these governments, and all public entities must submit plans, a number of different government bodies and agencies may have responsibility for submitting plans that cover the same program or service. If a separate agency oversees the leasing, purchasing or operation of buildings used by welfare programs, that agency must also address access issues in those buildings. In some cases advocates have chosen to press ADA planning issues with units of local government that have responsibility for a number of programs and services (such as counties and

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256. See 28 C.F.R. § 35.150(d)(1) (1999).

257. See *id.*

258. See 28 C.F.R. § 35.150 (d)(3) (1999).

259. See 28 C.F.R. § 35.150(d)(3)(iii) (1999).

260. See 28 C.F.R. § 35.150(d)(3)(iv) (1999).

261. 29 U.S.C.A. § 794 (West 2000).

262. See 28 C.F.R. § 35.150(d)(4) (1999).

263. See 28 C.F.R. § 35.150(d) (1999).

264. See 28 C.F.R. § 35.105(a) (1999).

265. See 28 C.F.R. § 35.105(b) (1999).

266. See 28 C.F.R. § 35.105(c) (1999).

267. See 28 C.F.R. § 35.105(d) (1999).

cities), rather than with specific agencies that directly operate programs (such as welfare agencies).<sup>268</sup> Reasons for taking this approach include efficiency, a desire for a top-down government commitment to ADA compliance, and the possibility that advocates do not know the full range of programs operated by a state, city or county. Sometimes requesting a complete list of the public entity's programs from the head of the state, city or county is the first step in the process.<sup>269</sup>

#### (iv) Determining Whether Title II Entities Have Drafted ADA Plans

As a first step, advocates need to determine whether the state and local governments and agencies with responsibility for TANF programs have developed ADA transition and self-evaluation plans, and if so, obtain and review these plans. As ADA regulations require government agencies to keep copies of self-evaluation plans on file for public inspection for three years, which would have been January 26, 1995, if plans were completed by the deadline, government entities may no longer have these plans or may take the position that they no longer have to provide public access to these plans. However, public entities that did not draft plans or drafted late plans should not be allowed to benefit from their noncompliance. Advocates should argue that at a minimum, an agency that drafted a late plan should keep it on file for public inspection for three years from the time it is completed. It should be possible to use state freedom of information laws to obtain plans after the three-year limit.<sup>270</sup>

#### (v) Agencies that Never Drafted ADA Plans

It is likely that some state or local agencies with authority for TANF programs did not create transition and self-evaluation plans for any of their programs and services.<sup>271</sup> Advocates and policymakers should insist that they do so now, or conduct an equivalent planning process with the input of legal aid and legal services offices and poverty law, disability, and welfare rights organizations.

Title II regulations require public entities, in creating these plans, to evaluate their "current" programs and services,<sup>272</sup> and TANF programs did not exist in July 1992 and January 1993, the deadlines for developing transition and self-evaluation plans. State and local governments and agencies may take the position that they have no legal obligation to draft transition and self-evaluation plans for TANF programs. However, if governments and agencies drafted no plans, a strong argument can be made that they have an obligation to do so now. And, if agencies are going to draft plans now, they may as well include TANF programs in these plans. It makes no sense to draft a plan that does not reflect current programs and services. Having missed the ADA planning deadlines by several years, state and local governments and agencies should not now be permitted to go back in time and avoid reviewing the accessibility of newer programs.

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268. *See, e.g.*, *Miller v. City of Johnson City*, No. 2:94-CV-246, 1996 U.S. Dist. LEXIS 7360 (E.D. Tenn. May 29, 1996); *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994). *See also* *ADA Task Force v. City and County of San Francisco*, No. C-97-02438 CRB (N.D. Cal. Mar. 23, 1999) (settlement agreement on file with the author).

269. Telephone interview with Joshua Konecky, Disability Right Advocates (June 22, 1999).

270. Government entities may argue that state freedom of information laws do not require them to make plans available after three years have passed, given the specific time limit in Title II regulations for public inspection. The ADA provides, however, that it does not invalidate or limit federal, state and local laws that provide greater or equal protection for the rights of people with disabilities. *See* 42 U.S.C.A. § 12201(b) (West 2000). This might include laws affecting access to information by people with disabilities related to ADA compliance.

271. *See, e.g.*, *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1045 (S.D.N.Y. 1995) (granting summary judgment for hearing impaired prisoners against state corrections agency which failed to develop a self-evaluation plan).

272. *See* 28 C.F.R. § 35.105(a) (1999).

(vi) Agencies that have Already Drafted Plans

Title II regulations state that agencies must evaluate “current” programs and services, which could be interpreted to mean that agencies that have already drafted plans are not required to update existing plans. As TANF programs did not exist in 1992 and 1993, this would mean that TANF programs would not be covered by transition and self-evaluation plans. However, if existing plans are inadequate or incomplete, an argument can be made that planning requirements were not satisfied and plans must be modified even now, years after the planning deadlines. DOJ has taken the position that an agency’s failure to address a particular provision of Title II in a plan renders the plan incomplete, and agencies that drafted incomplete plans must amend or supplement their plans, and provide an opportunity for interested persons to participate in this process.<sup>273</sup> If a plan addresses only the broad brush strokes of ADA compliance, advocates are in a good position to argue that it is inadequate and should be revised.<sup>274</sup>

Even if a public entity operating or overseeing TANF programs has already developed an adequate transition and self-evaluation plan prior to the passage of PRWORA, advocates can use this as the starting point for a discussion with the agency about the need for additional planning on ADA compliance.

Advocates should take the position that there is no way an agency can achieve the program access and avoid using “methods of administration” that have a discriminatory effect without assessing all of its programs and services for accessibility. Indeed, one court has held that the failure to plan is, in and of itself, a “method of administration”<sup>275</sup> that discriminates against people with disabilities.<sup>276</sup>

Regardless of whether Title II requires agencies to update existing plans to include TANF programs, there is no question that these same agencies are required to complete ADA plans for other programs and services in existence in 1992 and 1993, including the Medicaid and food stamp programs. Since the location, administration, and procedures of Medicaid and food stamp programs often overlap significantly with those of TANF programs, advocates can use agencies’ obligation to complete plans for Medicaid and food stamps to achieve many of the same goals for TANF clients. When agencies did not draft plans for Medicaid and food stamp programs, advocates can argue that they must do so now, and that they must revise inadequate plans for these programs. Advocates can also take the position that while they are doing so, they may as well address TANF programs as well. Even if it is not possible to persuade agencies to include TANF programs in the plans, given the overlap in the administration of these programs, drafting, revising and implementing plans for the Medicaid and food stamps programs will often improve access to TANF services for people with disabilities.

(vii) The Contents of Transition and Self-Evaluation Plans

If done correctly, ADA transition and self-evaluation plans are extensive documents that truly assess whether each of the services provided by an agency or program is accessible to and usable by people with disabilities, in compliance with other Title II requirements. The plans identify what needs to be done to bring programs into compliance using a specific implementation schedule. Agencies operating several programs, such as food stamp programs,

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273. See Letter from John Wodatch, Chief, Disability Rights Section, U.S. Dep’t of Justice, Civil Rights Div. to Michael Auberger, Americans Disable for Attendant Programs Today (ADAPT) and Bob Kafka, ADAPT of Texas (July 6, 1998). The Title II requirement that was absent from the plan in question was the requirement to provide programs and services in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (1999).

274. See, e.g., *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994).

275. See 28 C.F.R. § 35.130(b)(3) (1999).

276. See *Kathleen S. v. Dep’t of Pub. Welfare*, 10 F. Supp.2d 460, 473 (E.D. Pa. 1998).

Medicaid, TANF, and adult and child protection services, should conduct separate evaluations of and plans for each program, and should evaluate an agency's formal policies and practices, contained in administrative manuals, guides, policy directives, and memoranda, as well as less formal practices that may not be written down.<sup>277</sup>

In its Title II Technical Assistance Manual, the Department of Justice suggests that the following areas need "careful examination" in an agency's self-evaluation plan:

- 1) whether there are physical barriers to access;
- 2) the modifications needed to achieve program access, and the steps that will be taken to achieve access;
- 3) whether policies and practices exclude or limit participation of people with disabilities;
- 4) modifications of policies and practices needed to achieve program access and "complete justifications" modifications that will not be made;
- 5) whether communications with applicants, participants and members of the public are as effective as communications with others;
- 6) if the public entity communicates with applicants or beneficiaries by telephone, whether TDDs or equally effective telecommunications systems are used;
- 7) if telephone emergency services are provided, whether direct access to TDD and computer modems is ensured;
- 8) whether policies and practices insure that readers will be provided to people with visual impairments;
- 9) whether interpreters or other communication measures will be provided for people with hearing impairments;
- 10) whether accommodations will be provided for people with manual impairments;
- 11) whether a method for obtaining services exists, and guidance on when they will be provided,
- 12) whether equipment has been assessed for usability and there are policies to ensure that it is kept in working order;
- 13) whether emergency evacuation procedures meet the needs of people with disabilities, and whether audio and visual warning signals should be installed and other procedures adopted;
- 14) whether decisions about whether a modification would be a fundamental alteration or an undue financial or administrative burden are made properly and promptly;

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277. See ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 255, at § II-8.2000.

- 15) whether public meetings are physically accessible to individuals with mobility impairments;
- 16) whether employment practices comply with Section 504 of the Rehabilitation Act and the ADA;
- 17) whether building and construction policies for new construction and alterations conform to Title II ADA standards;
- 18) whether employees of the public entity are familiar with the policies and practices of the agency that are necessary to ensure full participation of people with disabilities, and if appropriate, whether training will be provided;
- 19) whether programs that deny participation to drug users have taken steps to ensure that they do not discriminate against former drug users;
- 20) whether audio-visual and written materials portray people with disabilities in an offensive or demeaning manner.<sup>278</sup>

The ADA Title II Action Guide for State and Local Governments suggests that a self-evaluation plan should address these additional Title II requirements:

- 1) the agency's process for responding to requests for modifications;
- 2) the process for determining whether a modification would be a fundamental alteration;
- 3) whether the agency has any separate programs for people with disabilities, and if so,
- 4) whether people with disabilities are excluded from participation in regular programs;
- 5) whether programs are provided in the most integrated setting appropriate to the needs of people with disabilities.<sup>279</sup>

Advocates who use the transition and self-evaluation plan requirements as leverage in raising disability access issues with TANF agencies will need to have some idea of what plans should look like and how agencies should go about developing them. As copies of good plans may be difficult to come by, one place to look for guidance is the ADA Title II Action Guide for State and Local Governments.<sup>280</sup> The Guide contains a proposed five-step process for developing plans and addresses the need for "institutionalizing compliance." The Guide discusses one method of conducting a review of program access and contains worksheets for conducting the assessments. While these worksheets do not cover the full range of possible Title II issues, they provide a helpful starting place.

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278. *See id.*

279. *See* ADA TITLE II ACTION GUIDE, *supra* note 187.

280. *See id.* at 89-142. Copies of this guide can be obtained free of charge from the Disability Rights Section of the Department of Justice. DOJ sent copies of the guide to the mayors of over 1,000 medium and large cities in late 1994. *See* U.S. DEP'T OF JUSTICE, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE (1994) available at <http://www.usdoj.gov/crt/ada/pubs/decprep.txt>. *See also* telephone conversation with Sally Willis, U.S. Dep't of Justice (March 25, 1999).

(viii) Including Organizations Under Contract with TANF Agencies in Plans

Because Title II requirements apply to services, programs, and activities regardless of whether the state or local government agency provides services “directly or through contractual, licensing, or other arrangements,”<sup>281</sup> all services provided by organizations under contract with state and local TANF agencies must be included in the public entity’s transition and self-evaluation plans.<sup>282</sup> Some state and local agencies that drafted transition and self-evaluation plans may have overlooked this obligation entirely. Agencies that have developed ADA plans that do not address the services and programs provided by private organizations through contracting, licensing and other arrangements are incomplete and inadequate under Title II. When this is so, advocates can insist that agencies amend their plans to include these contracted services, or in any event to bring ADA compliance planning issues back to the table for discussion.

(ix) Enforcing ADA Planning Obligations

State and local governments have been sued for failing to develop any,<sup>283</sup> adequate<sup>284</sup> or timely<sup>285</sup> transition and self-evaluation plans, and for lack of compliance with plans.<sup>286</sup> Some courts have held that public entities that fail to draft plans have violated Title II.<sup>287</sup> Others have held that plans were inadequate for failing to include specific time frames for modifications,<sup>288</sup> or other reasons.<sup>289</sup> As a remedial measure, some courts have ordered public entities to draft plans<sup>290</sup> or show cause why they should not be required to do so.<sup>291</sup> Other cases have ended in favorable settlements.<sup>292</sup> In all of the cases in which courts ordered relief related to planning requirements, however, planning claims were brought in conjunction with claims that programs and services were not accessible or violated other Title II requirements.<sup>293</sup> A number of courts have rejected legal challenges to non-compliance with Title II planning requirements on the basis that these requirements do not confer standing on private individuals to sue for enforcement

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281. 28 C.F.R. §§ 35.130(b)(1), 35.130(b)(3)(i)-(iv) (1999).

282. See also ADA TITLE II ACTION GUIDE, *supra* note 187, at 62. (“All contracted programs or services must be included in the self-evaluation.”).

283. See, e.g., *Simpson v. City of Charleston*, 22 F. Supp.2d 550 (S.D. W.Va. 1998) (Title II claim against city for failure to develop transition plan); *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995) (Title II claim against New York State Department of Corrections Services for failure to develop self-evaluation plan).

284. See, e.g., *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998); *Miller v. City of Johnson City*, No. 2:94-CV-246, 1996 U.S. Dist. LEXIS 7360 (E.D. Tenn. May 29, 1996); *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994).

285. See, e.g., *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997) (claiming that city failed to draft transition plan regarding installation of curb ramps). See also *Settlement Highlights Transition Plan, Self-Evaluation Requirements*, 14 DISABILITY COMPLIANCE BULLETIN 3 (1999) (describing a settlement agreement in a lawsuit against Orange County, California in which the plaintiff claimed the county failed to meet deadlines for drafting plans).

286. See, e.g., *Miller*, 1996 U.S. Dist. LEXIS 7360, at \* 1.

287. See, e.g., *Clarkson*, 898 F. Supp. at 1038; *Lightbourn v. Garza*, 928 F. Supp. 711 (W.D. Tex. 1996), *vacated on other grounds*, 118 F.3d 421 (5th Cir. 1997).

288. See, e.g., *Miller*, 1996 U.S. Dist. LEXIS 7360, at \*7.

289. See, e.g., *Tyler*, 857 F. Supp. at 814-816 (holding that self-evaluation plan was not sufficiently broad or complete, contained no list of completed modifications, and was not open to public inspection).

290. See, e.g., *Clarkson*, 898 F. Supp. at 1052; *Tyler*, 857 F. Supp. at 822.

291. See *Simpson v. City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W. Va. 1998).

292. See *Settlement Highlights Transition Plan, Self-Evaluation Requirements*, DISABILITY COMPLIANCE BULLETIN, VOL. 14(3), Feb. 25, 1999; *Settlement Agreement and Release, ADA Task Force v. City and Co. of San Francisco*, No. C-97-02438, (Mar. 25, 1999).

293. See, e.g., *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1333 (S.D. Cal. 1997); *Lightbourn v. Garza*, 928 F. Supp. 711, 712-13 (W.D. Tex. 1996); *Miller v. City of Johnson City*, No. 2:94-CV-246, 1996 U.S. Dist. LEXIS 7360, at \*4 (E.D. Tenn. May 29, 1996); *Clarkson*, 898 F. Supp. at 1019; *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 884 F. Supp. 487 (S.D. Fla. 1994).

because the requirements run to the benefit of everyone<sup>294</sup> or because plaintiffs did not plead or prove that there was a connection between non-compliance with planning requirements and denial of access.<sup>295</sup> At least one court has treated failure to implement a plan as evidence of discrimination.<sup>296</sup> While it may sometimes be possible to link the failure to comply with planning requirements with other ADA claims, in many instances the most effective use of these planning obligations will be as a means of engaging agencies in a discussion about their ADA obligations and their need for planning.

### *B. Training for ADA Compliance*

Title II regulations do not include specific training requirements for public entities, but as a practical matter public entities will not be able to fulfill their obligations under the ADA without a comprehensive effort to train employees at every level of an agency or department. Congress noted the essential role of training in achieving Title II compliance when the ADA was under consideration, and noted the harmful consequences of failing to train public employees about their Title II obligations.<sup>297</sup>

Courts have required defendants to conduct training as part of remedial relief in ADA cases.<sup>298</sup> Title II settlements have included training for employees,<sup>299</sup> and courts have suggested that public entities conduct such training.<sup>300</sup> Courts have also taken note of a public entity's failure to train employees.<sup>301</sup> Advocates should urge public entities to conduct both initial and ongoing training for current and incoming employees.<sup>302</sup> Training materials and handbooks of welfare agencies should be reviewed along with information about whom in the agency receives this training. Having an ADA compliance manual somewhere in the agency that an employee can locate if she makes a concerted effort is not sufficient, and does not qualify as training.<sup>303</sup>

To ensure compliance with the ADA, training should address three issues: 1) Title II of the ADA and how it applies to the TANF agency; 2) the nature of disabilities; and 3) the agency's policies and procedures for achieving ADA compliance. Telling employees "not to discriminate" is not adequate: employees should be instructed on what this means in the particular context of the agency and its programs and services.<sup>304</sup> ADA training should emphasize the ADA's prohibition on disparate impact discrimination, as employees of public entities are less likely to

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294. See, e.g., *Deck v. City of Toledo*, 76 F.Supp. 2d 816, 823 (N.D. Ohio 1999); *Concerned Parents to Save Dreher Park Ctr.*, 884 F. Supp. at 489.

295. See *Tyler v. Kansas Lottery*, 14 F.Supp. 2d 1220, 1225 (D. Kan. 1998); *Miller*, 1996 U.S. Dist. LEXIS 7360, at \*2-3.

296. See *Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998).

297. "In order to comply with the nondiscrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy and a variety of other disabilities are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training." H.R. REP. NO. 101-485 (III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 473.

298. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313, 1331 (D.N.M. 1998), *aff'd mem.*, 202 F.3d 281 (10th Cir. 1999) (Title I private employment case).

299. See, e.g., *Neff v. Via Metro. Transit Auth.*, 179 F.R.D. 185, 203-06 (W.D. Tex. 1998); see also *California DOC Reaches Settlement in ADA case*, 13 NAT'L DISABILITY. L. REP. 1 (1998) (describing the settlement in *Clark v. California* settlement in which the California Department of Corrections agreed to train all custodial, departmental, and clinical staff that identify, interact with, and have responsibility for inmates with disabilities).

300. See *Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp. 2d 989, 996 (D. Colo. 1998).

301. See, e.g., *Tugg v. Towey*, 864 F. Supp. 1201, 1208 (S.D. Fla. 1994); *Engle v. Gallas*, No. 93-3324, 1994 U.S. Dist. LEXIS 7935, at \*3 (E.D. Pa. June 10, 1994).

302. See, e.g., *Neff*, 179 F.R.D. at 203.

303. See, e.g., *id.* 203-04.

304. See, e.g., *Wal-Mart Stores, Inc.*, 11 F. Supp. 2d at 1323.

be aware that policies and practices with a disparate impact on people with disabilities can constitute illegal discrimination. In addition, each employee must be given copies of written materials discussing their obligations under the law.<sup>305</sup>

Congress was particularly concerned that a lack of understanding about disabilities by employees of government agencies could result in discriminatory and in some cases health and life-threatening situations for people with disabilities.<sup>306</sup> Given the high percentage of people with disabilities among public assistance recipients,<sup>307</sup> training about the nature of disabilities is essential for TANF programs. Training should address the fact that many disabilities are not visible, and should include education on prevalent disabilities that may not be visible, including cardiovascular disabilities, asthma, diabetes, seizure disorders, learning disabilities, and psychiatric disabilities. Training must also address the ways in which these disabilities might give rise to the need for modifications in the agency's policies and practices. Given the high percentage of individuals with psychiatric disabilities among applicants and recipients for public benefits,<sup>308</sup> and the frequent misperceptions and lack of understanding about psychiatric disabilities generally, special attention must be given to psychiatric disabilities in training efforts.

Finally, employees should receive training about the agency's own practices and procedures for ensuring ADA compliance. These include: procedures for requesting and obtaining modifications; procedures for obtaining sign language interpreters and other auxiliary aids and devices; procedures for conducting home visits, providing flexible appointments, and alternative means of applying for services; procedures for waiving program requirements when necessary to avoid discrimination; the agency's ADA grievance procedures; and the identity of the designated individual responsible for coordinating the agency's ADA compliance.

Training should be provided for employees at all levels of the agency, including individuals who come into direct contact with applicants and recipients, those with responsibility for making determinations on applications for benefits and their supervisors, and those in policy-making positions. Receptionists, security guards, and individuals who provide information over the phone should be trained as well, because they are often the first people applicants and recipients encounter from the agency and the first to relay basic information about the agency and its programs. These front-line personnel set the tone for the agency's interaction with the public, and they often have an enormous impact on access to services for people with disabilities.<sup>309</sup>

#### CHAPTER 4: THE ADA AND THE ELEVENTH AMENDMENT

As of the autumn of 2000, the question of whether Eleventh Amendment sovereign immunity protects states from lawsuits under the ADA has not been decided by the United States Supreme Court. In October 2000 the Court heard arguments in a case that raises the issue,<sup>310</sup> and petitions for certiorari have been filed in at least three other cases.<sup>311</sup> Whatever the outcome of these cases, advocates should have some familiarity with the topic.

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305. *See id.* at 1330-31.

306. *See* H.R. REP. NO. 101-485 (III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 473.

307. *See* PROFILE OF DISABILITY, *supra* note 3; WORK, WELFARE AND THE BURDEN OF DISABILITY, *supra* note 4; ANCILLARY SERVICES, *supra* note 9; RECENT STUDIES, *supra* note 5; IMPLEMENTING WELFARE REFORM, *supra* note 7.

308. *See* ANCILLARY SERVICES, *supra* note 9; PROFILE OF DISABILITY, *supra* note 3.

309. *See generally*, BAZELON CENTER FOR MENTAL HEALTH LAW, OPENING PUBLIC AGENCY DOORS: TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND PEOPLE WITH MENTAL ILLNESS: A COLLABORATIVE APPROACH FOR ENSURING EQUAL ACCESS TO STATE BENEFIT AND SERVICE PROGRAMS (1995); *see also* Neff v. Via Metro. Transit Auth., 179 F.R.D. 185 (W.D. Tex. 1998) (transportation authority agrees to train bus operators, dispatchers, telephone operators and customer service representatives on ADA).

310. *See* Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000), *argued* (Oct. 11, 2000).

311. *See* Stevens v. Illinois Dep't of Transp., 210 F.3d 732 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3022 (U.S. June 30, 2000) (No. 00-7); Erickson v. Bd. of Governors of State Colleges and Univ. for Northeastern Ill., 207

On its face, the Eleventh Amendment prohibits citizens of one state from suing another state in federal court, and prohibits those who are not citizens from suing a state in federal court. The Supreme Court, however, has interpreted the Eleventh Amendment far more broadly. Over a century ago, the Court held that the Eleventh Amendment also provides immunity for states from suit in federal court by their own citizens, and held that the immunity applied not only to state law claims but federal claims as well.<sup>312</sup>

Eleventh Amendment sovereign immunity has a number of exceptions, one or more of which might apply to ADA claims on behalf of clients in TANF programs.

#### *A. Exception: Suits Against Non-States*

Counties and municipalities are not “states” and are not protected by suit in federal court under the Eleventh Amendment. In determining whether a government entity is a state, the relevant issue is whether the government unit or agency is an “arm of the state” or a “municipal corporation or other political subdivision.”<sup>313</sup> The answer will depend on the nature of the law creating the government entity. Given the degree of flexibility states have in the design and operation of TANF programs, the question of whether the agencies running the programs are arms of the state may differ from one TANF program to another.

#### *B. Exception: Waiver by States or Abrogation by Congress*

States can waive sovereign immunity and consent to be sued in federal court, and Congress can abrogate sovereign immunity.<sup>314</sup> Abrogation by Congress is valid if: 1) Congress unequivocally expressed its intent to abrogate; and 2) Congress had the power to do so.<sup>315</sup> Congressional intent to abrogate state immunity when enacting the ADA could not be more clear.<sup>316</sup> The ADA states: “[a] State shall not be immune under the Eleventh Amendment to the constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.”<sup>317</sup> Thus, the question is whether Congress has the power to abrogate.

To determine whether Congress has the power to abrogate state immunity courts look at the constitutional provisions on which the statute was enacted, and the reach of the statute itself.<sup>318</sup> Congress must have the power to enact the statute, and there must be a “congruence” and “proportionality” between the statute and the constitutional violations the statute was intended to prevent or remedy.<sup>319</sup> The “purpose” section of the ADA provides that the ADA was intended to

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F.3d 945 (7th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3003 (U.S. June 26, 2000) (No. 99-2077); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3556 (U.S. Feb. 24, 2000) (No. 99-1417).

312. *See* *Hans v. Louisiana*, 134 U.S. 1 (1890).

313. *See* *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1997).

314. *See* *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

315. *See* *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

316. *See, e.g.,* *Lavia v. Pennsylvania Dep’t of Corrections*, 224 F.3d 190, 196 (3d Cir. 2000); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1006 (8th Cir. 1999); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 705 (4th Cir. 1999), *petition for cert. filed*, 69 USLW 3164 (U.S. Sept. 8, 1999); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997), *cert. denied sub nom*; *Wilson v. Armstrong*, 524 U.S. 937 (1998); *Thompson v. Colorado*, 29 F. Supp.2d 1226, 1233 (D. Colo. 1998); *Hedgebeth v. Tennessee*, 33 F. Supp.2d 668, 674 (E.D. Tenn. 1998) *aff’d on other grounds*, 215 F.3d 608 (6th Cir. 2000); *Thrope v. Ohio*, 19 F. Supp.2d 816, 820 (W.D. Ohio 1998).

317. 42 U.S.C.A. § 12202 (West 2000).

318. *See* *Kimel*, 528 U.S. at 75; *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

319. *See* *City of Boerne*, 521 U.S. at 530-531; *see also* *Kimel*, 528 U.S. at 75; *College Savings Bank v. Florida*

“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>320</sup> Thus Congress relied on at least two constitutional bases for its power to enact the ADA: The Fourteenth Amendment and the Commerce Clause.

The Supreme Court has held that Congress does not have sufficient authority to abrogate state sovereign immunity under the Commerce Clause.<sup>321</sup> The Supreme Court has long made clear, however, that Congress has sweeping power to enact legislation under Section 5 of the Fourteenth Amendment that curtails states’ rights,<sup>322</sup> including statutes that impose monetary relief against states.<sup>323</sup> The question, then, is whether the ADA is congruent and proportional to remedy and prevent constitutional violations of the Fourteenth Amendment against people with disabilities. Statutes enacted by Congress to “prevent” or “remedy” constitutional violations must enforce existing legal standards as determined by the Supreme Court; they cannot change the standard for what a constitutional violation is.<sup>324</sup> However legislation preventing or remedying constitutional violations can fall within the sweep of Congress’ power even if, in the process, it prohibits some conduct that is not in fact unconstitutional.<sup>325</sup>

As it is up to the Supreme Court to determine the standard for equal protection violations against people with disabilities, Eleventh Amendment analysis of the ADA depends in large part on case law interpreting the Equal Protection Clause of the Fourteenth Amendment as it applies to people with disabilities. In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>326</sup> an agency proposing to operate a community residence for people with mental retardation brought a challenge under the Equal Protection Clause to a local ordinance requiring special use permits for such residences. The Court rejected the argument that people with mental retardation are a quasi-suspect class entitled to intermediate scrutiny under the Equal Protection Clause.<sup>327</sup> Nevertheless, applying what it called a “rational basis” level of scrutiny, it struck down the permit requirement,<sup>328</sup> an unusual occurrence under this standard of review. Although *Cleburne* involved only people with mental retardation, subsequent courts have held that the rational basis level of scrutiny also applies to classifications made on the basis of other disabilities.<sup>329</sup>

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Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (reaffirming *Boerne* analysis).

320. 42 U.S.C.A. § 12101(b)(4) (West 2000).

321. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996).

322. *See, e.g., Kimel*, 528 U.S. at 75; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966).

323. *See Fitzpatrick*, 427 U.S. at 456.

324. *See City of Boerne*, 521 U.S. at 519. For this reason, the language in the ADA preamble declaring 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 mistreatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals,” 42 U.S.C. A. § 12101(a)(7) (West 2000), is not sufficient to make people with disabilities a suspect class under the 14th Amendment.

325. *See City of Boerne*, 521 U.S. at 501.

326. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

327. The Court gave a number of reasons for its decision. In its view, people with mental retardation were not politically powerless, and it pointed to Section 504 and other federal laws protecting people with disabilities as evidence of this fact. The Court also reasoned that people with mental retardation are undeniably different than others, but, because they range in functional abilities, they are not homogeneous. The Court concluded that mental retardation was a category that should legitimately be taken into account in many instances, to the benefit of people with mental retardation. While the Court acknowledged that invidious discrimination against people with mental retardation exists, it held that instead of creating a quasi-suspect class the preferable route was to examine each law individually to determine whether the classification was valid or discriminatory in that instance. *See City of Cleburne*, 473 U.S. at 442-45.

328. *Id.* at 448.

329. *See, e.g., More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (physical disabilities); *Spragens v. Shalala*, 36 F.3d 947 (10th Cir. 1994), *cert. denied*, 510 U.S. 1035 (blindness); *Brown v. North Carolina Dep’t of Motor Vehicles*, 166 F.3d 705, 706 (4th Cir. 1999), *petition for cert. filed*, 69 USLW 3164 (U.S. Sept. 8, 1999) (mobility impairments).

Many Courts of Appeals have held that Congress has the power under the Fourteenth Amendment to abrogate state sovereign immunity when enacting the ADA.<sup>330</sup> A few of these cases were decided prior to *City of Boerne*, and in some cases courts assumed that *Cleburne* did not define the limits of the constitutional standard for Equal Protection violations against people with disabilities.<sup>331</sup> In the majority of these cases, however, Courts considered *Boerne* and nonetheless concluded that the ADA was proportional to prevent or remedy Constitutional violations against people with disabilities. They pointed to the statement of Congressional “findings” in the ADA<sup>332</sup> and the extensive discussion in the legislative history of the discrimination against people with disabilities as evidence that Congress found widespread discrimination against people with disabilities.<sup>333</sup>

A number of Circuits, however, have held that the Fourteenth Amendment does not provide sufficient authority for Congress to abrogate sovereign immunity when enacting the ADA.<sup>334</sup> In the view of these courts, the reasonable accommodation requirement in the ADA goes beyond the prohibition on irrational disability-based classifications;<sup>335</sup> the ADA legislative history did not link testimony and findings of discrimination to violations of the constitutional standard;<sup>336</sup> there was no widespread pattern of “irrational” disability discrimination by the states discussed in the legislative history;<sup>337</sup> the breadth of Title II and its applicability to every state and local government agency is not proportional to the discrimination discussed in the legislative history;<sup>338</sup> state anti-discrimination laws prevent or remedy widespread disability discrimination by states;<sup>339</sup> or Title II of the ADA exceeds Congress’ power for other reasons.<sup>340</sup> Some of these cases appear to hold only that a particular section of the Title II regulations is beyond the scope of Congress’ authority<sup>341</sup> or that although the ADA cannot be enforced by private litigation in

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330. See, e.g., *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000); *Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 311 (2d Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir.), cert. denied, 525 U.S. 819 (1998); *Crawford v. Indiana Dep’t of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997), overruled by *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill.*, 207 F.3d 945 (7th Cir. 2000); *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997); *Williams v. Ohio Dep’t of Mental Health*, 960 F. Supp. 1276, 1282 (S.D. Ohio 1997); *Thompson v. Colorado*, 29 F. Supp.2d 1226, 1236 (D. Colo. 1998).

331. See *Clark*, 123 F.3d at 1270-71; *Williams*, 960 F. Supp. at 1282, *Mayer v. Univ. of Minnesota*, 940 F. Supp. 1474, 1479 (D. Minn. 1996).

332. See, e.g., *Coolbaugh*, 136 F.3d at 435; *Williams*, 960 F. Supp. at 1281-1282.

333. See, e.g., *Dare*, 191 F.3d at 1175; *Muller*, 187 F.3d at 308-09.

334. See, e.g., *Stevens v. Illinois Dep’t of Transp.*, 210 F.3d 732, 740 (7th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3022 (U.S. June 30, 2000) (No. 00-7); *Erickson*, 207 F.3d at 951-52; *Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000); *Lavia*, 224 F.3d at 206; *Alsbrook v. City of Maumelle* 184 F.3d 999, 1008-9 (8th Cir. 1999); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 707 (4th Cir. 1999), petition for cert. filed, 69 USLW 3164 (U.S. Sept. 8, 1999); *Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168, 1174 (S.D. Ohio 1997); *Hedgebeth*, 33 F. Supp.2d at 676.

335. See *Stevens*, 210 F.3d at 740; *Erickson*, 207 F.3d at 951-52; *Alsbrook*, 184 F.3d at 1008-9; *Brown*, 166 F.3d at 707; *Nihiser*, 979 F. Supp. at 1174; *Hedgebeth*, 33 F. Supp.2d at 675-77.

336. See *Brown*, 166 F.3d at 707. However, when Congress passed the ADA, *City of Boerne v. Flores*, 521 U.S. 507 (1997), had not yet been decided, and thus Congress had no reason to obtain hearing testimony that linked discrimination to a violation of Constitutional standards.

337. See, e.g., *Erickson*, 207 F.3d at 951-2; *Lavia*, 224 F.3d at 204.

338. See *Brown*, 166 F.3d at 707.

339. See *Stevens*, 210 F.3d at 741; *Lavia*, 224 F.3d at 204-05.

340. See *Brown*, 166 F.3d at 708 (holding that proof of animus is required for ADA claims against the state); *Stevens*, 210 F.3d at 738 (holding that the ADA’s presumption that classifications based on disability are not legitimate goes beyond the constitutional standard).

341. See, e.g., *Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000) (prohibition on surcharges for auxiliary aids or program access measures in Title II regulations goes beyond the scope of Congress’ power under the 14th Amendment); *Nihiser*, 979 F. Supp. at 1176 (reasonable accommodation provision of Title I applied to employment discrimination claim brought against state agency, is not a valid exercise of congressional power under Section 5 of the 14th Amendment).

federal court, it is valid legislation.<sup>342</sup> Other decisions are much broader, holding that the application of the ADA to states was not a proper exercise of congressional power.<sup>343</sup>

During the 1999-2000 term, the Supreme Court held in a 5-4 opinion in *Kimel v. Florida Board of Regents*<sup>344</sup> that Congress did not have the authority to abrogate Eleventh Amendment immunity when it enacted the Age Discrimination in Employment Act (ADEA). Like the ADA, ADEA contains a clear statement of intent to abrogate Eleventh Amendment immunity, but the Court held that Congress lacked the power to abrogate.<sup>345</sup> The Court reasoned that classifications based on age do not receive strict scrutiny under the Equal Protection Clause and thus the ADEA's broad restriction on age-based classifications by states was out of proportion to the harm the statute was meant to prevent or remedy.<sup>346</sup> The Court also relied on the fact that there was no evidence in the legislative history of a pattern of unconstitutional age discrimination by states,<sup>347</sup> and the fact that the plaintiffs had another avenue for relief, namely, state laws prohibiting age discrimination.<sup>348</sup> Given that ADA is a federal civil rights statute similar in some respects to the ADEA, the Supreme Court is likely to take a similar approach when analyzing Eleventh Amendment abrogation under the ADA.

There are a number of grounds for distinguishing *Kimel* from cases challenging the ADA on Eleventh Amendment grounds. One is the ADA's extensive legislative history and the frequent references to discrimination in transportation, education and other services that to a large extent are operated by state and local governments. Another is the history of discrimination against people with disabilities discussed in *Cleburne*. A third is the fact that the Court struck down the ordinance in *Cleburne* even under a rationale basis review, which indicates that unconstitutional treatment of people with disabilities may be easier to prove than unconstitutional age discrimination. Fourth, *Cleburne's* holding that a rational basis level of scrutiny is sufficient to protect people with disabilities rested in part on the fact that people with disabilities are not a politically powerless because they have laws such as Section 504 to protect their rights. If people with disabilities could no longer use those laws to sue states, a major rationale for *Cleburne's* application of a rationale basis level of scrutiny would be eliminated. Fifth, it is possible that the Court will make a distinction between ADA employment discrimination claims against states and other types of ADA claims against states. However, given the close vote in *Kimel*, it is difficult to predict what will happen.

### C. Exception: Suits for Injunctive Relief against State Officials

Eleventh Amendment immunity has a long-established exception, originating with *Ex parte Young*,<sup>349</sup> for plaintiffs seeking prospective injunctive relief against state officials. The theory behind the exception is that officials committing constitutional violations could not be acting under the imprimatur of the state, and thus are not entitled to state immunity. Many ADA Title II lawsuits against states should fall within this exception. Nevertheless, the exception does have limits. The Supreme Court has held that "equitable restitution" in the form of public benefits that would have been provided if the state had complied with the constitution in the past is not injunctive relief and does not fall within the exception, because plaintiffs are in fact seeking compensation for the failure to receive benefits in the past, which is retroactive monetary

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342. See *Erickson*, 207 F.3d at 952.

343. See *Alsbrook*, 184 F.3d at 1010-1011.

344. 528 U.S. 62 (2000).

345. See *id.* at 642.

346. See *id.* at 645-46.

347. See *id.* at 648-49.

348. See *id.* at 650.

349. See 209 U.S. 123 (1908).

relief.<sup>350</sup> In addition, suing a state official instead of the state does not necessarily bring the suit within the exception. The key issue is whether the official or the state treasury will be paying for relief ordered by the court.<sup>351</sup> In recent years, the Court has confirmed the continuing validity of *Ex parte Young*,<sup>352</sup> though some members of the Court have expressed the view that its application should be narrowed to federal civil rights cases and cases in which plaintiffs lack an alternative state forum.<sup>353</sup> Lower courts have continued to apply the exception in ADA cases.<sup>354</sup> One Circuit, however, has held that public entities are the only proper defendants in cases brought under Title II and therefore state officials cannot be sued under Title II under the *Ex parte Young* exception.<sup>355</sup>

#### D. Congressional Authority Under the Spending Clause

The “purpose” section of the ADA indicates that in enacting the ADA, Congress may have relied on its authority under constitutional provisions other than the Commerce Clause and the Fourteenth Amendment.<sup>356</sup> It is possible that these other Constitutional provisions provide sufficient authority for Congress to abrogate Eleventh Amendment immunity. One possible basis of authority is the Spending Clause, which permits Congress to place conditions on the receipt of federal funds by states.

To be a valid exercise of authority under the Spending Clause, a statute must: 1) be in pursuit of the general welfare; 2) the condition imposed on states in return for receiving federal money must be unambiguously stated, and 3) the condition imposed must be related to the federal interest that prompted the legislation.<sup>357</sup> The Supreme Court has taken a fairly relaxed view of “relatedness,” holding, for example, that Congress could pass legislation requiring states to adopt a minimum drinking age as a condition of receiving federal funds for highway construction, because of the connection between the drinking age and drunk driving.<sup>358</sup> Under this test Congress may well have the authority to enact legislation that conditions the receipt of federal funds on compliance with Title II of the ADA. But unless the ADA is amended to provide funding for ADA compliance, which is not likely, this would require amendment of another statute that does provide funding to include an unambiguous statement conditioning receipt of funds on compliance with Title II. It may be possible, however, to argue that when applying Title II of the ADA to TANF, no such amendment is necessary because PRWORA states that the ADA “shall apply to any program or activity which receives funds provided under this part.”<sup>359</sup> Thus an argument can be made that Congress has already conditioned receipt of federal TANF funds on compliance with the ADA.

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350. See *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

351. See *id.* at 665-67.

352. See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997).

353. See *id.* at 297.

354. See, e.g., *Uttilla v. City of Memphis*, 40 F. Supp.2d 968, 977 (W.D. Tenn. 1999), *aff’d*, 208 F.3d 216 (6th Cir. 2000) (unpublished decision).

355. See *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), *modified*, 2000 WL 968023 (7th Cir. 2000) (unpublished).

356. See 42 U.S.C.A. § 12101(b)(4) (West 2000) (“It is the purpose of this chapter- ... to invoke the broad sweep of congressional authority including the power to enforce the Fourteenth Amendment and the Commerce Clause”).

357. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

358. See *id.* at 208.

359. 42 U.S.C. A. § 608(d) (West 2000).

### *E. Restriction on Suits Against States Under Federal Law in State Court*

Unfortunately, the Supreme Court further extended the reach of the Eleventh Amendment during its 1998-99 term, holding that when Congress lacks the authority to abrogate a state's Eleventh Amendment immunity from being sued in federal court for violation of a federal statute, the state is also immune from suit under the same federal statute in state court.<sup>360</sup>

### *F. Eleventh Amendment Immunity Under Section 504 of the Rehabilitation Act*

In *Atascadero State Hospital v. Scanlon*,<sup>361</sup> the Supreme Court held that Congress did not include an unequivocal statement of intent to waive Eleventh Amendment immunity in Section 504 of the Rehabilitation Act. Congress subsequently amended Section 504 to add an unequivocal statement of abrogation.<sup>362</sup> The Supreme Court subsequently referred to this amendment as an "unambiguous waiver of immunity,"<sup>363</sup> and the lower federal courts have agreed.<sup>364</sup> However, as with Title II of the ADA, courts are divided on the question of whether Section 504 is a valid exercise of Congress' power under the Fourteenth Amendment.<sup>365</sup>

A number of courts have held that Section 504 was enacted under Congress' authority under the Spending Clause.<sup>366</sup> Frequently, it is defendants who have made Spending Clause arguments, in an attempt to prevent plaintiffs from obtaining damages under Section 504.<sup>367</sup> As Section 504 applies to recipients of federal funding, it presents a much stronger argument for Spending Clause authority than Title II does in its current form.

### *G. State Antidiscrimination Laws*

Even if advocates are unable to sue states under the ADA in federal and state court, it is still possible to use state and local laws prohibiting discrimination on the basis of disability. In the coming years, advocates may need to rely on these laws more heavily. Advocacy efforts may be needed to strengthen these laws so they can serve as an effective means of protecting the rights of people with disabilities.

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360. *See Alden v. Maine*, 527 U.S. 706, 754 (1999).

361. *See* 473 U.S. 234, 247 (1985).

362. 42 U.S.C.A. §§ 2000d-7(a)(1), (2) (West 2000).

363. *Lane v. Peña*, 518 U.S. 187, 198 (1996); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992).

364. *See, e.g., Clark*, 123 F.3d at 1271.

365. *Compare Clark*, 123 F.3d at 1270 (holding that Section 504 is a valid exercise of power), *with Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999) (holding Section 504 is not a valid exercise of power); *Nihiser*, 969 F. Supp. at 1176 (same).

366. *See, e.g., Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd on other grounds*, 124 F.3d 1019 (9th Cir. 1997), *cert. denied* 524 U.S. 937 (1998); *Moreno v. Consol. Rail Corp.*, 909 F. Supp. 480 (E.D. Mich. 1994), *aff'd in part on other grounds*, 63 F.3d 1404 (6th Cir. 1995); *Flores v. Puerto Rico Tel. Co.*, 776 F. Supp. 61 (D.P.R. 1991); *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986).

367. *See, e.g., Atascadero State Hosp.*, 473 U.S. at 244; *Tyler v. City of Manhattan*, 118 F.3d 1400, 1414 (10th Cir. 1997).

PART II: KEY ADA TITLE II TERMS AND CONCEPTS AND HOW THEY APPLY TO  
TANF PROGRAMS  
INTRODUCTION

The heart of Title II lies in a handful of key concepts, an understanding of which is essential for advocates. These concepts are interrelated, and a court's decision on how one of them applies to a particular situation will often dictate how the others apply. As a result, you should consult most or all of the Chapters in Part II, not just the ones you think may apply.

Given the close connections among all of the core ADA concepts, many ADA case opinions have multiple grounds for their rulings. Therefore, by necessity, the Manual does not include all of the alternative grounds for each court decision. You should always consult the case law in your jurisdiction rather than relying solely on the Manual.

CHAPTER 5: INDIVIDUAL WITH A DISABILITY

*A. In General*

There has been extensive litigation on the ADA definition of “disability” in cases brought under Title I of the ADA, which covers discrimination in employment. As the section of the ADA defining “disability” applies to all of the titles of the ADA, these cases are directly relevant to who can bring ADA claims against state and local government agencies under Title II.

Much of the litigation has focused on the question of whether a physical or mental impairment causes a “substantial limitation” on a major life activity. In fact, in one major study of Title I court decisions, plaintiffs’ inability to prove that a major life activity was substantially limited was among the six most common reasons that plaintiffs lost their cases.<sup>368</sup> EEOC regulations define substantial limitation as “[inability] to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.”<sup>369</sup> This would mean, for example, that an individual who can walk, but only for a short distance, with great difficulty or extremely slowly, would be substantially limited in the major life activity of walking.

(i) Actual Disability

In *Sutton v. United Airlines, Inc.*,<sup>370</sup> the Supreme Court held that when determining whether an individual is substantially limited in a major life activity, the effect of “mitigating measures” such as glasses, hearing aids, medication, and prosthetic devices must be taken into account.<sup>371</sup> In *Sutton*, two airline pilots with severe myopia that was corrected with glasses sued United Airlines after the airline refused to hire them on the basis that their uncorrected vision made them unsuitable for the job. The pilots sued, but the Supreme Court held that their case was properly dismissed because they did not have disabilities under the ADA. The Court held that the determination of whether an individual has a substantially limiting impairment must be made by

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368. See John W. Parry, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403-07 (1998) (finding that the “substantial limitation” requirement was one of six major reasons that plaintiffs lost Title I ADA claims).

369. 29 C.F.R. pt. 1630 app. § 1630.2(j) (1999). Department of Justice regulations do not define this term, but interpretive guidance to Title II contains the same definition. See 28 C.F.R. pt. 35 app. A § 35.104 (1999).

370. 527 U.S. 471 (1999).

371. See *id.* at 482.

viewing the impairment in its “mitigated” state, i.e., taking into account the effect of any medication, equipment or other measures used to treat or correct the impairment or its effects. As the pilots stated in their complaint that with glasses they were not limited in seeing, the Court held that they had not pled that they were substantially limited in a major life activity of seeing and granted the defendant’s motion to dismiss.<sup>372</sup>

In taking this approach, the Court explicitly rejected the EEOC’s Interpretive Guidance to Title I regulations, which stated that “the determination of whether an individual is substantially limited must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices,”<sup>373</sup> and the approach taken in DOJ’s Interpretive Guidance to Title II regulations on this issue.<sup>374</sup> The Court also ignored statements in the ADA legislative history,<sup>375</sup> and rejected the approach taken by most of the Circuits.<sup>376</sup> The Court’s rationale for this lack of deference was that Congress gave the EEOC and DOJ authority to promulgate regulations on specific titles of the ADA, and the definition of “disability” is not in those titles but is located in a section of the statute defining terms that are generally applicable throughout the statute.<sup>377</sup> While this is true, Congress must have understood that defining the term would be a part of both agencies’ responsibilities, since there is no way they can interpret and enforce Titles I through III without doing so.

*Sutton* creates a double standard for people with disabilities and employers. The employer in *Sutton* obviously considered plaintiffs’ uncorrected vision relevant to its decision not to hire them, yet the Court held that it was not relevant to whether the plaintiffs could sue to challenge the very same employment decision.

In *Albertsons, Inc. v. Kirkingburg*,<sup>378</sup> decided on the same day, the Court went further and held that an individual’s “ability to compensate” for an impairment, whether conscious or unconscious, is a “mitigating measure.” Therefore, it held, if as a result of this compensation an individual is no longer substantially limited in a major life activity, the individual is not a person with a disability covered by the ADA.<sup>379</sup> The plaintiff in *Albertsons* was an individual with monocular vision who learned to compensate for this condition, although he performed the major life activity of seeing differently than others did.

The full implications of these decisions are not yet clear. One troubling development is that a few cases decided after *Sutton* have held or implied that individuals who could have mitigated the effects of an impairment by taking a prescribed medication but failed to do so are not substantially limited in a major life activity.<sup>380</sup> *Sutton* and *Albertsons* also create a potential tension between the ADA’s definition of disability and its reasonable accommodation and modification requirements. Paradoxically, defendants may now attempt to argue that some of the very measures people with disabilities seek as reasonable modifications for their disabilities, such

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372. *See id.* at 488-89.

373. 29 C.F.R. pt. 35 app. A § 1630.2(j) (1999). The EEOC subsequently amended its guidance to conform with *Sutton*. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 65 Fed. Reg. 36327 (June 8, 2000) (to be codified at 29 C.F.R. §§ 1630.2(h), (j)).

374. *See* 28 C.F.R. § 35.104 (1999).

375. *See* S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 450-51; H.R. Rep. No. 101-485(II), at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334.

376. *See, e.g.,* Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998); Harris v. H & W Contracting, 102 F.3d 516 (11th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995). *But see* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996) (stating belief that Congress intended the substantial limitation determination be made with regard to mitigating measures).

377. *See* *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 480 (1999). Given this rationale, there is no reason to assume that the Supreme Court or lower courts will not defer to the EEOC and DOJ regulations, interpretations and guidance on other issues.

378. *See* 527 U.S. 555 (1999).

379. *See id.* at 566.

380. *See* Tangires v. Johns Hopkins Hosp., 79 F. Supp.2d 587 (D. Md. 2000), *aff’d*, 2000 U.S. App. LEXIS 23555 (4th Cir. Sept. 20, 2000) (unpublished opinion); Spradley v. Custom Campers, Inc., 68 F. Supp.2d 1225 (D. Kan. 1999).

as tutors with expertise in learning disabilities, and drug and alcohol treatment programs, mitigate the effects of impairments to such an extent that individuals receiving these measure no longer have disabilities and thus are no longer entitled to reasonable modifications under the ADA. As individuals with drug problems are only protected by the ADA if they have successfully completed treatment or are in treatment and not currently using illegal drugs,<sup>381</sup> this approach would be particularly absurd, because the same treatment that qualifies an individual with a drug problem for protection under the ADA may disqualify the individual from protection once the treatment takes effect. Fortunately, some courts have already rejected this approach.<sup>382</sup>

As bad as these Supreme Court decisions are, many people with disabilities will still be considered to have “actual” disabilities under the ADA. Many people continue to be substantially limited in a major life activity even when they use hearing aids and other devices, equipment or medication. For many others, the substantial limitation is mitigated by medication or other measures only part of the time. And mitigating measures such as medication may have side effects that themselves cause a substantial limitation in major life activities.<sup>383</sup> In *Sutton*, the Court made clear that both “positive” and “negative” effects of mitigating measures must be taken into account in determining whether an individual is substantially limited,<sup>384</sup> and the negative effects of psychotropic medications used to treat psychiatric disabilities are specifically mentioned.<sup>385</sup> Cases decided in the wake of *Sutton* have had mixed results, and some plaintiffs’ claims have survived.<sup>386</sup> In the future, advocates may want to focus on major life activities such as sleeping, thinking, interacting with others, and maintaining social and sexual relationships, particularly for clients with psychiatric disabilities, as these activities are often limited as a result of a psychiatric impairment, medication used to treat the impairment, or both. In addition, a few plaintiffs have successfully argued that the onerous requirements of treatment for their disabilities are themselves a substantial limitation in numerous life activities.<sup>387</sup> Even if courts interpret *Sutton* to disqualify people from ADA protection once treatments take effect, this should not affect initial coverage under the ADA or eligibility for reasonable modifications, as long as individuals are substantially limited in a major life activity when reasonable modifications are requested.

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381. See 42 U.S.C.A. § 12210 (West 2000). The one exception is when the discrimination is in the provision of health care of treatment for drug problems. See 42 U.S.C.A. § 12210(c) (West 2000).

382. See Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, No. C-98-2651 SI, slip op. at 9 (N.D. Cal. Mar. 16, 2000) (unpublished order) (granting preliminary injunction in a challenge to an ordinance barring the operation of a methadone maintenance program and rejecting the argument that plaintiffs were not protected by the ADA because the methadone mitigated their condition)[hereinafter Bay Area Order]; *Finical v. Collections Unlimited, Inc.*, 65 F.2d 1032, 1038 (D. Ariz. 1999) (holding that an assisted listening device provided by an employer could not be considered a mitigating measure).

383. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INSTRUCTIONS FOR FIELD OFFICES: ANALYZING ADA CHARGES AFTER SUPREME COURT DECISIONS ADDRESSING “DISABILITY” AND “QUALIFIED” (1999) available at <http://www.eeoc.gov/docs/field-ada.html> (providing a detailed discussion of other ways in which individuals may qualify as substantially limited after *Sutton*).

384. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999).

385. See *id.* at 484.

386. See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) (reversing summary judgment for the defendant where plaintiff argued that medication used to treat a psychiatric disability caused a substantial limitation in thinking); *McAndlin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), amended 201 F.3d 1211 (9th Cir. 2000) (reversing summary judgment for the defendant because there was an issue of fact as to whether the plaintiff’s limitations in sleeping, sexual relations, and interacting with others were substantially limited); *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999) (holding individual who wore leg brace was substantially limited in walking); but see *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000) (holding individual with severe depression who experienced no symptoms on medication was not a person with a disability).

387. See Bay Area Order, *supra* note 382, at 9-10.

(ii) Regarded As Having a Disability

The ADA also protects those who are “regarded as” having disabilities.<sup>388</sup> Some individuals who do not meet the definition of having “actual” disabilities may be protected under the “regarded as” prong of the ADA’s disability definition. Title II regulations define “regarded as having an impairment” as:

- 1) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;
- 2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- 3) has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.<sup>389</sup>

To date, most cases brought under a “regarded as” theory implicitly rely on the first of these theories, namely that the individual has an impairment that is not substantially limiting but is regarded by others as being so. Unfortunately, some courts have misinterpreted this theory and required plaintiffs to prove that a perceived impairment was in fact substantially limiting.<sup>390</sup> Plaintiffs have also had great difficulty with “regarded as” claims when they claim they were regarded as substantially limited in the major life activity of working. EEOC regulations provide,<sup>391</sup> and courts have held, that to be substantially limited in the major life activity of working, individual must be limited in a “class of jobs” or a “broad range of jobs in various classes,”<sup>392</sup> not just one job. However, this requirement has been extended from “actual” disability claims to “regarded as” claims, and courts have ruled for defendants because plaintiffs are unable to show that an employer regarded them as being substantially limited in a class of jobs.<sup>393</sup>

In *Sutton*, the Supreme Court put its seal of approval on this approach by holding that the plaintiffs did not state a claim under the “regarded as” theory of disability because their complaint pled that the employer regarded plaintiffs as disabled in the major life activity of working, yet alleged only that the employer regarded plaintiffs as unable to be “global airline pilots.” According to the Court, “global airline pilot” was not sufficiently broad to constitute a “class of jobs.” The Court held that to be regarded as substantially limited in working, the employer must regard the plaintiff as substantially limited in a class of jobs. According to the Court, “global airline pilot” was not sufficiently broad enough to constitute a “class of jobs.”<sup>394</sup>

In *Murphy v. United States Parcel Service, Inc.*,<sup>395</sup> the third ADA case decided on the same day, the Court held that mechanic jobs that require a U.S. Department of Transportation (DOT) interstate driver’s license are not a “class of jobs.” So a mechanic with high blood pressure whose employer believed he did not qualify for such a license was not “regarded as” unable to work under the ADA.

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388. See 42 U.S.C.A. § 12102(2)(c) (West 2000).

389. See 28 C.F.R. § 35.104 (1999).

390. See, e.g., *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 885 (6th Cir. 1996); *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992) (Section 504 case).

391. See 29 C.F.R. § 1630.2j(3) (1999).

392. See *Davidson v. Middlefort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (Section 504 case).

393. See, e.g., *Kocsis*, 97 F.3d at 885; *Welsh*, 977 F.2d at 1417.

394. 527 U.S. at 493.

395. 527 U.S. 516 (1999).

The plaintiffs in both *Sutton* and *Murphy* failed to assert that the employer regarded them as substantially limited in any major life activity other than working. In light of these decisions and the amorphousness of the “class of jobs” concept, both “actual” and “regarded as” discrimination claims should be based on a major life activity, other than working, when possible.

Advocates may also have greater success if they bring “regarded as” claims under the second and third “regarded as” theories. Advocates can argue that under the second theory, an employer’s attitude should be measured by the employer’s actions, not after-the-fact statements. Under the third theory, there is no reference to major life activities, or to the employer’s beliefs; the relevant issue is the employer’s actions.

Some courts have held or suggested that people who are protected under the ADA because they are “regarded as” having disabilities are not entitled to reasonable accommodations under Title I.<sup>396</sup> Therefore, it is probably preferable for a client to qualify for ADA protection as a person with an “actual” disability whenever possible.

### (iii) Record of Having a Disability

The ADA also protects people who have a “record of” a disability.<sup>397</sup> Title II regulations define “record of such impairment” as “had a history of, or has been misclassified as having,” a physical or mental impairment that substantially limits one or more major life activities.<sup>398</sup> Department of Justice Interpretive Guidance to the Title II regulations states:

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having an impairment, mental retardation, or mental illness.<sup>399</sup>

To date, this prong of the ADA definition of disability has been the subject of less litigation than “actual” and “regarded as” disability claims, although this may well change in light of *Sutton*, *Murphy*, and *Albertsons*. As with the “actual” and “regarded as” disability prongs, courts have required plaintiffs to demonstrate that the prior impairment was in fact substantially limiting,<sup>400</sup> and have been reluctant to hold that particular conditions were substantially limiting *per se*.<sup>401</sup>

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396. See, e.g., *Weber v. Strippet, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999); *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n.12 (3d Cir. 1999) (en banc) (court did not decide issue but stated that there was “considerable force” to the position that individuals “regarded as” having disabilities are not entitled to reasonable accommodations); *but cf.* *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (assuming that an individual “regarded as” having a disability is entitled to reasonable accommodations).

397. 42 U.S.C.A. § 12102(2)(b) (West 2000).

398. 28 C.F.R. § 35.104(3) (1999).

399. 28 C.F.R. pt. 35 app. A § 35.104 (1999).

400. See, e.g., *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *Sorenson v. Univ. of Utah Hosp.*, 194 F.3d 1084 (10th Cir. 1999); *Goldsmith v. Jackson Mem’l Hosp. Pub. Health Trust*, 33 F. Supp. 2d 1336 (S.D. Fla. 1998), *aff’d*, 198 F.3d 263 (11th Cir. 1999); *Barger v. Owens-Brockway Glass Container, Inc.*, No. 97-4418 FMS, 1999 U.S. Dist. LEXIS 945 (N.D. Cal. Feb. 1, 1999); *Buchanan v. Safeway Stores, Inc.*, No. 95-1658 FMS, 1996 U.S. Dist. LEXIS 18325 (N.D. Cal. Dec. 6, 1996).

401. See, e.g., *Goldsmith*, 33 F. Supp.2d at 1342 (history of alcoholism is not a *per se* record of a disability); *Jones v. HCA Health Serv. of Kansas, Inc.*, No. 94-1412 JTM, 1998 U.S. Dist. LEXIS 4419, at \*32 (D. Kan. Mar. 9, 1998) (court refuses to hold that a history of drug use is always substantially limiting).

Three closely related issues may arise in “record of” claims. The first is whether an individual who has not been diagnosed with a disability can have a “record of” a disability. It may be possible to argue that an individual who seeks services from a state or government program at one point in time, or an individual who requests services for a disability and who later returns to the same agency, has established a record of a disability. The reason for this is because the agency is on notice that the individual had a substantially limiting impairment, and given the passage of time, the long-term nature of the impairment is established. The EEOC has stated in guidance that written records are not essential in “record of” claims.<sup>402</sup>

The second issue is whether a defendant must have knowledge of prior substantially limiting impairment. Some cases suggest that the defendant’s knowledge is relevant to the “record of” determination.<sup>403</sup> It may be possible to argue that when a defendant has enough information for a reasonable person to be on notice that an individual tried to disclose a disability in the past, this is sufficient. It may also be possible to argue that when individuals seek services at an earlier time and have had symptoms of a disability, or attempt to disclose a disability, a defendant has knowledge of a disability that is sufficient for a “record of” claim. The EEOC has taken the position that while a defendant’s knowledge of the disability is not necessary to prove coverage under the ADA, it is necessary to prove discrimination.<sup>404</sup>

The third issue is causation, specifically, whether plaintiffs have to prove that the record of disability is related to the discrimination. In some cases, causation will be obvious, such as when a public entity opposes the establishment of a facility for individuals recovering from drug or alcohol addiction, or opposes a halfway house for people with psychiatric disabilities.<sup>405</sup> It may also be possible to argue that when a defendant discriminates against an individual because of a current physical or mental condition that tends to last a long time and the individual can later demonstrate that the condition was substantially limiting, then there is a sufficient link between the condition and the discriminatory conduct. The EEOC has taken the position that written records or employer knowledge of those records are not essential in “record of” claims, but there must be evidence that an employer acted on the basis of the record to prove discrimination.<sup>406</sup>

If courts require plaintiffs to show written documentation of a prior substantially limiting impairment or to demonstrate that defendants knew about this documentation, then establishing that an individual has a “record of” a disability will be at least as difficult as establishing that a present impairment is an “actual” disability. EEOC Interpretive Guidance states that there are many types of records that may contain evidence of a record of impairment, “including, but not limited to . . . educational, medical or employment records.”<sup>407</sup> Nevertheless, as these records are created for other purposes and often contain diagnostic information rather than information about an individual’s functional abilities, using such records to demonstrate the existence of a prior substantially limiting impairment has often proved difficult. With mixed results, courts have addressed the question of whether an employer’s knowledge of leaves of absence,<sup>408</sup> functional limitations,<sup>409</sup> hospitalization,<sup>410</sup> diagnosis,<sup>411</sup> and eligibility determinations from other

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402. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EXECUTIVE SUMMARY: COMPLIANCE MANUAL SECTION 902, DEFINITION OF THE TERM “DISABILITY” (2000) [hereinafter EEOC DISABILITY DEFINITION], available at <http://www.eeoc.gov/docs/902cm.html>.

403. See, e.g., *Whitfield v. Pathmark Stores*, 39 F. Supp.2d 434, 444 (Del. 1999); *Mark v. Burke Rehabilitation Hosp.*, No. 94-CV-3596, 1997 U.S. Dist. LEXIS 5159 (S.D.N.Y. Apr. 17, 1997).

404. EEOC DISABILITY DEFINITION, *supra* note 402.

405. See *Bay Area Order*, *supra* note 382, at 10.

406. See EEOC DISABILITY DEFINITION, *supra* note 402.

407. 29 C.F.R. § 1630.2(k) (1999).

408. See, e.g., *Whitfield*, 39 F. Supp.2d at 444; *Mastio*, 948 F. Supp. at 1414; *Hilburn v. Murata Elec. of N. Am.*, 17 F. Supp.2d 1230 (N.D. Ga. 1998); *Granzow v. Eagle Food Ctrs., Inc.*, 27 F. Supp.2d 1105 (N.D. Ill. 1998).

409. See, e.g., *Whitfield*, 39 F. Supp.2d at 444.

410. See, e.g., *Marke v. Burke Rehabilitation Hosp.*, 1997 WL 189124, at \*4 (S.D.N.Y. Apr. 17, 1997); *Madjessi v. Macy’s West, Inc.*, 993 F. Supp. 736 (N.D. Cal. 1997).

agencies<sup>412</sup> provide sufficient evidence that an employee had a record of a substantially limiting impairment.<sup>413</sup>

As with “regarded as” claims, the question of whether individuals with a “record of” a disability are entitled to reasonable accommodations is unsettled in the case law.<sup>414</sup>

#### (iv) Major Life Activities

ADA regulations contain examples of major life activities, including caring for oneself, performing manual tasks, walking, seeing, speaking, hearing, breathing, learning, and working,<sup>415</sup> but the list is not intended to be exclusive.<sup>416</sup> In its Guidance, the EEOC has identified several additional major life activities that may be of particular relevance to people with psychiatric disabilities, such as the ability to sleep, concentrate, and interact with others.<sup>417</sup> In its Interpretive Guidance, the EEOC suggests that if an individual is limited in any other major life activity, work should not be used as the life activity that qualifies as individual as having a disability.<sup>418</sup> As mentioned above, in *Sutton* the Supreme Court went further and expressed doubt about the notion that work is a major life activity under the ADA.<sup>419</sup>

#### (v) Duration of Substantial Limitation

To qualify as a disability, the substantial limitation caused by an impairment, its effects must be permanent or long term, or expected to be permanent or long term.<sup>420</sup> However, unlike the definition of disability used to determine eligibility for Social Security Disability and Supplemental Security Income,<sup>421</sup> the ADA does not require an expected duration of at least twelve months. A condition that is potentially long term may qualify as a disability if its effects are severe and it is not possible to know its duration.<sup>422</sup> The EEOC has said in Enforcement Guidance that an impairment is substantially limiting if it lasts for more than several months and significantly restricts a major life activity during that time.<sup>423</sup> Yet the Enforcement Guidance

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411. See, e.g., *Granzow*, 27 F. Supp.2d at 1110; *Mastio*, 948 F. Supp. at 1396.

412. See, e.g., *Kaleriristos v. CTF Hotel Mgmt. Corp.*, 958 F. Supp. 641 (D.D.C.), *aff'd mem.*, 132 F.3d 1481 (D.C. Cir. 1997); *Howell v. Sam's Club*, 959 F. Supp. 260 (E.D. Pa. 1997) *aff'd*, 141 F.3d 1153 (3d Cir. 1998).

413. Compare *Hillburn*, 17 F. Supp.2d at 1382 (employer knowledge of leave of absence insufficient to establish record of disability), with *Whitfield*, 39 F. Supp.2d at 444 (employer knowledge of leaves of absence sufficient to defeat employer motion for summary judgment on whether plaintiff had a record of a substantially limiting impairment).

414. See, e.g., *Davidson v. Middlefort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (court did not reach the issue but suggests that people with a record of disability may be entitled to at least some types of accommodations).

415. See 28 C.F.R. § 35.104 (1999).

416. See *id.* (“[T]he phrase major life activities means functions such as walking, seeing, hearing, speaking, breathing, learning, and working.”) (emphasis added); see also 29 C.F.R. § 1630.2(i) (1999) (defining major life activities in exactly same language).

417. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 10-12 (1999) [hereinafter EEOC PSYCHIATRIC DISABILITIES GUIDANCE] available at <http://www/eec.gov/docs/psych.html>.

418. 29 C.F.R. § 1630.2(j) (1999).

419. See *Sutton*, 527 U.S. at 492 (“We note, however, that there may be some conceptual difficulty in defining ‘major life activities’ to include work.”).

420. See 29 C.F.R. § 1630.2(j)(2)(iii); see also *Ryan v. Grae & Rybicki P.C.*, 135 F.3d 867, 871 (2d Cir. 1998) (holding that plaintiff’s colitis, often asymptomatic, was neither permanent nor long term and therefore not substantially limiting); *Brown v. Lankenau Hosp.*, 1997 U.S. Dist. LEXIS 7289, at \*4 (E.D. Pa. May 16, 1997) (looking at duration of impairment in making disability determination); *Downs v. Massachusetts Bay Transp. Auth.*, 13 F. Supp.2d 130, 139 (D. Mass. 1998) (denying summary judgment where unclear whether plaintiff’s injuries involved temporary or permanent effects.)

421. See 42 U.S.C.A. § 423d(1) (West 2000); 42 U.S.C.A. § 1382c(3) (West 2000).

422. See *supra* note 400.

423. See EEOC DISABILITY DEFINITION, *supra* note 402; EEOC PSYCHIATRIC DISABILITIES GUIDANCE, *supra* note 417.

states that chronic conditions with episodic symptoms, such as many psychiatric disabilities, are covered if they are substantially limiting in their active phase and there is a strong likelihood of recurrence.<sup>424</sup> This means that each active phase need not last for several months. After *Sutton*, however, these recurring states would have to be substantially limiting even after mitigating measures are taken.

### *B. Individual with a Disability in TANF Programs*

#### (i) The Effect of the Supreme Court's Definition of "Actual" Disability on TANF Clients

Although *Sutton*, *Murphy*, and *Albertsons* unquestionably limit the number of people protected by the ADA, for a number of reasons, they probably pose less of a problem for TANF applicants and recipients than for others.

Many TANF applicants and recipients have disabilities that have never been diagnosed.<sup>425</sup> Disabilities that have not been diagnosed are probably not being "mitigated" with medication or other treatment. TANF applicants and recipients with unmitigated disabilities that are substantially limiting should continue to fall within the ADA's definition of disability.

Psychiatric disabilities are common in the TANF population. As noted above, many people with psychiatric disabilities remain substantially limited in major life activities even when they have been diagnosed and medication has been prescribed for them, either because medication does not eliminate the symptoms that cause a substantial limitation, medication is not consistently available or affordable, or because the side effects of the medication cause or contribute to a substantial limitation in major life activities.

Other disabilities that are common in TANF applicants and recipients are unlikely to be completely mitigated. Many individuals with mental retardation and learning disabilities are able to learn skills and tasks with appropriate education and training, but many will remain substantially limited because of the time it takes to complete tasks.

An argument can be made that some disabilities prevalent in the TANF population cannot be mitigated. Mental retardation is one example. Education and training do not cause the brains of people with mental retardation to "compensate" for the developmental disability in the way that the plaintiff in *Albertsons* learned to compensate for his monocular vision. Title II regulations identify learning as a major life activity.<sup>426</sup> Individuals with mental retardation are substantially limited in the major life activity of learning regardless of any accommodations they receive. One court has taken this type of approach by holding that hearing aids and lip reading may improve the ability of a hearing-impaired individual to communicate but do not necessarily improve the ability to hear, a major life activity.<sup>427</sup> One Circuit has implicitly rejected this approach by holding that individuals with learning disabilities may be able to "self-accommodate" to such an extent that they are not substantially limited.<sup>428</sup>

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424. See EEOC PSYCHIATRIC DISABILITIES GUIDANCE, *supra* note 412, at 9.

425. See PROFILE OF DISABILITY, *supra* note 3; IMPLEMENTING WELFARE REFORM, *supra* note 7.

426. See 28 C.F.R. § 35.104(3) (1999). DOJ Section 504 coordination regulations, which Congress instructed DOJ to use as the basis for Title II regulations, also includes learning as a major life activity. See 28 C.F.R. §41.31(b)(2) (1999). Congress mentioned learning as a major life activity in the Committee Reports. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485(III), at 28, *reprinted in* 1990 U.S.C.A.N. 267, 451.

427. See *Finical v. Collections Unlimited Inc.*, 65 F.Supp.2d 1032 (D. Ariz. 1999).

428. See *Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69, 80 (2nd Cir. 2000).

(ii) The Effect of the Supreme Court’s Definition of “Regarded As” Having a Disability on TANF Clients

The “regarded as” theory of the ADA disability definition may prove less useful to TANF applicants and recipients than the “actual” disability theory, although this will largely depend on the nature of the discrimination. If individuals with particular conditions are routed into particular types of training programs based on assumptions about their abilities, a “regarded as” theory should apply. It should also apply when programs treat people with particular conditions less favorably than others because of myths, fears, and stereotypes.<sup>429</sup>

(iii) The Effect of the Supreme Court’s Definition of “Record Of” Having a Disability on TANF Clients

The “record of” prong may also prove less useful in the TANF context than the “actual disability” theory, because so many TANF applicants and recipients have undiagnosed disabilities, existing records of other agencies will rarely have the type of information needed to establish a record of a substantially limiting impairment. Even under broad interpretations of the “record of” theory, it may be difficult to show that a prior acute phase was sufficiently long and limiting to constitute a disability. If individuals are being routed into low-level programs by TANF agencies because programs are aware of individuals’ prior disabilities and are making assumptions about people’s current abilities based on this knowledge, the “record of” theory of coverage should be useful.

(iv) General Considerations When Using ADA Definition of Disability on Behalf of TANF Clients

Wherever advocates seek to use the ADA on behalf of TANF applicants and recipients, several points are crucial.

Not every person with a functional limitation will be an “individual with a disability” under the ADA.<sup>430</sup> To be protected by the ADA, the substantial limitation must be caused by a physical or mental impairment. Many people who have difficulty reading have learning disabilities or mild mental retardation, but some do not. Only the former is protected under the ADA. Difficulties with concentration, stress, agitation, and difficulty navigating the welfare system may be, but are not necessarily, symptoms of disabilities. In many instances these symptoms and behaviors suggest the need for screening and assessment to determine whether the individual has a disability. But alone, they are not conclusive evidence that an individual has a disability protected by the ADA.

In addition, despite numerous studies documenting that many people in public assistance programs have disabilities, none of these reports define disability the same way as the ADA or *Sutton*. As a result, these studies do not necessarily reflect the percentage of TANF applicants and recipients with disabilities covered by the ADA.

With a few exceptions, each TANF program is free under PRWORA to create its own exceptions to work requirements, time limits, sanctions, and other program requirements, and many have done so for at least some individuals with disabilities.<sup>431</sup> TANF programs, however,

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429. *See* Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 737 (9th Cir. 1999).

430. *Cf.*, Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319, 326 (N.Y. App. Div. 1st 1999) (challenging placement of people with disabilities into public assistance jobs incompatible with their disabilities where the court decertified the plaintiff class on the basis that not all individuals who were “employable with limitations” affected by work experience requirements were people with disabilities under the ADA).

431. *See* THE URBAN INSTITUTE, STATE WELFARE-TO-WORK POLICIES FOR PEOPLE WITH DISABILITIES: CHANGES

rarely if ever use the ADA definition of disability when defining the category of individuals entitled to these exceptions. For example, California TANF program (CalWORKS) exempts from work requirements individuals who provide medical proof of a disability that will last for more than 30 days and “significantly impair[] the recipient’s ability to be regularly employed or participate in welfare-to-work activities, provided that the individual is actively seeking appropriate medical treatment.”<sup>432</sup> The New York TANF program exempts from work requirements individuals who are “disabled or incapacitated” as defined by the welfare agency or a private doctor referred by the agency<sup>433</sup> and those who are “ill or injured to the extent that he/she is unable to engage in work for up to three months as verified by medical evidence.”<sup>434</sup> None of these definitions are identical to the ADA definition of disability. Some programs have no formal definition of disability for those eligible for exceptions based on physical or mental conditions because they do not differentiate between people with disabilities and people in other hard-to-serve populations.<sup>435</sup> This means the population of individuals with physical and mental conditions eligible for exceptions to TANF requirements and people covered under the ADA will not completely overlap. As a result, some individuals entitled to work exemptions and other exceptions to program requirements under state law will not be entitled to these exceptions as reasonable modifications under the ADA. In addition, some individuals who are entitled to these exceptions as reasonable modifications under the ADA will not be entitled to them under state law, in which case it may be necessary to rely on the ADA in advocacy efforts.

## CHAPTER 6: QUALIFIED INDIVIDUAL WITH A DISABILITY

### *A. In General*

Title II prohibits discrimination against a “qualified individual with a disability,”<sup>436</sup> which is defined as “an individual 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, or meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>437</sup> Two things are noteworthy about this definition. First, some of the substantive prohibitions of Title II, like the reasonable modification requirement, are incorporated into the definition of who is protected under Title II. As a result, many Title II cases are decided on the basis that individuals do not fall within the class of people protected by Title II when, in fact, courts are considering the merits of the discrimination claim. Second, many of the core Title II concepts are interrelated. As a result, a court’s application of any one of these concepts in a case will often decide the entire case.

Congress used the phrase “qualified individual with a disability,” in Title II, instead of “otherwise qualified individual with a disability,” the language used in Section 504 of the Rehabilitation Act,<sup>438</sup> for a reason.<sup>439</sup> The purpose of both requirements is to make clear that the physical effects of a person’s disability may be taken into account when determining whether an individual can meet essential eligibility requirements of a program and whether the individual

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SINCE WELFARE REFORM 8 (October 1998) [hereinafter OCTOBER 1998 URBAN INSTITUTE REPORT], available at <http://www.urban.org/welfare/we12work.pdf>.

432. See e.g. Cal. Welf. & Inst. Code § 11320.3(b)(3)(A) (West 2000).

433. See N.Y. Comp. Codes R. & Regs. tit.12 § 1300.2 (b)(4) (1999).

434. N.Y. Comp. Codes R. & Regs. tit.12 § 1300.2(b)(1) (1999).

435. See OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at 8.

436. 42 U.S.C.A. § 12132 (West 2000).

437. See 42 U.S.C.A. § 12131(2) (West 2000).

438. 29 U.S.C.A. § 794(a) (West 2000).

439. See S. REP. NO. 101-116, at 44-45 (1989); H.R. REP. NO. 101-485(II), at 85 (1990), reprinted in U.S.C.A.N. 267, 368.

poses a significant risk to others.<sup>440</sup> To use a classic example from the employment area, it would not be discriminatory to refuse to hire a person who is blind for a position as a bus driver. Seeing is obviously an essential eligibility requirement for driving, and a person who is blind cannot meet that requirement or perform the job without posing a significant risk to others.

Some courts, however, have interpreted the “otherwise qualified” language of Section 504 in a manner that defeats many other types of discrimination claims. In *Southeastern Community College v. Davis*,<sup>441</sup> an early Section 504 case involving an deaf applicant to nursing school, the Supreme Court held that “an otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>442</sup> The Court also made clear, however, that some program requirements were not essential and deprived qualified individuals with disabilities the opportunity to participate, and in those cases it would be discriminatory to refuse to make reasonable modifications to program requirements.<sup>443</sup> Nevertheless, some courts have interpreted the “in spite of” language in *Davis* literally, holding, for example, that Section 504 does not apply to or prohibit discrimination in programs designed specifically for individuals with disabilities, because in such cases plaintiffs are seeking services because of a disability, not “in spite of” it.<sup>444</sup> Despite the use of different language in Title II, some courts have interpreted Title II narrowly.<sup>445</sup> When necessary, advocates should argue that Title II should not be interpreted in this restrictive manner and point to the difference in the language of the two statutes.

Title II makes clear that an individual is a “qualified individual” even if a reasonable modification is needed to meet program eligibility requirements. The determination of whether an individual is qualified must be made *after* the effect of any possible reasonable modifications are considered. For example, if a program requires application for services be filled out in person at a program office and an individual has a mobility impairment that prevents her from traveling to that office to fill out the application, the question of whether the individual is qualified for services can only be made after she is provided with a reasonable modification of that rule, such as allowing her to complete an application over the telephone, or through the mail, or allowing another person to travel to the office to fill out the application on her behalf. The fact that she cannot fulfill that requirement does not make her unqualified under Title II for the program to which she is applying.

Title II Interpretive Guidance states that people who pose “a significant risk to others will not be ‘qualified,’ if reasonable modifications to the public entity’s policies, practices or procedures will not eliminate the risk.”<sup>446</sup> Title II regulations do not contain this exception, but Titles I and III of the ADA both contain exceptions for individuals who pose a “direct threat,”<sup>447</sup> and the Department of Justice (DOJ) assumes that a similar exception applies to Title II. According to DOJ, the determination that an individual poses a direct threat must be

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440. See H.R. REP. NO. 101-485(IV), at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 527.

441. See 442 U.S. 397 (1979).

442. 442 U.S. at 406.

443. See *id.* at 412-13.

444. See, e.g., *Doe v. Pfrommer*, 148 F.3d 73 (2d Cir. 1998); *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116 (7th Cir. 1997); *Johnson v. Thompson*, 971 F.2d 1487 (10th Cir. 1992); *United States v. Univ. Hosp. State Univ. of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984). The more reasoned approach, taken in cases such as *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d Cir. 1995), is that discrimination on the basis of disability is actionable under Section 504 and the relevant focus is the reason why an individual was treated less favorable than others, not the nature of the program or service. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), a majority of the Supreme Court rejected the view that the ADA does not reach discrimination in programs designed specifically for people with disabilities. See *infra* Part II.10.B, C.

445. See, e.g., *Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994); *Aughe v. Shalala*, 885 F. Supp. 1428 (W.D. Wash. 1995).

446. 28 C.F.R. § 35.104 (1999). See also ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II 2.8000 (“[A]n individual who poses a direct threat to the health and safety of others will not be ‘qualified’”).

447. See 42 U.S.C.A. § 12113(b) (West 2000); 42 U.S.C.A. § 12182(a)(B)(3) (West 2000).

individualized and based on current medical evidence. Further, it must consider the nature, duration, and severity of risk, the probability that the potential injury will occur, and whether reasonable modifications of policies, practices, and procedures can reduce or eliminate the risk.<sup>448</sup> Courts have applied the “direct threat” concept in Title II cases.<sup>449</sup>

Program requirements are not necessarily essential just because a state or local government program says they are. In the words of one court in a Section 504 employment discrimination case, defendants cannot “merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee unqualified. The district court must look behind the qualification. To do otherwise reduces the term ‘otherwise qualified’ and any arbitrary set of requirements to a tautology.”<sup>450</sup>

The DOJ has made clear in Interpretive Guidance that the essential eligibility requirements for many state and local government programs are minimal, as when the nature of the program or service is to provide information to the public. But essential eligibility requirements will be more complex where questions of safety are involved.<sup>451</sup> There are a number of cases in which the essential eligibility requirements for Title II programs have been held to be minimal, and thereby enabled plaintiffs to pursue ADA claims and obtain reasonable modifications.<sup>452</sup>

Many Title II cases turn on the definition of “qualified individual with a disability.” However, courts have reached opposite conclusions in cases with similar facts about whether particular program requirements were essential. For example, in *Howard v. Department of Public Welfare*,<sup>453</sup> children with learning and other disabilities challenged a provision in a state’s AFDC program that provided benefits to children who were 18 years old only when they were full-time students in secondary school or in an equivalent program and were expected to graduate by age 19. Plaintiffs were not expected to graduate before their 19th birthdays because they had repeated grades at school for reasons related to their disabilities. The Supreme Court of Vermont held that plaintiffs were “qualified individuals” who were entitled to continue receiving AFDC benefits until age 19 as a reasonable modification of the rule.<sup>454</sup> The court reasoned that plaintiffs were qualified because they met all program criteria except the expected graduation date, which had a “particular exclusionary effect” on and “screened out” children with disabilities, and was not necessary to provide the benefits.<sup>455</sup> The court gave several additional reasons for its ruling, including: federal law did not prohibit states from providing benefits to 18 year olds who were not expected to graduate by age 19, but rather prohibited using federal funds for this purpose;<sup>456</sup> the defendant had not put forth evidence that that HHS, the federal agency administering AFDC, was not willing to make reasonable modifications to its own rule; and,

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448. See ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II 2.8000.

449. See *e.g.* Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735-37 (9th Cir. 1999) (holding that the significant risk test, otherwise known as the direct threat test, must be applied when determining whether plaintiffs are entitled to the ADA’s protections).

450. Pandazides v. Virginia Bd. of Educ., 946 F.2d 345, 349 (4th Cir. 1991), *on remand*, 804 F. Supp. 794 (E.D. Va. 1992), *rev’d on other grounds*, 13 F.3d 823 (4th Cir. 1994).

451. See 28 C.F.R. § 35.104 (1999).

452. See *Heather K. v. City of Mallard*, 887 F. Supp. 1249, 1262 (N.D. Iowa, 1995) (essential eligibility requirements for receiving services from a city were being present in the city and seeking to use services); *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F. Supp. 986, 990 (S.D. Fla. 1994) (essential eligibility requirement for city recreation programs was requesting services from the program, and it was irrelevant that a child with a disability may not be able to play each of the sports included in the program); *Tugg v. Towey*, 864 F. Supp. 1201, 1205 (S. D. Fla. 1994) (individuals are qualified for county mental health program because they reside in the county and are eligible to receive mental health services); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1368 (D. Neb. 1993) (essential eligibility requirements for university housing were admission to university and application for housing).

453. 655 A.2d 1102 (Vt. 1994).

454. See *id.* at 1110.

455. See *id.* at 1107.

456. See *id.* at 1107-08.

most importantly, that the purpose of AFDC was to support needy children and this purpose would not be fundamentally altered by providing benefits to 18 year olds with disabilities.<sup>457</sup>

In contrast, a federal district court in *Aughe v. Shalala*<sup>458</sup> came to the opposite conclusion on identical facts. The court held that plaintiffs were not qualified individuals because the graduation requirement was essential. The court reasoned that the purpose of AFDC was to help needy children and their families, and the exclusion of those 18 and over allowed programs to maintain their “fiscal viability.”<sup>459</sup>

### B. *Qualified Individual with a Disability in TANF Programs*

The question of whether individuals with disabilities are “qualified individuals” under Title II will depend on which aspect of the TANF program is at issue in a discrimination claim. If the application process has a discriminatory effect on people with disabilities, individuals are not required to show that they ultimately qualify for TANF benefits in order to challenge discrimination in the application process. If a benefits program gives anyone the right to fill out an application and receive an eligibility determination, the only essential requirement is the desire to apply for services.<sup>460</sup> The fact that the individual may ultimately be found to be ineligible for those services is irrelevant.<sup>461</sup> ADA challenges have been brought to application and screening processes of state and local government programs, and the question of whether plaintiffs were qualified by the ADA was not an issue.<sup>462</sup>

In other types of ADA cases involving TANF programs, demonstrating that an individual is a qualified individual with a disability may be more onerous. For example, if a particular vocational training program requires participants to have a high school diploma or equivalent and an individual with a disability has neither, the individual is not a “qualified individual with a disability,” provided this requirement is essential for the participating in and benefiting from the training program.<sup>463</sup>

The question of whether clients receiving TANF are “qualified individuals” with disabilities is likely to arise under TANF in the context of work requirements, benefits, and sanctions. For example, states may argue that plaintiffs with disabilities who cannot satisfy work requirements are not “qualified individuals” who are entitled to benefits, or that individuals who have been

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457. *See id.*

458. 885 F. Supp. 1428 (W.D. Wash. 1995).

459. *See id.* at 1431. Chapter 10 contains an extensive discussion of the Title II’s “reasonable modification” requirement, which is the flip side of the “qualified individual” and “essential eligibility requirements” concepts.

460. *Cf. Concerned Parents to Preserve Dreher Park Cir.*, 846 F. Supp. at 990 (the only essential eligibility requirement of a city’s recreational program is the request for services).

461. Unfortunately, the OCR TANF Guidance is less clear than it might be on this issue. It states that an individual is qualified if he or she “meets the essential eligibility requirements for receipt of services or participation in the program or activity.” Elsewhere however, it makes clear that the ADA applies to the application process. *See* OCR TANF GUIDANCE, *supra* note 242, Technical Assistance § V.

462. *See, e.g., Hunsaker v. County of Contra Costa*, No. C-95-1082 MMC, 1997 WL 835164 (N.D. Cal. July 31, 1997) (challenge to substance abuse screening form used in application process for public assistance), *rev’d on other grounds*, 149 F.3d 1041 (9th Cir. 1998); *Henrietta D. v. Giuliani*, No. 95-CV-0641-SJ, 1996 U.S. Dist. LEXIS 22373 (E.D.N.Y. Oct. 25, 1996) (challenge to operation of program within public assistance agency that assists people with HIV in applying for benefits), *later op.*, 2000 U.S. Dist. LEXIS 13382 (E.D.N.Y. 2000). In addition, numerous cases have challenged bar application requirements. *See, e.g., Clark v. Virginia Bd. of Law Exam’rs*, 880 F. Supp. 430 (E.D. Va. 1995); *Applicants v. Texas State Bd. of Bar Exam’rs*, No. 93-CA-74055, 1994 U.S. Dist. LEXIS 21290 (W.D. Tex. Oct. 10, 1994); *Ellen S. v. Florida Bd. of Bar Exam’rs*, 859 F. Supp. 1489 (S.D. Fla. 1994).

463. Otherwise, the diploma requirement would be an eligibility criterion that screens out or tends to screen out people with particular disabilities, such as learning and cognitive disabilities, from the full and equal enjoyment of the program under 28 C.F.R. § 35.130(b)(8) (1998).

sanctioned for such non-compliance are not “qualified individuals” entitled to extensions of benefits beyond a time limit.<sup>464</sup> These topics are discussed further in Chapters 16 and 17.

## CHAPTER 7: DISCRIMINATION BY REASON OF SUCH DISABILITY

### A. In General

Title II prohibits discrimination “by reason of such disability.”<sup>465</sup> This prohibition covers a wide range of actions, including: intentional and unintentional discrimination;<sup>466</sup> less favorable treatment of one individual because of disability;<sup>467</sup> and less favorable treatment of a group of people with all,<sup>468</sup> some,<sup>469</sup> or one particular<sup>470</sup> disability. It also includes the failure to provide reasonable modifications,<sup>471</sup> and a failure to comply with all of the other requirements in the Title II regulations. Some courts have held that it also prohibits discrimination *between* disabilities, that is, less favorable treatment of a group of individuals with one disability as compared with those with other disabilities,<sup>472</sup> and a majority of the Supreme Court agrees.<sup>473</sup> Some courts have held that it prohibits discrimination on the basis of severity of disability,<sup>474</sup> which often takes the form of giving less favorable treatment to individuals with severe disabilities compared to those that are less severe. It includes both explicit disparate treatment on the basis of disability,<sup>475</sup> and, as discussed in detail below, rules and requirements that do not refer to disability at all, being “neutral on their face,” but nonetheless have a disproportionately negative effect on people with disabilities. One example of a facially neutral rule with a discriminatory effect on people with disabilities is a rule requiring people to show a drivers’ license as the only accepted means of

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464. See *infra* Parts III.16 and III.17.

465. 42 U.S.C.A. § 12132 (West 2000).

466. See *Alexander v. Choate*, 469 U.S. 287, 298 (1985) (Section 504 case).

467. See, e.g., *Blesdoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 525 U.S. 826 (1998) (individual with knee injury can sue a public employer under Title II).

468. See, e.g., *Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996) (state Medicaid managed care program that excluded people with blindness and other disabilities discriminated against people with disabilities), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999); *Concerned Parents to Preserve Dreher Park Ctr. v. City of West Palm Beach*, 884 F. Supp. 487 (S.D. Fla. 1994) (elimination of recreational programs for people with mental and physical disabilities but not other recreational programs was discriminatory).

469. See, e.g., *Lightbourn v. Garza*, 928 F. Supp. 711 (W.D. Tex. 1996), *rev’d on other grounds*, 118 F.3d 421 (5th Cir.), *vacated*, 127 F.3d 33 (5th Cir. 1997) (challenging discrimination and failure to accommodate people with blindness and mobility impairments in voting process).

470. See, e.g., *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D. N.Y. 1995) (failure to accommodate hearing impaired inmates violated Title II); *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (failure to provide mental health counselors proficient in sign language for people with hearing impairments violated Title II).

471. See 28 C.F.R. § 35.130(b)(7) (1999).

472. See, e.g., *King v. Weil*, No. 92-M-2409 (D. Colo. June 26, 1996) (policy of excluding people with physical and developmental disabilities from Medicaid home and community-based waiver program violates Title II); *Bosteder v. Soliz*, No. 93-2-01817-4 (Sup. Ct. Wash. Feb. 3, 1994) (policy of refusing to provide Medicaid personal care to individuals with psychiatric disabilities violates Title II); *but see*, *Flight v. Gloeckler*, 68 F.3d 61 (2d Cir. 1995) (Section 504 case).

473. See *Olmstead v. L.C.*, 527 U.S. 581, 602 (1999). Four Justices explicitly endorsed this position and a fifth implicitly did by supporting affirmation of the Court of Appeals opinion.

474. See, e.g., *Plummer v. Branstad*, 731 F.2d 574 (8th Cir. 1992); *Clark v. Cohen*, 613 F. Supp. 684, 692 (E.D. Pa. 1985), *aff’d on other grounds*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986); *Messier v. Southbury Training Sch.*, 1999 U.S. Dist. LEXIS 1479, at \*10 (D. Conn. Jan. 5, 1999); *Homeward Bound, Inc. v. Hissom Mem’l Ctr.*, 1987 U.S. Dist. LEXIS 16866 (N.D. Okla. July 24, 1987); *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993).

475. See, e.g., *Howard v. Dep’t of Soc. Welfare*, 655 A.2d 1102 (Vt. 1994); *Bingham v. Oregon Sch. Activities Ass’n*, 37 F. Supp.2d 1189 (D. Or. 1999). Disparate treatment is not the same thing as intentional discrimination. Some courts, however, appear to confuse these concepts. See, e.g., *Harding v. Winn Dixie Stores, Inc.*, 907 F. Supp. 386 (M.D. Fla. 1995).

identification. This would have a disparate impact on people with particular conditions such as visual impairments, some musculoskeletal conditions, and other disabilities who are far less likely as a group to have drivers' licenses.

#### (i) Disparate Treatment Under Title II

Disparate treatment occurs when a program refers to one or more disabilities explicitly and treats people with these disabilities less favorably in some way. A rule excluding all blind people from jury service is one example.<sup>476</sup> A state Medicaid managed care program that explicitly excludes people with disabilities from participation is another.<sup>477</sup>

One might expect that overt unfavorable disparate treatment on the basis of disability would be easy to challenge. However, there are five common (often interrelated) obstacles to disparate treatment claims.

First, defendants sometimes argue that the ADA and Section 504 do not reach differential treatment *between people with different disabilities* and only prohibit distinctions made *between people with disabilities and those without them*.<sup>478</sup> Most of these arguments stem from a broad interpretation of *Traynor v. Turnage*,<sup>479</sup> a case in which the Supreme Court stated in dicta that the "central purpose" of Section 504 is "to assure that handicapped individuals receive even-handed treatment in relation to non-handicapped individuals."<sup>480</sup> This argument has suffered a serious blow as a result of *Olmstead v. L.C.*,<sup>481</sup> a Title II case in which four Justices explicitly rejected a similar argument, stating "we are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA,"<sup>482</sup> and a fifth Justice implicitly rejected it.<sup>483</sup> The plurality noted that Title VII has been held by the Court to prohibit discrimination "because of" sex, even when the person who discriminated and the plaintiff are the same sex,<sup>484</sup> and the Age Discrimination in Employment Act has been held to prohibit discrimination "because of" age when the person hired instead of the plaintiff was also in the protected class.<sup>485</sup> Thus there is a strong argument that a majority of the Court has already embraced the view that in ADA cases, it is the reason for the treatment and not the identity of a comparison group that is relevant.

Second, the argument is sometimes made that agencies are allowed to provide specialized services that people with particular disabilities need and have no obligation to provide other types of specialized services that people with every other disability need.<sup>486</sup> Medical specialists, for example, are allowed to specialize in treating particular types of disorders and are not discriminating against people with other types of disorders that are outside their area of expertise if they refer them elsewhere.<sup>487</sup> But when a program does not provide specialized services that people need because of their particular disabilities, it is not accurate to characterize the service as

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476. See *Galloway v. Superior Ct. of the District of Columbia*, 816 F. Supp. 12, 19 (D.C. 1993).

477. See, e.g., *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 773 (D. Haw. 1996); see also *King v. Weil*, No. 92-M-2409 (D. Colo. June 26, 1996) (exclusion of people with both physical and developmental disabilities from Medicaid Home and Community-Based Waiver program violates Title II).

478. See, e.g., *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998); *Rogers v. Dep't of Health and Env't'l Control*, 174 F.3d 431 (4th Cir. 1999); *Ulrich v. Senior and Disabled Servs. Div'n*, 989 P.2d 48 (Or. Ct. App. 1999).

479. *Traynor v. Turnage*, 485 U.S. 535 (1988).

480. *Id.* at 548; see also *Vaughn v. Sullivan*, 83 F.3d 907, 913 (8th Cir. 1996).

481. 527 U.S. 581 (1999).

482. *Id.* at 598 n.10.

483. *Id.* at 607.

484. See *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

485. See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

486. See, e.g., *Easley v. Snider*, 36 F.3d 297, 301 (3d Cir. 1994); *Doe v. Colautti*, 592 F.2d 704, 708-09 (3rd Cir. 1979).

487. See 28 C.F.R. § 36.302(b)(2) (1999) (Title III regulations); 45 C.F.R. § 84.4 (Section 504 regulations for HHS); 45 C.F.R. pt. 84 app. A subpart F § 84.23 (1999) (interpretive guidance to HHS Section 504 regulations).

“specialized.” It is the qualitative nature, and not the amount of services that is relevant to the “specialized services” exception.

Third, defendants argue, relying on *Traynor*, that “there is nothing in the Rehabilitation Act that requires any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.”<sup>488</sup> Sometimes the rationale for this argument is that the agency had no obligation to provide the service at all or no obligation to provide the service in any particular amount, and thus it isn’t discriminatory to provide the service in a manner that leaves some or all people with disabilities with less than others. One court reasoned that since a program would be allowed to give *all* of the participants less, it could not possibly be discriminatory to give people with some disabilities more than they give to others, because Section 504 “cannot forbid partial limits that leave some disabled individuals better off and the remainder no worse off.” Holding otherwise, according to the court, would create an incentive for programs to provide less to everyone.<sup>489</sup> Sometimes courts also simply rely on *Traynor* as support for this argument without further justification.<sup>490</sup>

Advocates can argue in response that under the ADA and Section 504, regardless of whether a program is an entitlement, once an agency decides to provide a program or service, it must do so in a way that does not discriminate against people with disabilities.<sup>491</sup> Moreover, it is a poverty of imagination to accept the premise that there are only two ways to allocate services - one that gives everyone the same amount and another that gives only some people with disabilities more than others.

*Traynor*, moreover, is factually distinguishable from most ADA and Section 504 cases. *Traynor* was a Section 504 challenge to a Veterans Administration (VA) regulation that gave an extension of time to apply for a VA benefit to most people with disabilities, but excluded some individuals with alcoholism from the extension.<sup>492</sup> Thus, the plaintiffs tried to use the Rehabilitation Act to challenge the design of a federal program permitted by another federal law. The Court’s analysis was based on the relationship between the Rehabilitation Act and the other federal law, and the fact that Congress amended the Rehabilitation Act to make it applicable to federal agencies shortly after the VA regulation in question was promulgated, but said nothing about the VA regulation at the time. As “repeals by implication are disfavored”<sup>493</sup> and the Rehabilitation Act would not be “rendered meaningless” because the VA regulation and the Act were not in direct conflict, the Court reasoned that it would not be appropriate to assume Congress intended Section 504 to invalidate the VA regulation.<sup>494</sup> In explaining why there was no direct conflict between the two statutes, the Court noted that the VA policy was not discriminatory because, by granting people with most disabilities extensions of time that were not available to others, it was on the whole more favorable to people with disabilities than to others.<sup>495</sup> As most Rehabilitation Act claims do not involve challenges to federal regulations, and the ADA does not even apply to federal agencies or their programs, the potential conflict between the Rehabilitation Act and another federal law will not exist in most ADA and Section 504 claims.

Fourth, defendants sometimes argue that Section 504 and the ADA do not reach the design of services but only whether “equal access” to the service was provided. This argument has been

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488. *Traynor*, 485 U.S. at 549. For cases adopting this rationale, see *Moddero v. King*, 82 F.3d 1059 (D. C. Cir. 1996); *Ulrich v. Senior and Disabled Dep’t Servs. Div’n*, 989 P.2d 48, 51 (Or. Ct. App. 1999).

489. See *Moddero*, 82 F.3d at 1062.

490. See, e.g., *Easley*, 36 F.3d at 305; *Cramer v. Chiles*, 885 F. Supp. 1545, 1552-53 (M.D. Fla. 1995), *aff’d on other grounds*, 117 F.3d 1258 (11th Cir. 1997).

491. See *Niece v. Fitzner*, 922 F. Supp. 1208, 1218 (1996).

492. See 485 U.S. 535. See *infra* Part I.2.E.i for an additional discussion of *Traynor*.

493. See *Traynor*, 485 U.S. at 547.

494. See *id.* at 546-548.

495. See *id.* at 548.

made in a number of cases challenging insurance policies that exclude or limit coverage for particular conditions while providing coverage for others. A number of courts have accepted this argument,<sup>496</sup> though others have not.<sup>497</sup> Applied to TANF, this would mean TANF programs could provide 30 months of cash assistance to most TANF recipients but only 15 months of cash assistance to TANF recipients with disabilities, or TANF recipients with particular disabilities such as HIV or psychiatric disabilities. Given the nature of insurance and the fact that it is treated somewhat differently than other employee benefits in the ADA,<sup>498</sup> this type of argument probably is far less likely to be made or accepted in public benefits cases.

Finally, defendants argue, and some courts agree, that even when people with disabilities have been given less favorable treatment than others, there has been no discrimination because the services provided to people with disabilities and those provided to others are two separate programs, and comparison is therefore not appropriate.<sup>499</sup> In *Does 1-5 v. Chandler*,<sup>500</sup> the Ninth Circuit held that California's general assistance benefits for dependent children was one program and general assistance benefits to people with disabilities was another, and consequently that there was no discrimination even though people with disabilities were entitled to only one year of benefits while dependent children were entitled to unlimited benefits (as long as they remained dependent children). In *Weaver v. New Mexico Human Services Department*,<sup>501</sup> a case with identical facts, the Supreme Court of New Mexico held that general assistance to dependent children and people with disabilities were one program, and the disparity in benefits given to these two populations discriminated against people with disabilities.<sup>502</sup>

## (ii) Disparate Impact Under Title II

Because there are an infinite number of ways that program rules and requirements and program design can have a disparate impact on people with disabilities, disparate impact discrimination is far more common than disparate treatment. Understanding the concept, its application to people with disabilities, and its limits, is therefore essential.

Title II prohibits discrimination "by reason of such disability."<sup>503</sup> This language is different from the language used in Section 504, which includes the phrase "solely by reason of ... disability."<sup>504</sup> Congress employed the phrase "by reason of such disability," which is used in the Section 504 regulations of some federal agencies, and rejected the "solely by reason of" language

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496. See, e.g., *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 562 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000); *Ford v. Schering Plough Corp.*, 145 F.3d 601, 612-614 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996), *cert. denied*, 119 S. Ct. 850 (1999); *Brewster v. Cooley Assocs.*, No. 97-CV-00058, 1997 U.S. Dist. LEXIS 21434, at \*1 (D.N.M. Nov. 6, 1997).

497. See, e.g., *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 425-26 (D.N.H. Nov. 6, 1996); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 305-06 (N.D. Calif. 1997); *Schroeder v. Connecticut Gen. Life Ins. Co.*, 1994 U.S. Dist. LEXIS 21298 (D. Colo. Apr. 22, 1999).

498. The ADA permits differential treatment in insurance on the basis of disability when there is an actuarial basis for this differential treatment. See 42 U.S.C.A. § 12201(c) (West 2000).

499. See, e.g., *Doe v. Colautti*, 592 F.2d 704, 708-709 (1979) (holding that Medicaid coverage for physical illness and mental illness were two separate programs, and it was not discriminatory to provide unlimited coverage for private inpatient medical treatment but only 60 days of coverage for private inpatient mental health treatment as long as people with mental disabilities had equal access to private hospitals for treatment of physical illness); *Rodriguez v. DeBuono*, 197 F.3d 611, 618 (1999), *cert. denied*, 2000 US LEXIS 5735 (U.S. Oct. 2, 2000) (in a challenge to a Medicaid personal care program that provides safety monitoring for physical disabilities but not mental disabilities, the court defines the service sought by plaintiffs as "independent safety monitoring," *i.e.*, safety monitoring without other personal care services, and held that there was no discrimination because this service wasn't provided to anyone).

500. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996).

501. *Weaver v. New Mexico Human. Servs.*, 945 P.2d 70 (N.M. 1997).

502. Program definition is discussed further in Part II.8.

503. 42 U.S.C.A. § 12132 (West 2000).

504. 29 U.S.C.A. § 794(a) (West 2000).

of Section 504, to prevent courts from interpreting Title II too narrowly. Some courts have interpreted the “solely by reason of” language in Section 504 narrowly to exclude some types of disparate impact discrimination from the reach of Section 504.<sup>505</sup> As Congress deliberately used different language in Title II, advocates should argue that the restrictive Section 504 decisions on this issue do not apply to ADA claims.<sup>506</sup> The ADA legislative history notes that a literal interpretation of the “solely by reason of” language would lead to “absurd results,”<sup>507</sup> such as excluding from the reach of Section 504 discrimination based on two impermissible bases (i.e., disability and race).

Title II regulations unambiguously prohibit disparate impact discrimination. The prohibitions on using criteria or methods of administration “that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability” or have the “purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities”<sup>508</sup> plainly bring disparate impact discrimination within the reach of Title II. Many other provisions of the Title II regulations, such as the prohibition on giving qualified individuals with disabilities an opportunity to participate in programs and services “that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others,”<sup>509</sup> applies to both disparate treatment and disparate impact.

The legislative history of Title II refers to *Alexander v. Choate*,<sup>510</sup> a Section 504 case in which the Supreme Court “assume[d] without deciding” that program design features having a disparate impact on people with disabilities could violate Section 504 of the Rehabilitation Act.<sup>511</sup> The legislative history of the ADA states that Congress intended to incorporate the *Choate* analysis into the ADA.<sup>512</sup> Advocates should therefore have a detailed understanding of *Choate*.

In *Choate*, plaintiffs with disabilities challenged a reduction in coverage for inpatient care under Tennessee’s Medicaid program, which reduced coverage from 20 to 14 days per year. Plaintiffs argued that the reduction had an adverse effect on people with disabilities who on the

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505. See, e.g., *Sandison v. Michigan High Sch. Athletic Ass’n. Inc.*, 64 F.3d 1026, 1033 (6th Cir. 1995) (holding that rule prohibiting students from participating in inter-school competitive sports after they reached age 19 did not discriminate “solely on the basis of . . . disability” against learning disabled students who attended school to a later age as a result of their disabilities because the limitation was on the basis of age, not disability, and learning disabled students could participate until age 19); *Flight v. Gloeckler*, 68 F.3d 61 (2d. Cir. 1995) (holding that vocational rehabilitation agency rule providing a higher reimbursement for van modifications to people with disabilities who drove vans than to people with disabilities who were passengers in vans did not discriminate “solely by reason of . . . disability” because the rule did not classify on the basis of diagnosis but on the basis of the functional effects of disability); *Rhodes v. Ohio High Sch. Athletic Ass’n*, 939 F. Supp. 584, 589 (N.D. Ohio 1996) (holding that rule prohibiting students from participating in inter-school competitive sports for more than 8 consecutive semesters did not discriminate “solely on the basis of disability” against learning disabled students who attended school until a later age due to their disabilities because the rule was neutral regarding disability and did not completely exclude students with learning disabilities from participation); *Sadler v. Univ. Interscholastic League*, No. A-91-CA 836, 1991 WL 633967 (W.D. Tex. Nov. 25, 1991) (similar reasoning applied to rule prohibiting participation after the students turned 19).

506. Nevertheless, some courts have applied a similar narrow reading to Title II. See, e.g., *Doe v. Pfrommer*, 148 F.3d 73 (2d Cir. 1998); *Sandison*, 64 F.3d at 1035.

507. S. REP. NO. 101-116, at 44-45 (1989); see also H.R. REP. NO.101-485(II), at 85 (1990) reprinted in 1990 U.S.C.C.A.N. 267, 368.

508. 28 C.F.R. §§ 35.130(b)(3)(i), (ii) (1999).

509. 28 C.F.R. § 35.130(b)(1)(iii) (1999).

510. 469 U.S. 287.

511. *Id.* at 298.

512. See H.R. REP. NO. 101-485 (II), at 61, 84 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 367; see also S. REP. NO. 101-116, at 30, 44-45 (1989).

whole need more hospital care. The Court rejected this challenge, but indicated that some rules and requirements with a disparate impact can violate Section 504.<sup>513</sup>

The Court began its analysis by noting that when Congress enacted Section 504, it believed that much of the discrimination against people with disabilities was not the result “invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”<sup>514</sup> Moreover, the Court observed, many of the problems Congress sought to address in Section 504, such as eliminating architectural barriers, could not be addressed if Congress intended to reach only conduct motivated by discriminatory intent.<sup>515</sup>

But the Court rejected the idea that Section 504 reached *all* conduct with a disparate impact on people with disabilities. It reasoned that people with disabilities “typically are not similarly situated” to others and that such an interpretation “would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped,” which “could lead to a wholly unwieldy administrative and adjudicative burden,” and be “boundless.”<sup>516</sup> The Court compared this second type of standard to a requirement that federal grantees prepare “handicapped impact statements before any action was taken that affected the handicapped,” which it said there was no evidence Congress intended. Therefore, it reasoned, Section 504 must be interpreted to give effect to the statutory objectives of the Act and “the desire to keep Section 504 in manageable bounds,” so that neither goal “overshadows the other as to eclipse it.”<sup>517</sup> The Court also spoke of the need to “str[ike] a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs.”<sup>518</sup> The Court struck that balance in *Choate* by holding that under Section 504, an otherwise qualified handicapped individual must be provided with “meaningful access to the benefit that the grantee offers.”<sup>519</sup>

On the facts before it, the Court held that there was no violation of Section 504 because people with disabilities were not denied meaningful access to or excluded from the Medicaid program. Even though 27.4 % of people with disabilities who received Medicaid and used hospital care during a recent year needed more than 14 days of hospital care a year as compared with 7.8 % of Medicaid recipients without disabilities using such care,<sup>520</sup> the Court held that the 14 day inpatient limit did not deny meaningful access because:

(1) the coverage limit did not use criteria that have a “particular exclusionary effect” on people with disabilities.<sup>521</sup>

(2) the coverage limit was “neutral on its face” and did not distinguish between those whose coverage will be reduced and those whose coverage will not be on the basis of any test, judgment or trait that people with disabilities as a class are any less capable of meeting or less likely of having.<sup>522</sup>

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513. *See Choate*, 469 U.S. at 302.

514. *Id.* at 295.

515. *See id.* at 296-97.

516. *Id.* at 298-99.

517. *Id.*

518. *Id.* at 300.

519. *Id.* at 301.

520. *See id.* at 289.

521. *See id.* at 302.

522. *See id.*

(3) there was no evidence on the record that people with disabilities “will be unable to benefit meaningfully from the coverage they will receive under the 14 day rule.”<sup>523</sup> The Court noted that “[t]he record does not contain any suggestion that the illnesses uniquely associated with the handicapped or occurring with greater frequency among them cannot be effectively treated, at least in part, with fewer than 14 days’ coverage.”<sup>524</sup>

(4) the coverage limit would leave both people with disabilities and others with identical and effective services fully available for their use, with both classes of users subject to the same limitation.<sup>525</sup>

The Court in *Choate* also noted that the Medicaid statute contained no “guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs,”<sup>526</sup> and noted that the federal Medicaid statute gave states “substantial discretion to choose the proper mix of amount, scope and duration limitations on coverage, as long as care and services are provided in ‘the best interests of the recipients.’”<sup>527</sup>

Two other aspects of *Choate* are noteworthy. Although hospital users with disabilities were far more likely to need more hospital coverage than was provided to hospital users without disabilities, only 5 % of Medicaid recipients with disabilities needed more hospital coverage than was provided.<sup>528</sup> Presumably this was because the percentage of Medicaid recipients with disabilities who received any hospital care was small. The Supreme Court’s mention of these statistics may indicate that the Court was swayed in part by the fact that the overall percentage of people whose hospital care needs would not be fully met was small.

Few cases discuss the *Choate* “meaningful access” standard in detail. As a result, there is little case law on the question of when a barrier to access is sufficiently severe to constitute disparate impact discrimination. A complete exclusion of a class of people with disabilities from a program has been held to be a denial of meaningful access,<sup>529</sup> though it is not necessary to prove a denial of meaningful access.<sup>530</sup> A four-month exclusion from a program<sup>531</sup> and “substantially limit[ing]” choices as compared with others<sup>532</sup> have been held to constitute a denial of meaningful access. Few cases discuss statistical evidence.

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523. *Id.*

524. *Id.* at 302 n.22.

525. *See id.* at 302.

526. *See id.* at 303.

527. *Id.*

528. *See id.* at 303.

529. *See, e.g., Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996) (Medicaid managed care program that excluded people with blindness and other disabilities denied meaningful access), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999); *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (rule excluding individuals with personal attendants from participating in college roommate program violated Title II and Section 504); *Galloway v. Supreme Ct. of the Dist. of Columbia*, 816 F. Supp. 12, 19 (D.D.C. 1993) (rule excluding blind individuals from jury service violated Title II and Section 504). Although courts sometimes use the term “meaningful access” in cases challenging the complete exclusion of people with all or particular disabilities from programs and services, complete exclusion cases almost always involve disparate treatment, not disparate impact.

530. *See, e.g., Randolph v. Rodgers*, 170 F.3d 850 (8th Cir. 1999) (failure to provide sign language interpreter to hearing impaired prisoner denied equal access to prison disciplinary proceedings). *But cf. Slager v. Duncan*, 1997 U.S. Dist. LEXIS 12963 (D. Md. 1997), *aff’d*, 162 F.2d 1155 (4th Cir. 1998) (holding that speed bumps, which caused pain to individual with a spinal cord injury, but did not prevent him from using the streets entirely, did not deny him meaningful access to the streets).

531. *See Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir.1996) (state animal quarantine law discriminated against people who are blind and use guide dogs, by denying them meaningful access to state programs).

532. *See Oconomowoc Residential Programs v. City of Greenfield*, 23 F. Supp.2d 941, 954 (E.D. Wisc. 1998) (zoning law restricting placement of community residences for people with disabilities violated the ADA by severely limiting choices).

*Choate* is a mixed blessing, because although it makes clear that disparate impact discrimination is actionable under Section 504 (and by extension, the ADA), it also gives ample discretion to states in designing their programs as they see fit, particularly when federal law gives states substantial flexibility in program design. *Choate* is a benchmark for courts on disparate impact claims, so advocates should always consider the extent to which a potential claim differs factually from *Choate*. The greater the similarity, the more difficult it will be.

(iii) What Must Be Disparate, and How Disparate Must the Impact Be?

Many facially neutral policies negatively affect people with disabilities for reasons related to their disabilities and affect people without disabilities for other reasons. For example, a rule requiring people to fill out written forms to obtain services, coupled with a failure to provide help with these forms, will be a barrier to services to some people with learning disabilities, mental retardation, visual impairments, and other impairments, because these disabilities make reading, writing, and seeing difficult. This same rule will create a barrier to services to people without disabilities who have difficulty reading and writing for other reasons, such as inadequate education. This raises a number of critical questions. If the total number of people without disabilities who experience the rule as a barrier is the same or greater than the number affected for disability-related reasons, is there an valid ADA claim? Are comparison groups even necessary for ADA disparate impact claims? How relevant are numerical disparities in disparate impact claims? Can the nature of the impact on people with disabilities constitute disparate impact without regard to the number or percentage of people affected in a comparison group?

The answer is that the law is not consistent or clear. In *Choate*, the Court obviously treated the percentages of people with and without disabilities who were negatively affected by the coverage limit as relevant. However, not all of the four disparate impact criteria mentioned in *Choate* require a disparity in the number or percentage of people with and without disabilities. The third criterion focuses on whether the absolute amount of the benefit provided is meaningful, and the fourth focuses at least in part on the nature of the program restriction. Thus *Choate* suggests that some types of disparate impact do not require proof of a disparity in the number or percentage of people with and without disabilities that are adversely affected by a rule or requirement. The common sense meaning of the phrase “meaningful access” also suggests that it should be possible to show a denial of meaningful access without any consideration of the experiences of others.

Title II regulations, however, do not use the phrase “meaningful access,” but they prohibit programs from providing benefits, services or opportunities that are “not equal” to those provided to others, or which are not as effective in providing an equal opportunity to gain the same benefit or level of achievement as that provided to others.<sup>533</sup> A comparison group is obviously necessary for claims under these sections of the regulations. Very few courts have addressed the relationship between the “meaningful access” requirement of *Choate* and the requirements in the Title II regulations. A few have and have come to opposite conclusions.<sup>534</sup>

In fact, some courts do not discuss comparison groups in disparate impact cases at all. In *Crowder v. Kittigawa*, for example, the Ninth Circuit held that Hawaii’s 90 day animal quarantine law was discriminatory because of its exclusionary effect on people with disabilities who use

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533. See 28 C.F.R. §§ 35.130(b)(1)(ii), (iii) (1999).

534. In *Henrietta D. v. Giuliani*, 81 F. Supp.2d 425, 431-32 (E.D.N.Y. 2000), the court denied defendant’s motion for summary judgment, holding that meaningful access and equal access are two separate requirements, either one of which could give rise to Title II claim. In *Wright v. Giuliani*, No. 99-CV-10091 WHP, 2000 U.S. Dist. LEXIS 8322, at \*7 (E.D.N.Y. June 14, 2000), another case in the same court but before a different judge, the court suggested in denying a motion for a preliminary injunction that plaintiffs must prove that defendants failed to provide both meaningful and equal access. On appeal, the Second Circuit held that this was not an abuse of discretion, but neither rejected nor embraced the district court’s interpretation. See No. 00-7853, 2000 U.S. App. LEXIS 26796 (2d Cir. Sept. 25, 2000).

service animals without mentioning the number or percentage of people without disabilities who have animals who were also excluded from the state, or the number or percentage people with visual disabilities who do not use guide dogs and were not affected by the law. The court made only a vague reference to comparisons when it noted that the law imposed a burden on people with disabilities that was “different and greater” than for others.<sup>535</sup>

The nature of the harm caused by the discrimination also has an effect on the approach taken by courts. When the impact of discrimination is the complete exclusion of people with particular disabilities from a program, courts may believe there is less need to compare percentages of people with and without disabilities who are adversely affected by a rule or policy. In *Crowder*, for example, the result of the quarantine law was the complete exclusion of guide dog users from the state for three months. Moreover, it was beyond dispute that the quarantine law caused the exclusion, and that the exclusion was “by reason of” disability.

In other cases, courts may require a showing of a disproportionately negative impact on people with disabilities as compared with others as this is the only way to prove that the negative effect of the policy on people with disabilities is “by reason of” disability. In *Choate*, everyone was given the same number of days per year of Medicaid coverage for hospitalization, and the discrimination claim was based on the fact that, on the whole, people with disabilities had a greater need for hospitalization. Thus, disparities in hospital use between people with and without disabilities was the primary evidence that the rule had a disparate impact on people with disabilities. Even when a comparison group is required, advocates can argue that policies and practices that have an adverse impact on people with disabilities are not acceptable under the law just because they have an incidental affect on people without disabilities.<sup>536</sup>

Advocates have a strong argument that in some types of ADA claims, comparison groups should not be necessary. In claims involving the failure to provide reasonable modifications, for example, there should be no need for a comparison group, because the nature of the discrimination is that one or more individuals with disabilities were denied the right to something that is needed in order to have a meaningful or equal opportunity to participate in and benefit from the program or service. Therefore, advocates can argue that the focus of the inquiry should be on whether the modification sought is reasonable, not on a comparison between the treatment of or benefits for people with disabilities and others. Indeed, a plurality of the Supreme Court arguably embraced this approach in *Olmstead*, when it rejected the argument that the plaintiffs should be compared to a group of individuals without disabilities,<sup>537</sup> though it discussed comparison groups elsewhere in the opinion.<sup>538</sup> In addition, the failure to provide reasonable modifications was not the only ADA claim in *Olmstead*,<sup>539</sup> and the opinion does not clearly state which ADA claim the Court was addressing when it rejected the need for a comparison group.

At least one federal district court has embraced the view that comparisons to people without disabilities are not necessary in claims involving the failure to provide reasonable modifications.<sup>540</sup> However, in another case brought in the same circuit, the Court of Appeals held that it was not an abuse of discretion to deny a preliminary injunction to plaintiffs because

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535. See *Kitagwa*, 81 F.3d at 1484.

536. Cf. *McWright v. Alexander*, 982 F.2d 222, 229 (7th Cir. 1992) (in a Rehabilitation Act case challenging an employer’s child care policy that disadvantaged adoptive parents, court held that even though some people adopt for reasons other than disability, the “fit” between the rule’s criteria and disability were close enough to raise the possibility of discriminatory treatment).

537. See *Olmstead v. L.C.*, 527 U.S. at 598.

538. See *id.* at 601 (plurality noting the fact that many people with psychiatric disabilities are forced to live in institutions in order to receive the care they need, whereas people with other conditions of comparable severity are not).

539. See discussion of *Olmstead* in Part II.10.B.

540. See, e.g., *Henrietta D. v. Guiliani*, No. 95-CV-0641 SJ, 2000 U.S. Dist. LEXIS 13382, at \*92-96 (E.D.N.Y. Sept. 18, 2000) (granting permanent injunctive relief to homeless individuals with HIV and AIDS who did not receive adequate assistance from a division of a city agency designed to ensure that these individuals had meaningful access to public benefits).

comparison data on access to the program by people with disabilities was not presented to the court.<sup>541</sup>

Obviously, considering the impact of a policy or practice on a comparative group of people without disabilities, or omitting this comparison, will make an enormous difference to the outcome of a case. However, given existing case law, it is difficult to predict which approach courts will take in a particular case. Advocates should assume that when the impact of a policy is the complete exclusion of some people with disabilities from a program for reasons that are obviously related to their disability, courts will probably be less likely to require proof of numerical disparities. This Manual also assumes that when the challenge is to the amount of a benefit or service, courts are probably more likely to require proof of numerical disparities. In some instances the Manual assumes that advocates would seek to make a particular legal argument on behalf of a class, and a court would consider the effect of the program feature on a comparison group. If the same claim was made for only one person and there is an obvious connection between the individual's disability and the adverse impact, courts may be less likely to consider the effect on comparison groups and so the claim may be easier to pursue.

#### (iv) Disparate Impact Discrimination in Public Benefits Programs

A number of cases have challenged disparate impact discrimination in public benefit programs, with mixed success. As with so many Title II ADA cases, the decisions in most of these cases turn not on whether the disparate impact was sufficient to constitute discrimination, but on the application of other ADA concepts. In addition, courts have reached opposite results on identical facts, making the outcome of litigation difficult to predict.

Two cases specifically address "neutral" eligibility rules under the AFDC program. Under the former AFDC program, states had the option to provide AFDC benefits to children who were 18 years old if they were full-time students in secondary school (or an equivalent) and were reasonably expected to graduate before the age of 19.<sup>542</sup> Plaintiffs in two different states that opted to provide this coverage challenged this requirement on behalf of children with learning disabilities who, as a result of their disabilities, were 18 and not expected to graduate by the age of 19. In one case,<sup>543</sup> the Vermont Supreme Court held that the graduation requirement was not fundamental to the AFDC program and extending benefits was a reasonable modification. In another,<sup>544</sup> a federal district court held that this requirement was an essential program requirement that neither the state nor the federal government could waive.<sup>545</sup>

#### (v) Other Trends in ADA Disparate Impact Cases

Advocates have generally had greater success in disparate impact cases challenging program administration or design features that exclude people with disabilities from programs altogether

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541. See *Wright v. Giuliani*, No. 00-7853, 2000 U.S. App. LEXIS 26796 (2d Cir. Sept. 26, 2000).

542. See 42 U.S.C.A. § 606(a) (West 1991)(repealed 1996).

543. See *Howard v. Department of Soc. Welfare*, 655 A.2d 1102 (Vt. 1994).

544. See *Aughe v. Shalala*, 885 F. Supp. 1428 (W.D. Wash. 1995).

545. This is no longer required by federal law. PRWORA currently defines "child" as an individual under the age of 18 or under the age of 19 and still a full-time student in a secondary school or in the equivalent level of vocational or technical training. See 42 U.S.C.A. § 619(2) (West 2000). Nevertheless, more than half of the states have retained the requirement, either in statutes, regulations or policy manuals. States may not be aware of the change in federal law and may not have considered the discriminatory impact of this policy on 18-year-olds who are not expected to complete school by age 19 because of their disabilities. Advocates should encourage states that retain this policy to change it in light of the change in federal law. Advocates in at least one state have sued to challenge the state's post-AFDC retention of this policy. See *Fry v. Saenz*, Sup. Ct. of Cal., Sacramento County, Sept. 29, 2000 (petition for writ of mandate and injunctive and declaratory relief).

or that adversely affect initial access to services,<sup>546</sup> and more difficulty when people with disabilities and others receive some services and the harm is the result of the amount or duration of services provided.<sup>547</sup> Obviously, it is easier to prove denial of meaningful access when some people are getting nothing. Program cuts and service reductions that affect both people with disabilities and others, like those in *Choate*, are also generally more difficult to challenge. Since everyone is being hurt to some extent, it is necessary to prove that people with disabilities are being hurt more than others to such an extent that it rises to the level of discrimination.<sup>548</sup>

It will often be easier to prove denial of meaningful access in an individual case than to prove it for a class of people. Aggregate data showing the percentage of people with and without disabilities who are adversely affected by a policy or practice may not convey the degree of harmful impact on those individuals who did experience a barrier to services,<sup>549</sup> and it may be difficult to prove a causal link between program design features and disparate impact on a group of people with disabilities.<sup>550</sup>

### *B. Discrimination By Reason of Disability in TANF Programs*

TANF program rules and practices at every step of the program, from the application process to access to support programs, and to time limits for benefits, may have a disparate impact on people with disabilities. Given the observations above, it is likely that cases on behalf of individual clients in the TANF program on the whole have a greater chance of success than class actions, and cases challenging the application process, diversion practices, and other factors affecting access to TANF benefits have a greater chance of success than challenges to benefit time limits.<sup>551</sup> There are a few issues that are relevant for a number of different ADA challenges to the TANF program. One is discussed below.

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546. *See, e.g.*, *Crowder v. Kitigawa*, 81 F.3d 1480 (9th Cir. 1996) (reversing denial of summary judgment for defendants on challenge to Hawaii animal quarantine law on the basis that it denied blind users of guide dogs meaningful access to the State); *Chandler*, 939 F. Supp. at 773 (categorical exclusion of disabled plaintiffs from state's Medicaid managed care program violates ADA); *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (college policy on dorm space that was used to keep wheelchair user out of college roommate program violated the ADA); *but see Hunsaker*, 149 F.3d at 1044 (use of a substance abuse screening form before providing general assistance benefits did not violate the ADA because there was no specific evidence that it denied meaningful access to the benefits).

547. *See, e.g.*, *Alexander v. Choate*, 469 U. S. 287 (1987); *Doe v. Colautti*, 592 F.2d 704 (3d Cir.1979); *Aughe*, 885 F. Supp. 1428 (holding that denial of AFDC benefits to plaintiff with a learning disability after age 18 did not violate Section 504 or ADA).

548. *See, e.g.*, *Lincoln CERCPAC v. Health and Hosp. Corp.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (holding that plaintiffs with disabilities could not show ADA violation because they were not being denied any services provided to people without disabilities), *aff'd*, 147 F.3d 165 (2d Cir. 1998).

549. *See, e.g.*, *Raines v. Florida*, 983 F. Supp. 1362 (N.D. Fla. 1997) (slight disparities in monthly averages in prison gain-time earned by subclasses of prisoners with disabilities do not prove discrimination though there may be disparate treatment claims in individual cases).

550. *See, e.g.*, *Henrietta D. v. Giuliani*, No. 95-CV-0641 SJ, 1996 U.S. Dist. LEXIS 22373 (E.D.N.Y. Oct. 25, 1996) (holding there was no likelihood of success on disparate impact claim brought by people with HIV and AIDS challenging barriers to accessing public benefits). In a later decision, however, the court denied summary judgment to defendant. *See* 81 F. Supp.2d 425 (E.D.N.Y. 2000), and eventually ruled for plaintiffs on the merits. *See* No. 95-CV-0641 SJ, 2000 U.S. Dist. LEXIS 13382 (E.D.N.Y. Sept. 18, 2000); *see also Lincoln CERCPAC*, 920 F. Supp. at 497 (court was not persuaded that there was any disparate impact in challenged program); *Hunsaker v. County of Contra Costa*, No. C-95-1082 MMC, 1997 WL 835164 (N.D. Cal. July 31, 1997), *rev'd on other grounds*, 149 F.3d 1041 (9th Cir. 1998).

551. These issues are discussed in greater detail in Part III.

(i) The Significance of the High Percentage of People with Disabilities in the TANF Population

Title II requires public entities to make reasonable modifications “when the modifications are necessary to avoid discrimination on the basis of disability.”<sup>552</sup> This phrasing makes clear that public entities must not only provide reasonable modifications to address existing discrimination, but also take pre-emptive action to prevent discrimination from occurring. One question raised by this provision is how certain plaintiffs must be that discrimination will occur in the absence of modifications. When advocating for an individual client, there may be particular facts indicating that the client will suffer some harm if an accommodation is not provided. When advocating for a group, these types of facts may be more speculative. This is where studies on the prevalence of disabilities among welfare applicants and recipients may be particularly helpful to advocates. Although the percentages of welfare recipients found to have particular physical or mental conditions varies from study to study, there is no dispute that if one takes into account all of the different disabilities prevalent in the TANF population, it is likely that more than half of the families applying for or receiving TANF benefits have at least one individual who has a physical, mental, or developmental condition that may qualify as a disability under the ADA.<sup>553</sup> Given this fact, there is near certainty that many TANF program policies and practices will have a discriminatory effect on people with disabilities if the policies are not modified in a variety of ways for people with disabilities. This should strengthen arguments that preventive modifications through systemic changes are required even in the absence of individual plaintiffs with particular disabilities or needs.

CHAPTER 8: PROGRAM, SERVICE OR ACTIVITY

*A. In General*

Title II prohibits discrimination in “services, programs or activities” of public entities. This has been construed broadly to include a wide range of government operations, including prison programs for inmates,<sup>554</sup> animal quarantine laws,<sup>555</sup> zoning decisions,<sup>556</sup> access to streets and sidewalks,<sup>557</sup> and even programs that people participate in involuntarily, such as police arrests.<sup>558</sup>

The definition of a “program, service or activity” is relevant to three Title II issues. The first is the “program access” standard, which requires a “program” to be accessible “when viewed in its entirety.”<sup>559</sup> The second is program purpose, which affects whether a particular program modification would be reasonable or a fundamental alteration or undue burden. The third is defining the group with whom people with disabilities will be compared for the purpose of determining whether discrimination has occurred. The outcome of ADA claims therefore often turns on the question of what constitutes a discrete “program.” As the Ninth Circuit has noted, “[t]he key issue . . . is one of characterization.”<sup>560</sup>

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552. See 28 C.F.R. § 35.130(b)(7) (1999).

553. See *supra* Part I.

554. See, e.g., *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998).

555. See, e.g., *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996).

556. See *Innovative Health Sys. Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997).

557. See, e.g., *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993).

558. See, e.g., *Gorman v. Barch*, 152 F.3d 907 (8th Cir. 1998).

559. 28 C.F.R. § 35.150(a) (1999).

560. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996).

(i) Broad or Narrow Program Definition?

Program definition in ADA cases is a tricky business. Consequently, it is difficult to make sweeping recommendations about which program formulations are advisable for advocates to use in ADA claims. There is no rule that will cover every situation. Some general considerations follow.

In disparate treatment cases, it is more advantageous if programs are defined broadly enough to include a comparison group. If a program is defined too narrowly, the services for people with disabilities will be regarded as a separate program and there will be no group in the same program receiving better treatment.<sup>561</sup>

At the same time, in disparate treatment cases there is a danger that if a program or service is defined too broadly it will dilute the evidence of disparate treatment.<sup>562</sup>

In disparate impact cases, narrow program definitions are often beneficial for people with disabilities because broad ones dilute the appearance of disparate impact.<sup>563</sup> For example, in *Alexander v. Choate*,<sup>564</sup> the Supreme Court defined the relevant program or service as the entire Tennessee Medicaid program, not the Tennessee Medicaid program coverage for inpatient care. The Court then noted that the Medicaid program “has the general aim assuring that individuals will receive necessary medical care.”<sup>565</sup> It then held that meaningful access to this program wasn’t denied to Tennessee Medicaid recipients with disabilities, despite the fact that people with disabilities who needed hospital care were more than three times as likely to need more care than was covered by Medicaid than people without disabilities needing such care. If the Court had defined the relevant program or service as Medicaid inpatient care, the difference in hospital use between Medicaid recipients with and without disabilities may have had a greater impact on the Court.

Broad program definitions make claims of denial of program access more difficult. If the relevant program is defined as all of the welfare centers in a city, the fact that some are not accessible to wheelchair users is not sufficient to prove a violation of the program access standard. If each center is considered to be a separate program, the failure to make even one center wheelchair accessible may violate the program access standard, unless the center arranges for another way to deliver services to wheelchair users that is equivalent in terms of the time it takes to receive benefits, travel distance and any other relevant factors.<sup>566</sup>

In some situations, there may be both disparate impact and disparate treatment discrimination. As it may be beneficial for one claim to frame the program or service in one way but beneficial in another claim to frame it in another, careful thought is required about the effect that program definition will have on all claims and issues.

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561. Compare *Weaver v. New Mexico Human Servs.*, 945 P.2d 70, 75 (N.M. 1997) (holding that a state’s general assistance benefits for people with disabilities and its general assistance benefits for needy children were one program, and that a time limit on benefits for people with disabilities that did not apply to needy children violated Title II of the ADA), with *Chandler*, 83 F.3d at 1155 (holding that general assistance benefits for needy children and people with disabilities were two separate programs, and the disparity in the benefit limit that applied only to people with disabilities did not violate the ADA); see also *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F. Supp. 986, 990 (1994) (granting preliminary injunction addressing budget cuts to city recreational programs for children with disabilities that were far greater than those made to other city recreational programs after deciding that the program at issue was the “sum of the city’s recreational programs,” not two separate programs); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979) (Medicaid inpatient coverage for private general hospitals and private psychiatric hospitals were two separate programs and differences in coverage were not discriminatory).

562. For example, if the courts in *Chandler* and *Weaver* had defined the relevant program as “all social services programs in the state,” the differential impact of the one-year benefit limit on people with disabilities would seem inconsequential, viewed in conjunction with the other social services programs that do not make the same distinction.

563. See, e.g., *Chandler*, 83 F.3d at 1150.

564. 469 U.S. 287 (1985).

565. *Id.* at 303.

566. See *infra* Part II.9 for further discussion of this issue.

In *Olmstead v. L.C.*,<sup>567</sup> the first Supreme Court decision interpreting some of the core Title II concepts, a plurality of the Court used an extremely broad program definition when defining the relevant group for analyzing the state's fundamental alteration defense. *Olmstead* challenged the failure to place individuals with disabilities who were living in institutions into the community under Title II's requirement that services be provided in the most integrated setting appropriate to the needs of people with disabilities, and the Title II reasonable modification requirement.<sup>568</sup> The plurality stated that the state could meet its burden of proving that the relief sought by the plaintiffs, which was to receive services in the community, would be a fundamental alteration if it could show that, "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of individuals with mental disabilities."<sup>569</sup> The plurality did not call the state's entire mental health service system a "program," and the relevance of this characterization was to analyze the state's defense, not to determine whether there was disparate impact discrimination. It is therefore not clear how relevant this is to program definition for purposes of assessing disparate impact or treatment. However it is possible that future courts will look to *Olmstead* as guidance on defining the relevant program definition for determining whether disparate impact or treatment has occurred.

Some types of discrimination do not fall neatly into "disparate impact" or "disparate treatment" categories. The Title II requirement that services be provided in "the most integrated setting appropriate to the needs of qualified individuals with disabilities,"<sup>570</sup> is one example. Segregation of people with disabilities may be the result of disparate treatment or disparate impact or both. In many cases it may not be possible to tell whether disparate treatment or impact is the cause of the segregation, and the segregation may be the result of many factors and actions by many agencies. Advocates need to give careful thought on how to frame program definitions in such instances.

There is a potential tension between program definition and undue burden and fundamental alteration analysis, at least in disparate impact cases. Generally, the broader the program definition, the greater the funds available for modifications for people with disabilities. In such cases, it should be more difficult for a state or local government to demonstrate that modifications would be an undue burden.<sup>571</sup> Further, the broader the program definition, the easier it will be to identify statements of program purpose that are consistent with particular program modifications sought for people with disabilities.<sup>572</sup> Yet broader program definitions may also make it more difficult to prove a disparate impact on people with disabilities. Advocates need to consider this potential trade-off when framing Title II arguments.

It may be possible to argue that program definitions for the purpose of showing discrimination and for measuring funds available to pay for program modifications are not, or need not be, the same. Arguably, *Olmstead* applied two different program definitions: the program within which discrimination existed was residential mental health services in the community, whereas the program for the purpose of defining available funds for reasonable modifications was the state's entire mental health budget. One court has interpreted *Olmstead* in just this way.<sup>573</sup> There is a strong argument that there is no reason why program definitions for

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567. 527 U.S. 581, 602-603 (1999).

568. *See id.* *See also infra* Part II.10 for further discussion of *Olmstead* and its implication for future Title II cases.

569. *Id.* at 604.

570. 28 C.F.R. § 35.130(d) (1999).

571. However, this may no longer be true in light of *Olmstead*.

572. *See infra* Part II.10 for a discussion of program purpose in TANF programs and its impact on ADA claims.

573. *See Pascuitti v. New York Yankees*, 87 F. Supp.2d 221, 224-25 (S.D.N.Y. 1999) (holding in a challenge to lack of physical access to a sports stadium that the stadium was the relevant program for determining whether the program was accessible but the City Parks Department budget was the relevant program for determining whether it would be an undue burden to make modifications).

these two purposes should be identical, and given the fact that resource allocation between government programs is often the cause of discrimination, the definition for the purpose of measuring available resources to remedy the problem should be much broader than the definition used for the particular program within which discrimination occurs.

(ii) Is it One Program or More than One?

In *Olmstead*, the plurality did not discuss its reasons for identifying the state's entire mental health services system as the relevant universe for determining whether the relief plaintiffs sought would be a fundamental alteration. Courts rarely explain their reasons for conceptualizing programs as they do. The factors listed below have been mentioned in the case law as relevant to program definition in Title II cases. It is unclear, however, whether courts will continue to consider these factors relevant after *Olmstead*.

1) Statute versus regulation: When the state statute defines a program as one program but implementing regulations treat it as two separate programs, the statute's formulation of the program controls.<sup>574</sup>

2) Statements of legislative purpose: In *Weaver v. New Mexico Human Services Department*,<sup>575</sup> the fact that the state enabling legislation for the state's general assistance program for needy families and program for people with disabilities had a single motivating purpose was relevant to the court's decision to view them as a single program.

3) Use of the singular or plural in state enabling legislation: In *Weaver*, the New Mexico Supreme Court also relied on the fact that the statute referred to the benefits for needy families and people with disabilities in the singular as "a single General Assistance program."<sup>576</sup>

4) Budget act formulation: The fact that the benefits to needy families and people with disabilities was a single item in the state budget was deemed relevant to the determination that there was a single program in *Weaver*.<sup>577</sup>

5) Whether the benefit is the rule or an exception to the rule: In *Does 1-5 v. Chandler*, the Ninth Circuit reasoned that because the only people who qualified for general assistance in the state were children and people with disabilities, these populations were exceptions to the general rule that there was no general assistance program. The court held that this weighed against viewing the benefits for these two groups as a unified program. Instead, the court viewed assistance to these two groups as two separate programs, each of which was an exception to the general rule that most individuals are not entitled to cash assistance.<sup>578</sup>

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574. See *Raines v. Florida*, 983 F. Supp. 1362, 1373 (N.D. Fla. 1997).

575. 945 P.2d 70, 75 (N.M. 1997).

576. *Id.*

577. *Id.*

578. 83 F.3d 1150, 1155 (9th Cir. 1996). The reasoning in this case seems particularly circular. Under this rationale, any program or service could be characterized as an exception to the rule that there is no program.

6) Whether the program allows participants to obtain the same benefits or service by different means: In *Raines v. Florida*,<sup>579</sup> a federal district court held that because a state statute allowed prisoners to earn maximum incentive gain time in one of four ways, the gain time program was one program regardless of how the time was earned, and thus state regulations giving prisoners who were unable to work full time for medical or disability-related reasons a lesser opportunity to benefit from the program violated the ADA.

### *B. Program, Service or Activity in the TANF Program*

Because PRWORA gives states maximum flexibility to use federal TANF grants and state maintenance of effort funds as they choose, the definition of “program, activity or service” will differ from one state’s TANF program to another, and possibly even one county’s program to another. In addition, program definition will depend on the nature of the discrimination. If the application process is discriminatory, the relevant program may be “TANF benefits,” or even several different benefit programs (including food stamps and Medicaid) combined. No determination has been made about the type of benefits and services an applicant needs or is entitled to when the discrimination occurs, and the barriers to accessing benefits may affect access to all of these benefits. If the discrimination occurs at a later stage, narrow program definitions will probably be more appropriate.

Typically, ADA and Section 504 cases define programs by the benefit or service provided, not the funding source that provides it. In cases challenging discrimination in the Medicaid or AFDC programs, for example, the fact that funding came from a state or federal source, or both, was usually irrelevant to program definition.<sup>580</sup> So the fact that a TANF employment-training program is funded with federal TANF block grant dollars or maintenance of effort funds<sup>581</sup> will usually be irrelevant to program definition. But there may be circumstances in which particular sources of funding also qualify as programs. One is when a funding source is discriminating in its use of funds.

Another issue that may arise is whether benefits programs and work requirements are one program or two. If they are one program, statements of program purpose related to helping needy individuals that typically appear in legislation, regulations and state plans for benefit programs are arguably relevant to the state work requirements. This helps to support an argument that it would not be a fundamental alteration of the program to modify work requirements for people with disabilities and continue to provide them with benefits, as this would be consistent with the program goal of aiding the needy. On this issue as well, the answer will be different from one state to another because states have structured and codified their benefits program and work requirements in a variety of ways. New York, for example, has codified its benefits program and work requirements separately.<sup>582</sup> In contrast, California treats both as part of CalWORKS, its TANF program.<sup>583</sup> Even where benefits and work requirements are codified as parts of a single program, however, it is important to approach this type of argument with caution. Congress was well aware when it enacted PRWORA that cash assistance

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579. 983 F. Supp. 1362, 1373 (N.D. Fla. 1997).

580. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Henrietta D. v. Giuliani*, No. 95-CV-0641 SJ, 2000 U.S. Dist. LEXIS 13382 (E.D.N.Y. Sept. 18, 2000); *Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996) *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999).

581. *See supra* Part I.I.C.viii.

582. *See* N.Y. SOC. SERV. LAW §§ 330-343 (McKinney 1993; McKinney Supp. 1999).

583. CAL. WELF. & INST. D.9, Pt. 3, Ch. 2, Art. 3.2 (1999).

would end for some families before the adults in those families were employed, and it did not prohibit TANF programs from ending cash assistance to such families.

Even where benefits and work programs are arguably separate programs for some purposes, a work program may be relevant to whether there is discrimination in the related benefits program. Whenever satisfying the requirements of one program is a requirement for the receipt of benefits or services of another program, the first program is an eligibility requirement for the second. If the first, “prerequisite” program is designed or administered in a discriminatory manner, both programs have discriminated, the first program by its own direct actions, and the second program by using the first as an “eligibility criteri[on]” for its program. Therefore, if participation in work activities is a requirement for receiving TANF cash assistance and the work activities are designed or operated in a discriminatory manner, the benefits program violates Title II by using the discriminatory work program as the basis for qualifying for benefits.

## CHAPTER 9: PROGRAM ACCESS

### *A. In General*

“Program access” in Title II is a term of art: its meaning is different than most people’s “common sense” understanding of what it means for something to be accessible to people with disabilities. The most obvious difference between the “program access” concept and common understanding is that Title II’s program access requirement does “not . . . necessarily require a public entity to make each of its existing facilities accessible.”<sup>584</sup> It is the program, “when viewed in its entirety,” that must be “accessible to and usable by individuals with disabilities.”<sup>585</sup> Public entities can achieve program access by making structural changes to existing facilities to make them accessible. But program access may be achieved in other ways by: relocating services to accessible buildings; building new facilities; redesigning equipment; making home visits; delivering services at alternative accessible sites;<sup>586</sup> or providing accessible transportation to accessible program locations.<sup>587</sup>

Two issues that arise in connection with Title II’s “program access” requirement are: 1) when a program or service is provided at multiple sites, the number of physical sites or locations must be accessible to people with disabilities; and 2) the application of the “program access” requirement when programs and services are delivered, at least in part, by private agencies under contract and licensing arrangements.

#### (i) How Many Sites Must be Accessible Under Title II?

When a program or service is provided at multiple sites, there is no numerical formula in the regulations for determining how many sites must be accessible to and usable by people with disabilities. Rather, the relevant inquiry is whether people with disabilities can benefit meaningfully and effectively from the program or service; whether the goals of the program or service are met effectively for people with disabilities; and possibly whether access to the benefit or service by people with disabilities is comparable to access by others. When a particular program site where a state or local government service is provided is not accessible to, and usable by, people with disabilities, the question of whether an agency has violated Title II will depend on a number of factors, including:

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<sup>584</sup> 28 C.F.R. § 35.150(a)(1) (1999).

<sup>585</sup> 28 C.F.R. § 35.150(a) (1999). *See also* OCR TANF GUIDANCE, *supra* note 242; *Anderson v. Dep’t of Pub. Welfare*, 1 F. Supp.2d 456, 463 (E.D. Pa. 1998).

<sup>586</sup> *See* 28 C.F.R. § 35.150(b) (1999).

<sup>587</sup> *See* ADA Title II Action Guide, *supra* note 187.

- 1) whether there are other accessible sites in the area where the service is provided that the individual is permitted to use;<sup>588</sup>
- 2) whether the distance traveled to an accessible site, or average travel time, is an obstacle for people with disabilities in accessing the service, and whether it is reasonably equivalent to the travel time of others;<sup>589</sup>
- 3) whether the program has alternative methods for obtaining services, and whether the agency informs individuals of these alternatives;
- 4) whether services obtained through alternative means are reasonably equivalent to the services provided to others.

In some situations, it may be possible to argue that each site at which a service is delivered is its own program that must independently meet the Title II program access requirement:

- 1) When the very purpose of a program is to serve people in their own neighborhoods, it can plausibly be argued that each program site is its own program, and requiring people to travel to another site impairs or defeats the nature and purpose of the program. Libraries and police stations are two examples, as are public benefits offices, when the benefits are designed and intended to serve people through neighborhood offices.
- 2) When agencies provide emergency services, an argument can be made that it is inappropriate to view all of the service delivery sites together as one program. Rather each must be accessible because requiring people to travel to other areas to obtain the service will impair the effectiveness of the service.
- 3) When program sites do not all provide identical services or facilities, each site with a unique service should be regarded as its own program subject to Title II's program access requirements. For example, when particular high schools offer unique programs and courses or have unique equipment, each school is a separate program, which has to be accessible to and usable by people with disabilities.<sup>590</sup>

(ii) Program Access When Programs and Services are Provided Under Contract or Licensing Arrangements

When a public entity contracts with private organizations to provide services, the relevant question is whether the state or local government's program, not the private agency's program, is accessible in its entirety. For example, if a local welfare program provides job training to welfare recipients but contracts with a private organization to provide some of this training, it is all of the welfare agency's training programs, including those that are provided directly by the

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588. One court has held that where an existing facility delivering services has 15 or more employees, it must ensure that its office is accessible or arrange to provide services at an accessible location, while sites with less than 15 employees could make a referral to and arrange for the individual to receive services from another accessible provider. *See Anderson*, 1 F. Supp.2d at 465.

589. *See ADA Title II Action Guide*, *supra* note 187, at 72-73.

590. In *Putnam v. Oakland Unified Sch. Dist.*, 980 F. Supp. 1094 (N.D. Cal. 1995), the defendant conceded that high schools with unique programs were separate programs subject to the Title II program access standard.

agency and those provided by the private agency, that are relevant under Title II, not all of the private organization's training programs.

Some plaintiffs have argued that when a Title II entity contracts out services to be provided by a private organization or licenses a private organization to provide the services, each physical site of the private organization that provides the public entity's service must be physically accessible, which is a higher standard than Title II's general program access standard. A few courts have rejected this interpretation.<sup>591</sup> However, settlements that achieve this higher standard have been obtained in some cases.<sup>592</sup>

### (iii) Which Access Standard is Better: Title II or Title III?

When state or local government services are provided, at least in part, by private organizations, advocates can use either Title II or Title III, which applies to privately operated places of public accommodation, such as retail businesses, private schools, and private social service and health care organizations, doctors and dentists' offices, private transportation providers, and other enumerated privately owned or operated businesses and organizations.<sup>593</sup> Advocates therefore need to understand the differences between the two standards.

Title III requires places of public accommodation to remove architectural, communication and transportation barriers when it is "readily achievable,"<sup>594</sup> which is defined as "easily accomplishable and able to be carried out without much difficulty or expense."<sup>595</sup> If removal of architectural barriers is not readily achievable, Title III requires places of public accommodation to make their services accessible through alternative, readily achievable measures.<sup>596</sup> A number of factors are relevant to a determination of whether changes are readily achievable, including the type of operation involved, the number of employees it has, and the relationship and degree of separateness between facilities operated by the entity.<sup>597</sup> Given this standard and the fact that the unit of analysis for determining accessibility is different under Title II and Title III, Title III will often be a more stringent access standard for a particular program site than Title II.

To take one example, a privately operated day care center under contract with a city to provide services at one site for a city day care program is required under Title III to remove architectural barriers at that site if it can be done without much difficulty and expense. That same day care center may not be required to do this under Title II, because the relevant program for Title II purposes is likely to be all of the day care centers operated directly by the city and those under contract with the city, and all Title II requires is that the city day care program be accessible in its entirety. If there are other day care centers in the geographic area serving children of the same age with similar admission criteria and some of them are accessible to children and parents with disabilities, this might be sufficient to achieve program access under Title II. Even if there aren't other accessible day care centers in the area, the city can achieve program access under Title II by making changes at other program sites, obviating any need for the private day care center to improve access at its site. If a private day care agency under

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591. See *Tyler v. Kansas Lottery*, 14 F. Supp.2d 1220, 1227 (D. Ka. 1998); *Anderson v. Dep't of Pub. Welfare*, 1 F.Supp.2d 456, 465 (E.D. Pa. 1998). But see *Lightbourn v. Garza*, 928 F.Supp. 711, 713-14 (W.D. Tex. 1996) (Secretary of State violated the ADA by allowing political parties to select inaccessible polling places), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997).

592. See, e.g., *Von Smetterling v. SEPTA*, No. 97-CV0748 (E.D. Pa) (settled Sept. 5, 1997) (challenging the sale of tokens for public transportation in inaccessible locations). Texas agreed to limit the sale of lottery tickets to accessible locations when faced with legal action. See *Inspection of Lottery Stores Said to be Going Well in Texas*, 7(7) NAT'L DISAB. L. REP. HIGHLIGHTS 4 (Feb. 1, 1996).

593. See 42 U.S.C.A. § 12181(7) (West 2000).

594. See 42 U.S.C.A. § 12182(b)(2)(iv) (West 2000).

595. See 42 U.S.C.A. § 12181(9) (West 2000).

596. See 42 U.S.C.A. § 12182(b)(2)(A)(v) (West 2000).

597. See 42 U.S.C.A. § 12181(9)(D) (West 2000).

contract with the city provides day care at multiple sites, it is even more likely that any one of those sites will be required under Title III to remove architectural and other barriers because the likelihood is greater that it is a larger agency with greater financial resources.

Other considerations will obviously affect the choice of approach. If the goal is to improve access to private day care centers city-wide, going after one particular provider under Title III may not achieve that result, unless that provider operates a high percentage of centers or serves a high percentage of individuals served by the city program, or a single case is sufficiently visible to motivate other private providers to change their ways. Unless a state or local government entity contracts out all of its service delivery for a program to private organizations, private organizations will not have responsibility for the “big picture” of how a state or local government program is operated in its entirety. Advocates can always use both Title II and Title III to address lack of access to government services provided under contract. Even then, of course, two different access standards will apply and a private operator of a service operating under contract to a state or local government program will be subject to two sets of access requirements which will not necessarily require that the same action be taken.

### *B. Program Access in TANF Programs*

An argument can be made that a greater number or percentage of welfare centers must be accessible to and usable by TANF applicants and recipients than the number or percentage of sites of many other state and local government programs, for the following reasons:

1) Welfare centers operate public benefits programs that provide income and other basic services to those in serious need. Thus the distance that applicants and recipients should have to travel, and the other obstacles that applicants and recipients should have to endure to obtain and continue receiving benefits should be lower than in many other situations because the consequence of a delay in accessing services is so severe.

2) Some of the services and benefits provided at these centers, such as emergency cash assistance and emergency food stamps, are intended to be provided, and in some cases required to be provided, within a very short time frame. Indeed, it is the very purpose of these services to serve people immediately. If people with disabilities experience obstacles in the application process, the program has not been effective for people with disabilities, meaningful access has been denied and the underlying purpose of the program has not been satisfied.

3) If a TANF program operates through local welfare offices and each site is designed to serve only those within a particular catchment area, it may be possible to argue that each local site is a separate program for the purpose of Title II, and program access cannot be achieved by referring people with disabilities to other sites. This is particularly true if the program has not anticipated serving people at different locations or catchment areas and does not have a well-functioning system to do so, as a delay in accessing services is inevitable in this situation.

Even if each welfare center is not considered to be a separate program and it is permissible under Title II to refer people with disabilities to locations other than centers that are closest to their homes, the Title II program access requirement may not be satisfied if travel times and waiting times for appointments are significantly longer for people with disabilities traveling to other sites. Given limited accessible transportation, requiring people with mobility impairments to travel even a little further than others to access services is likely to create barriers to accessing services. It is also likely that some service sites will offer unique education and training

programs to TANF recipients, and thus constitute their own “programs” for program access purposes.

When a public benefits program has several components, such as a benefits application or recertification process, disability or work-readiness evaluations, job search activities, and job placements, each step of the process may be viewed as a separate “program” to which the program access standard applies. In addition, the program access standard applies to the entire process as a whole. Whenever individuals must satisfy one step of the process before they are eligible for the next, lack of access to that step affects access to the later stages.

## CHAPTER 10: REASONABLE MODIFICATIONS, FUNDAMENTAL ALTERATION, AND UNDUE ADMINISTRATIVE OR FINANCIAL BURDEN

### *A. In General*

Title II regulations have a number of different defenses and exceptions that apply to various Title II requirements. Public entities are not required to make reasonable modifications necessary to avoid discrimination when it would fundamentally alter the nature of the program, activity, or service.<sup>598</sup> In addition, public entities are not required to take action to achieve program access, or to ensure effective communication with applicants, recipients and the general public, when doing so would fundamentally alter the nature of the program, activity or service, or be an undue financial or administrative burden.<sup>599</sup> DOJ regulations and Interpretive Guidance treat fundamental alteration and undue burden as affirmative defenses,<sup>600</sup> and many courts have as well.<sup>601</sup> The Supreme Court appears to have endorsed this interpretation.<sup>602</sup>

Title II regulations do not contain a fundamental alteration and undue burden defense for any other Title II requirements,<sup>603</sup> and the legislative history of Title II suggests that Congress intended these defenses to apply only in limited circumstances.<sup>604</sup> Nonetheless, most courts have assumed that both defenses apply to other Title II requirements.<sup>605</sup> Many advocates believe that courts would never interpret Title II requirements to be absolute, and have not pressed for an interpretation of Title II that would leave state and local governments without any defense to

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598. See 28 C.F.R. § 35.130(b)(7) (1999).

599. See 28 C.F.R. §§ 35.150(a)(3); 35.164 (1999).

600. See 28 C.F.R. §§ 35.130(b)(7); 35.164; see also 28 C.F.R. app. pt. A § 35.150 (“The burden of proving that compliance with paragraph (a) of § 35.150 would fundamentally alter the nature of a service, program or activity or would result in undue financial and administrative burden rests with the public entity”).

601. See, e.g., *L.C. v. Olmstead*, 138 F.3d 893, 904 (11th Cir. 1998), *aff’d in part*, 527 U.S. 581 (1999); *Gorman v. Barch*, 152 F.3d 907, 913 (8th Cir. 1998); *McNally v. Prison Health Servs.*, 46 F. Supp.2d 49 (D. Me.), *reconsideration denied*, 52 F. Supp.2d 147 (D. Me. 1999); *Kathleen S. v. Dep’t of Pub. Welfare*, 10 F. Supp.2d 460, 471 (E.D. Pa. 1998).

602. See *Olmstead v. L.C.*, 527 U.S. 581, 605-06 (1999). Although the Court did not discuss burdens of proof, it squarely placed the burden of demonstrating that a modification would be a fundamental alteration with the defendant: “If, for example, the State were to demonstrate that it had an effectively working plan for placing qualified persons with mental disabilities in less restrictive settings and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable modification standard would be met.” *Id.* at 605-06.

603. Some, however, contain exceptions when actions are “necessary” for reasons specified in the regulations. See e.g., 28 C.F.R. §§ 35.130(b)(1)(iv); 35.130(b)(8) (1999).

604. See H. R. Rep. No. 101-485(III), at 50-51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 473-74.

605. See, e.g., *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), *cert. denied*, 506 U.S. 813 (1995) (applying fundamental alteration defense to Title II’s requirement that services be provided in the “most integrated setting appropriate to the needs of qualified individuals with disabilities”); *Heartz v. Morton*, No. Civ. 98-317-B, 1999 WL 1327398 (D.N.H. Jan. 8, 1999) (same); *Williams v. Wasserman*, 937 F. Supp. 524, 528 (D. Md. 1996) (same). But some courts have held that in particular types of Title II cases, some Title II defenses do not apply. See, e.g., *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733-35 (9th Cir. 1999) (holding that the fundamental alteration defense, described by the court as the “reasonable modification” test, does not apply in challenges to facially discriminatory laws).

some Title II requirements. In any event, as most program changes necessary to avoid discrimination could be framed as reasonable modifications, there is some logic to applying the defenses more broadly. Advocates should assume that, despite the language of the regulations, courts will treat most if not all Title II claims as if the fundamental alteration and undue burden defenses apply.

Although one might assume that “fundamental alteration” refers to the nature of the modification and “undue burden” to the cost and inconvenience of implementing the modification, in practice courts treat these terms as interchangeable. In *Olmstead v. L.C.*, for example, the plurality opinion discusses a cost-based defense as a fundamental alteration issue.<sup>606</sup> The discussion that follows therefore treats the two defenses as interchangeable.

#### (i) Fundamental Alteration and Undue Burden Procedural Requirements

Title II regulations contain procedural requirements for public entities that wish to assert a fundamental alteration or undue burden defense:

- 1) A decision that a particular action, modification or provision of auxiliary aids and devices would be a fundamental alteration or undue financial or administrative burden must be made by the head of the public entity or his or her designee.<sup>607</sup>
- 2) Before such a determination is made, *all* of the resources available for use in the operation of the program or service must be considered.<sup>608</sup>
- 3) The public entity’s determination must be accompanied by a written statement of the reasons for the decision.<sup>609</sup>
- 4) If an agency determines that a particular action would be an undue financial or administrative burden, this is not a justification for the public entity to do nothing. Instead, the public entity must take any other action that would not be a fundamental alteration or undue burden but that would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the entity.<sup>610</sup>

Though many defendants assert fundamental alteration and undue burden defenses, few cases mention these procedural requirements or discuss whether defendants have complied with them.<sup>611</sup> Advocates may want to request written justifications when public entities refuse to make program modifications and if litigation ensues, argue that defendants have violated this requirement and that after-the-fact justifications should be viewed skeptically by courts.

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606. See *Olmstead*, 527 U.S. at 602-03.

607. See 28 C.F.R. §§ 35.150(a)(3); 35.164 (1999).

608. See *id.*

609. See *id.*

610. See 28 C.F.R. § 35.164 (1999).

611. See, e.g., *Olmstead*, 527 U.S. 581 (Title II procedural requirements not mentioned); *Sandison v. Michigan High Sch. Athletic Ass’n*, 64 F.3d 1026, 1034-36 (6th Cir. 1995) (same); *Aughe v. Shalala*, 885 F. Supp. 1428, 1431-32 (W.D. Wash. 1995) (same). *But see* *Tugg v. Towey*, 864 F. Supp. 1201, 1209-10 (S.D.Fla. 1994) (court mentions failure to comply with Title II procedural requirements).

## (ii) The Program Flexibility Concept

A basic tenet of the reasonable modification requirement is that state and local governments have the flexibility to decide how they will satisfy their obligation to make reasonable modifications.<sup>612</sup> An agency's refusal to provide the particular modification requested by or for a person with a disability is not necessarily discrimination; if the agency offers another modification that is effective, it has satisfied its legal obligation.<sup>613</sup>

## (iii) Relevant Factors in Reasonable Modification, Fundamental Alteration and Undue Burden Analysis

Although the question of whether a modification is reasonable is highly fact-specific, courts have treated the following factors as relevant to whether a modification is reasonable or a fundamental alteration:

1) *Is the modification required by or consistent with state law?*: When a requested modification is consistent with state enabling legislation for a program, courts have held it would not be a fundamental alteration of the program to make the modification. In *Helen L. v. DiDario*, the Third Circuit required a state Medicaid agency to provide attendant services to a Medicaid recipient in her home, which would enable her to leave a nursing home where she had been living. The court held that this was not a fundamental alteration in part because state attendant care legislation stated that community living was among its goals.<sup>614</sup>

(2) *Does state legislation mention the requirement the person with a disability seeks to modify?*: In *Easley v. Snider*,<sup>615</sup> the Third Circuit rejected an ADA challenge to a state attendant care program that excluded individuals who were not mentally alert. Plaintiffs argued that the exclusion had a discriminatory effect on people with psychiatric and other disabilities that affected mental alertness, and argued that individuals with mental disabilities who were not alert should be admitted into the program and permitted to use surrogates to direct their care. Reversing a judgment for the plaintiffs, the Third Circuit held that it would be a fundamental alteration to do so, in part because one of the three purposes of the program identified in the statute was for people with disabilities to control their attendant care.<sup>616</sup> Given this statutory language, the court reasoned that consumer direction of the service was not just a means of providing service, but an essential program requirement.<sup>617</sup> One of the most troubling

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612. See, e.g., *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754 (8th Cir. 1998) (holding that a school did not discriminate by refusing to administer medication above the customary dose to student when it allowed parents or their designee to do so); *Maczacyj v. New York*, 956 F. Supp. 403 (W.D.N.Y. 1997) (holding that a masters program with a required on-site component did not discriminate against individual with panic disorder who was unable to deal with social situations when school offered several accommodations, including a separate room in which to retreat, accompaniment by a friend, and waiver of attendance at social events).

<sup>613</sup> See *id.*

614. See 46 F.3d 325, 337-38 (3d Cir. 1995). See also *Kathleen S. v. Department of Pub. Welfare*, 10 F. Supp.2d 460, 470, 470-71 (E.D. Pa. 1998) (holding that state Medicaid program must provide services to institutionalized individuals with psychiatric disabilities in the community where state law, like the ADA, requires placement of individuals with psychiatric disabilities in the least restrictive environment). *But cf.* *Randolph v. Rodgers*, 170 F.3d 850, 859 (9th Cir. 1999) (holding that existence of state law requiring sign language interpreters in prisons was not conclusive of whether it would be an undue burden to provide them).

615. 36 F.3d 297 (1994).

616. See *id.* at 303, 305.

617. See *id.* at 303; see also *Marshall v. McMahon*, 22 Cal. Rptr.2d 220, 226 (Ct. App. 4th 1993) (affirming judgment

aspects of this decision is that another purpose of the program mentioned in the statute was to enable people with disabilities to live in their own homes and communities.<sup>618</sup> However, the court did not discuss this purpose or examine whether the attendant program at issue was the only one serving people with disabilities in the region, in which case individuals excluded from this program would be prevented from obtaining any community home care services, in clear conflict with this other program purpose. Thus, the decision appears to privilege one statutory purpose over another.

3) *Does the modification change the eligibility requirements for the program?:* In *Helen L. v. DiDario*,<sup>619</sup> the Third Circuit suggested that if a modification does not change program eligibility requirements, this tips in favor of a determination that it is not a fundamental alteration under the ADA. In *Helen L.*, the issue was whether Medicaid recipients eligible for attendant services would be served in an institutional or a community setting, but eligibility requirements for the service were the same, so providing this service in the home as opposed to an institution would not alter program eligibility requirements.

4) *Does the modification change the substance of the program or service?:* In *Helen L.* the court also reasoned that providing the service in the community instead of an institution was not a fundamental alteration because it would not change the substance of the attendant care service.<sup>620</sup>

5) *Is the modification a complete waiver of a program requirement or another type of change?:* Courts generally view waivers of program requirements less favorably than other types of program modifications.<sup>621</sup> When the only modification that would enable an individual to participate in a program is a complete waiver of a rule or eligibility requirement, a number of courts have held that the modification would be a fundamental alteration.

Several cases have been brought under Titles II and III of the ADA by high school and college athletes with disabilities seeking modifications in rules limiting participation in interscholastic sports for students over age 19, limiting participation to 8 semesters, or

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for defendants in a case challenging exclusion of people with mental impairments from protective oversight home care under Section 504 on the basis that people with mental disabilities were not "otherwise qualified" because they lacked the ability to "self direct").

618. See *Easley*, 36 F.3d at 300.

619. 46 F.3d at 337.

620. See *id.* at 337; see also *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) (holding that providing safety monitoring to people with psychiatric disabilities in a Medicaid home health care program would change the substance of the services provided, and was therefore not required under the ADA); *Charlie H. v. Whitman*, 83 F. Supp.2d 476, 501 (D.N.J. 2000) (involving a challenge to the failure to train foster parents of children with disabilities, in which the court held that plaintiffs were challenging the substance of the services provided, which is not actionable under the ADA); *Charles Q. v. Houstoun*, 1996 U.S. Dist. LEXIS 21671 (M.D. Pa. Apr. 22, 1996) (following *Helen L.* in requiring state to provide outpatient psychiatric services); *Henrietta D.*, 81 F. Supp.2d at 432 (denying defendant's motion for summary judgment because plaintiffs sought access to existing public benefits, not a change in the benefits provided); *Howard v. Dept. of Soc. Welfare*, 655 A.2d 1102 (Vt. 1994) (holding that allowing 18 year olds with disabilities to continue receiving AFDC benefits would not be a fundamental alteration because it wouldn't change the nature of the benefits provided).

621. See, e.g., *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 757 (8th Cir. 1998) (waiving school policy refusing to administer medications to children in more than the recommended maximum dose even when prescribed by a doctor is unreasonable); *Weinreich v. Los Angeles Co. Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997) (transportation authority is not required to waive requirement that applicants seeking a half-fare card for people with disabilities submit updated medical information every three years); *Jacobsen v. Tillmann*, 17 F. Supp.2d 1018, 1026 (D. Minn. 1998) (the ADA does not require waiver of mathematics requirement of teacher certification test).

limiting participation to students who can satisfy particular academic requirements. Older students who were in school for a longer period of time or at an older age as a result of disabilities, and students unable to satisfy academic requirements as a result of disabilities, have argued that these rules have a discriminatory effect.<sup>622</sup> While some plaintiffs in these cases obtained preliminary or permanent relief,<sup>623</sup> preliminary relief was denied in others,<sup>624</sup> and in others still, preliminary relief was reversed on appeal.<sup>625</sup> In some of the decisions that were unfavorable to plaintiffs, the fact that the modification sought was a complete waiver of an existing rule weighed in favor of holding that it would be a fundamental alteration.<sup>626</sup>

6) *Is a complex factual determination required to decide whether a rule should be modified for an individual?:* Some courts have rejected plaintiffs' Title II, Title III, and Section 504 claims on the basis that the remedy sought, namely, an individualized determination as to whether a rule should be modified for an individual with a disability, would require a complex factual assessment that was difficult to perform or resource-intensive.<sup>627</sup>

7) *Does the program already have a waiver provision or other means of applying for an exception to the program requirement?:* When a program already provides a mechanism for making individualized determinations about whether a rule will be waived for some individuals, courts have held that it is not a fundamental alteration or undue burden to create, or to expand an existing waiver process for waiver requests for disability-related reasons.<sup>628</sup> At the same time, courts have also viewed a program's failure to have any

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622. Some of these cases were brought under Title III of the ADA, which applies to privately owned or operated places of public accommodation, and Section 504, not Title II of the ADA, but their analysis is equally applicable to Title II claims.

623. *See, e.g.,* Washington v. Indiana High Sch. Athletic Ass'n Inc., 181 F.3d 840, 852 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999) (preliminary injunction affirmed); Bingham v. Oregon Sch. Activities Ass'n, 37 F. Supp. 2d 1189, 1202 (D. Or. 1998) (holding that waiving the eighth semester rule was a reasonable modification); Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996) (preliminary injunction granted), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 586 (M.D. Fla. 1995), *vacated and dismissed as moot*, 102 F.3d 1172 (11th Cir. 1997); Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978) (preliminary injunction granted), *vacated on other grounds*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); Booth v. Univ. Interscholastic League, No. Civ. A-90-CA-764, 1990 WL 484414, at \*5 (W.D. Tex. Oct. 4, 1990) (preliminary injunction granted); Univ. Interscholastic League v. Buchanan, 848 S.W.2d 298, 304 (Tex. App. 1993) (affirmed permanent injunction).

624. *See* Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 584, 592 (N.D. Ohio 1996) (holding that plaintiff was not discriminated against "solely by reason of" disability); Cavallaro v. Ambach, 575 F. Supp. 171 (W.D.N.Y. 1983).

625. *See, e.g.,* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 462 (6th Cir. 1997); Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994).

626. *See, e.g.,* McPherson, 119 F.3d at 462; Pottgen, 40 F.3d at 930.

627. *See, e.g.,* Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998) (holding that waiving school policy of refusing to administer more than customary dose of medication would require burdensome determination of safety of each request); McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 462 (6th Cir. 1997) (*en banc*) (holding that evaluating waiver requests of a rule prohibiting students from participating in inter-school sports for more than eight semesters to determine whether a particular student's participation would give a team an unfair competitive advantage would be burdensome); Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000) (holding that it would be burdensome to evaluate requests to waive walking requirement at U.S. Open), *rehearing en banc denied*, 2000 U.S. App. LEXIS 14464 (June 22, 2000).

628. *See, e.g.,* Bingham v. Oregon Sch. Activities Ass'n, 37 F. Supp.2d 1189, 1201-02 (D. Or. 1998) (holding that a waiver of the eight semester limit for high school athletes was a reasonable modification because waivers were granted for other program eligibility rules); Ganden v. National Collegiate Athletic Ass'n, 1996 U.S. Dist. LEXIS 17368 at \*14 (N.D. Ill. Nov. 21, 1996) (Title III case denying a preliminary injunction to learning disabled athlete challenging denial of eligibility from college athletic program based on grade point average and core courses taken, but holding that it would not be a fundamental alteration to modify core course requirement because a waiver process was already in place); Univ.

mechanism for granting exceptions to rules as an indication that defendants made no effort to consider the needs of or accommodate people with disabilities.<sup>629</sup> However, some courts have suggested that infrequent granting of waivers under a pre-existing waiver process might indicate that program requirements were essential.<sup>630</sup>

8) *Does the agency make or allow the modification in other circumstances?*: A number of Title II and Title III cases have held that when a program makes a program modification for reasons other than disability or in other circumstances, it would not be a fundamental alteration to make the same modification for people with disabilities as a modification under the ADA.<sup>631</sup>

9) *Is there evidence that the modification would save money?*: Prior to *Olmstead v. L. C.*,<sup>632</sup> when a modification was a less expensive way of delivering services than existing methods, this significantly undercut undue burden arguments. For example, in cases challenging programs for failing to provide services in the “most integrated setting” appropriate for the needs of people with disabilities<sup>633</sup> courts have considered the fact that providing mental health and attendant care services in the community is far less expensive than providing services in institutions.<sup>634</sup> Arguments about cost savings have been made successfully in the other types of Title II cases as well.<sup>635</sup> However, as discussed below, *Olmstead* has significantly altered the legal landscape on this issue.

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*Interscholastic League v. Buchanan*, 848 S.W.2d 298, 302-03, Nos. 3-92-108-CV, 3-92-161-CV (Feb. 3, 1993) (holding that providing a waiver procedure for making fitness determinations for students over age 19 to participate in college athletics would be a reasonable accommodation under Section 504); *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (D. Conn.) (preliminary injunction granted), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (Title III case). *But see McPherson*, 119 F.3d at 462 (fact that defendant already has waiver process does not mean it wouldn't be unduly burdensome because individualized determination that would have to be made about whether waiving the rule would lead to unfairness is a different type of determination).

629. *See, e.g., Booth v. Univ. Interscholastic League*, No. A-90-CA-764, 1990 WL 484414, at \*4 (W.D. Tex. Oct. 4, 1990).

630. *See, e.g., Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp.2d 460, 478 (D. N.J. 1998).

631. *See, e.g., Martin v. PGA Tour, Inc.*, 994 F. Supp 1242, 1248 (D. Or. 1998), *aff'd*, 204 F.3d 994 (9th Cir.), *cert. granted*, 121 S. Ct. 30 (2000) (holding under Title III that it was not a fundamental alteration of professional golf association tournament to allow golfer with a mobility impairment to ride in golf cart during a tournament when other association golf tournaments allowed players to use golf carts); *Washington v. Indiana High Sch. Athletics Ass'n, Inc.*, 181 F.3d 840, 852 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999) (court holds that argument that it would be a fundamental alteration to grant a waiver to a student with a disability “particularly unpersuasive” where school had previously granted waivers of a rule limiting participation in high school athletics to eight semesters); *Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp.2d 1189 (D. Or. 1999) (holding that it was a reasonable modification to grant exceptions to rule limiting participation in high school sports to eight semesters for disability-related reasons when exceptions were granted for other reasons); *Galusha v. New York State Dep't of Env'tl. Conservation*, 27 F. Supp.2d 117, 125 (N.D.N.Y. 1998) (where state park allowed many motorized vehicles to use roads despite rule prohibiting access by motorized vehicles, it was not an undue burden to allow motorized wheelchair users to use them); *c.f. Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp.2d 460, 478 (D.N.J. 1998) (the fact that college athletic program waived core course requirement at the request of a college and later amended rules to allow students to request waivers created genuine issue of material fact as to whether core course requirement was an essential eligibility requirement).

632. 527 U.S. 581 (1999).

633. *See* 28 C.F.R. § 35.130(d)(1999) (“A public entity shall administer services programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”).

634. *See, e.g., Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir. 1995); *Charles Q. v. Houstoun*, 1996 U.S. Dist. LEXIS 21671 (M.D. Pa. Apr. 22, 1996).

635. *See, e.g., Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (failure of county mental health program to renew contracts of mental health professionals who spoke sign language violated ADA where funding these individuals would in fact be less expensive than using mental health counselors unfamiliar with sign language in addition to sign language interpreters to serve deaf clients).

10) *Does the modification appear to give people with disabilities “more” than others?:* Modifications that appear to give people with disabilities more of something than others get are less likely to be viewed as reasonable. This is so even though Title II regulations provide that “nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.”<sup>636</sup> The fact that programs are allowed to provide more of something to people with disabilities, however, does not mean that they have discriminated if they fail to do so. In addition, courts may interpret this provision to mean only that public entities can offer special benefits and services that people with disabilities need because they have disabilities, such as programs that teach people Braille or education programs for people with learning disabilities, not more of the same benefit.

Of course, many modifications can be characterized either as “more” of something than other people receive or as “creating a level playing field” by providing something that is necessary for people with disabilities to have the *same* opportunity to benefit from the program as others. Under *Alexander v. Choate*,<sup>637</sup> and *Southeastern Community College v. Davis*,<sup>638</sup> a modification is considered to be “more” or “extra” only when it would fundamentally alter the nature of the program.<sup>639</sup> The fact that everyone does not receive the same amount of a benefit or service after the modification is made does not necessarily mean the modification is unreasonable.

Although characterization plays a large role in determining whether a modification is reasonable, there are some important guideposts for assessing the strength of an ADA reasonable modification argument. Title II requires an “opportunity to participate in and benefit from” programs and services, and an “equal opportunity to obtain the same result, to gain the same benefit or reach the same level of achievement.”<sup>640</sup> It does not require equal results.<sup>641</sup> In many situations, the line between reasonable and unreasonable is the difference between a modification that creates an equal opportunity and one that creates equal results.

(11) *Is the modification necessary for people with disabilities to receive any services?:* Modifications that affect initial access to services are more likely to be viewed as reasonable than modifications that increase the amount of services people with disabilities receive. When a barrier of some kind prevents an individual or group of individuals with disabilities from obtaining any services at all from a program, the remedy for this type of discrimination usually gives everyone access to the same service, but does not change the amount of services people are entitled to receive. Thus the remedy is less likely to raise issues of fairness that arise when people with disabilities are given “more” than others. To take one example, requiring applicants to a local government program to use a driver’s license as the only means of identification has a discriminatory effect on people who are blind and those with other disabilities that make it difficult or impossible to drive. A program can remedy this discrimination by changing its rule and accepting alternative forms of identification, which will give

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636. 28 C.F.R. § 35.130(c) (1999).

637. 469 U.S. 287 (1985).

638. 442 U.S. 397 (1979).

639. See *Choate*, 469 U.S. at 300 n.20; *Davis*, 442 U.S. at 410, 411 n. 10.

640. 469 U.S. at 304; see also *Davis*, 442 U.S. at 397; 28 C.F.R. §§ 35.130(b)(1)(ii), (iii) (1999).

641. See *Choate*, 469 U.S. at 304; *Davis*, 442 U.S. at 397; see also ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II-3.3000.

everyone an equal opportunity to satisfy the identification requirement of the application process. It would not give some people with disabilities more benefits than others would. Nor would it give people with disabilities more benefits than they would have received had there been no discrimination. In contrast, when a neutral limit on services, like the 14-day hospital coverage limits in *Choate*, has a disparate impact on people with disabilities, in order to remedy the disparate impact, the program must either:

- (1) Provide more days of coverage just to people with disabilities but not others;
- (2) Provide more coverage to everyone; or
- (3) Create an individualized system in which every one gets the numbers of days of coverage he or she needs.

Two of these possible remedies will provide more days of coverage to some than to others, which is likely to appear unfair. Moreover, at least two, and probably all three of these remedies increase the amount of services provided overall, which is likely to be more costly to the program and therefore less likely to be considered reasonable.

(iv) When Does the Cost of a Program Modification Make it a Fundamental Alteration or Undue Burden?

There are many ways to conceptualize the cost of most program modifications. Though many defendants make fundamental alteration and undue burden arguments based on cost, few put forth specific cost information in support of their arguments.<sup>642</sup> Although a simple comparison between the cost of a modification and an agency or program budget is no longer the only factor relevant to making fundamental alteration determinations,<sup>643</sup> case law making such calculations may nonetheless be informative. Some examples follow:

1) A panel of the Eleventh Circuit held that it would not be an undue burden to add one correction officer to a prison at a cost of under \$25,000 so that inmates with HIV could be integrated into regular prison programs where annual budget of the Department of Corrections was \$178 million.<sup>644</sup> On rehearing *en banc*, the Eleventh Circuit made a different assessment of risk and cost, and held that a \$1.7 million cost for additional prison guards out of a \$163 million budget would be an undue burden when the prison system was already 124 guards short at its current budget level.<sup>645</sup>

2) A federal district court held that providing hepatitis inoculations for staff and residents, which would cost \$4,600 - \$6,500 plus \$500-1600 each year, was not an undue burden for a residential program with a \$ 4 million annual budget, and one-time cost of \$500-1,500 plus \$400-600 each year was not an undue burden for school with \$1.1 million annual budget.<sup>646</sup> On appeal, the Eighth Circuit reversed on other grounds.<sup>647</sup>

3) In reversing summary judgment for the defendant, the Second Circuit held that a \$6 million cost to improve public transportation accessibility out of a \$490 million federal

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642. *See, e.g.*, Howard v. Dep't of Soc. Welfare, 655 A.2d 1102, 1110 (Vt. 1994) ("we do not decide if such circumstances would amount to a fundamental alteration because [the defendant] has presented no evidence on the number of children who would qualify under modification criterion"); Kathleen S. v. Department of Pub. Welfare, 10 F. Supp. 2d 460, 471 (E.D. Pa. 1998) (noting that defendant produced no evidence that providing appropriate community services to plaintiff class institutionalized in psychiatric hospital would be a fundamental alteration); *see also*. Borowski v. Valley Central Sch. Dist., 63 F.3d 131, 142 (2d Cir. 1995) (in Section 504 employment case, court notes that defendant presented no evidence of the cost of an accommodation, its budget or other relevant information though it made an undue hardship argument).

643. *See* discussion of *Olmstead*, *infra* in Part II.10.B.

644. *See* Onishea v. Hopper, 126 F.3d 1323, 1338-39 (11th Cir. 1997).

645. *See* Onishea, 171 F.3d 1289, 1304 (11th Cir. 1999) (*en banc*), *cert. denied sub nom* Davis v. Hopper, 120 S. Ct. 931 (2000).

646. *See* Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Mo. 1987) .

647. *See* Kohl, 856 F.2d 930 (8th Cir. 1988), *cert. denied*, 493 U.S. 892 (1989).

grant was not “massive” or burdensome under Section 504, in part because federal regulations suggested spending 5 percent on improving transportation access to people with disabilities.<sup>648</sup>

4) In a motion for a permanent injunction, a district court held that an estimated \$40.8 million cost for the first year of providing safety monitoring for people with mental disabilities in a Medicaid home care program, 10% of which would be paid by the City and 40% of which would be paid by the State, and an estimated \$42 million penalty the City would incur for failing to meet federal cost containment goals, was not an undue burden, but “a mere fraction of” the \$2.7 billion cost of the state’s Medicaid home care program.<sup>649</sup> On appeal, the Second Circuit vacated on the basis that safety monitoring was a separate service, which the program had no obligation to provide.<sup>650</sup>

#### (v) Reasonable Modifications Versus Reasonable Accommodations

Title II regulations require public entities to make “reasonable modifications” unless it would be a “fundamental alteration.”<sup>651</sup> In contrast, Title I, which governs employment, requires employers to make “reasonable accommodations” unless it is an “undue hardship.”<sup>652</sup>

Advocates may want to take the position that these standards are not identical. Generally, under Title I employees must ask employers for reasonable accommodations to be entitled to them,<sup>653</sup> whereas state and local government agencies must make programs accessible even in the absence of individual requests for modifications.<sup>654</sup> In addition, Title I in most instances requires only that employers make accommodations to the “known” disabilities of employees and applicants,<sup>655</sup> whereas Title II plainly requires state and local government agencies to make policy and practice changes even in the absence of knowledge about whether particular applicants and recipients of services have disabilities.<sup>656</sup>

The law is unclear on whether there is a difference between the two standards. The “reasonable modifications” requirement in Title II regulations is based on Title III of the ADA, which has an identical requirement.<sup>657</sup> The fact that Congress used the “reasonable accommodation” and “undue hardship” language in Title I and “reasonable modifications,” and “fundamental alteration” in Title III certainly suggests that Congress intended the reasonable modification and reasonable accommodation requirements to be different standards. The

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648. See *Dopico v. Goldschmidt*, 687 F.2d 644, 650 (2d Cir. 1992).

649. See *Rodriguez v. DeBuono*, 44 F.Supp. 2d 601 (S.D.N.Y.), *vacated*, 197 F.3d 611 (2d Cir. 1999).

650. See *Rodriguez v. City of New York*, 197 F.3d 611, 616-617 (2d Cir. 1999).

651. 28 C.F.R. § 35.1340(b)(7) (1999).

652. 42 U.S.C.A. § 12112(b)(5)(A) (West 2000).

653. See 29 C.F.R. pt. 1630 app. §1630.9 (1999) (“Generally, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.”); see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT Q.39 (1999) [hereinafter EEOC REASONABLE ACCOMMODATION GUIDANCE] available at <http://www.eeoc.gov/docs/accommodation.html>. The Guidance makes an exception to this requirement when an employer knows the individual has a disability and the disability may be the very reason the individual does not make a request. Mental retardation is the example given.

654. See *supra* Part I.2.B.iii-C.iv and Part I.3. Arguably this requirement comes from Title II’s prohibition on “methods of administration” with a discriminatory effect, Title II’s planning requirements and other Title II provisions, not Title II’s reasonable modification requirement.

655. See 29 C.F.R. § 1630.9 (1999).

656. See *supra* Part I.3.B. Unfortunately, however, the OCR TANF Guidance does not reflect this distinction. It states that a benefit provider may violate the ADA or Section 504 by making an inappropriate referral to job placement opportunities because of a failure to properly and individually take into account a person’s “known” disabilities. See OCR TANF GUIDANCE, *supra* note 242, at Overview.

657. See 42 U.S.C.A. § 12182(b)(2)(A)(ii) (West 2000).

legislative history, however, is inconsistent on the issue. At one point it refers to both undue hardship and undue burden in the same sentence, noting that each standard has a different exception.<sup>658</sup> Elsewhere, though, the terms are described as “analogous”<sup>659</sup> or are used interchangeably.<sup>660</sup>

A few recent developments may make it more difficult to argue that the reasonable accommodation requirement of Title I and the reasonable modifications requirement of Title II are different standards. In *Olmstead v. L.C.*,<sup>661</sup> the Supreme Court, for the first time, interpreted the Title II reasonable modification requirement. The plurality opinion ends with a footnote that Congress intended the reasonable modification standard to be “consistent with” the reasonable accommodation standard of Section 504 regulations.<sup>662</sup> The rationale offered in this footnote is questionable at best.<sup>663</sup> The main point of the footnote is that factors other than cost should be considered in determining whether a modification is reasonable under Title II. The plurality believed that the Eleventh Circuit considered only cost in determining that providing the relief sought by the plaintiffs in the case was reasonable, and in its view, this was incorrect. Advocates can argue that the *Olmstead* footnote means no more than that cost should not be the only consideration in reasonable modification determinations. It does not mean that the two standards are identical in every respect.

(vi) Is it the General Purpose of a Rule or its Purpose as Applied to the Individual with a Disability that is Relevant?

Program rules and requirements should be “a means to an end,”<sup>664</sup> not be an end themselves. Program rules, no matter how legitimate their purposes generally, may not make sense as applied to particular individuals with disabilities. This may be because the problem the rule seeks to address does not exist in the case of the individual with a disability, or the individual with a disability is unable to comply with the rule because of a disability so the motivating purpose of the rule is ineffective and unnecessary. When this is the case, a strong argument can be made that modifying or waiving the rule for the individual with a disability would not be a fundamental alteration, because the rule would not have achieved its purpose anyway if it was applied to that individual. In other words, advocates should take the position that the relevant question in “fundamental alteration” analysis should be whether the purpose of a rule makes sense *as applied to the particular individual seeking the modification*, and whether it would fundamentally alter the purpose of the rule to modify it *for that individual*, not whether the rule generally makes sense. In a challenge to an AFDC waiver allowing California to reduce benefits and use work incentives, the Ninth Circuit used a similar rationale when it noted that HHS’ decision to approve a federal waiver that reduced benefits and imposed work requirements on people with disabilities who could not work was “absurd,” particularly when the waiver program offered no child care, work training, or other services people would need to be able to work.<sup>665</sup> Some Title II cases

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658. See H.R. REP. NO. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 473.

659. H.R. REP. NO. 485(II), at 106, *reprinted in* 1990 U.S.C.C.A.N. 267, 389.

660. See H.R. REP. NO. 485(IV), at 38, *reprinted in* 1990 U.S.C.C.A.N. 267, 527.

661. See *Olmstead v. L.C.*, 527 U.S. 581 (1999).

662. See *id.* at 606 n.16.

663. All of the Section 504 regulations mentioned by the plurality as providing the model for Title II apply only to discrimination in employment. Many Section 504 regulations typically have one set of requirements for discrimination in employment and another for access to the agency’s programs and services. It is far more likely that Congress intended the Section 504 standards for access to programs and services, not those for employment, to be the model for Title II regulations.

664. *Johnson v. Florida High Sch. Activities Ass’n*, 899 F. Supp. 579, 586 n.8 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997).

665. See *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994). Because the Ninth Circuit held that its only jurisdiction to review the waiver was under the limited Administrative Procedure Act (APA) “arbitrary and capricious” standard, it

have taken an individualized approach to analyzing whether program or rule changes would be a fundamental alteration.<sup>666</sup> The outcome of many cases turns on whether the court uses this approach.

The issue has arisen most often in cases brought by students with disabilities seeking modifications of rules limiting participation in interscholastic sports by prohibiting participation by older students, students who have already participated for 8 semesters and students who cannot meet minimum academic requirements.<sup>667</sup> The stated purpose of these rules is usually to protect students' safety by excluding players who are older, and therefore likely to be larger than other students, and to prevent teams from having an unfair advantage by filling their teams with larger and more experienced athletes. Some courts have held that it would not violate these purposes to allow students with disabilities who are older or beyond the semester limit because of disabilities to continue to participate when they were not likely to hurt others and there was no question of unfair advantage.<sup>668</sup> Other courts, however, have considered only whether the purpose of these rules were legitimate generally.<sup>669</sup> Finding they were legitimate, these courts inevitably conclude that waiving these rules for particular individuals would be a fundamental alteration.<sup>670</sup>

An individualized analysis of whether modifying the rule for an individual with a disability is a fundamental alteration is consistent with the overall scheme of the ADA. The ADA is based on the premise that the abilities and needs of people with disabilities are individualized. It requires individualized assessments of whether an individual has a disability protected by the law;<sup>671</sup> whether an individual is qualified to perform a job;<sup>672</sup> and whether an individual has a disability that poses a "direct threat" to the health and safety of others;<sup>673</sup> to name a few of the individualized determinations required. In the employment context, the EEOC has indicated in its ADA Title II Technical Assistance Manual that "blanket" medical standards prohibiting

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did not reach the question of whether the waiver program violated the ADA. Instead, it held that the waiver violated the APA because the administrative record contained no evidence that HHS considered the plaintiffs numerous objections to the waiver, including its impact on people with disabilities. *See id.* at 1074.

666. *See, e.g.,* Washington v. Indiana High Sch. Athletic Ass'n Inc., 181 F.3d 840, 851 (7th Cir. 1999); Ganden v. Nat'l Collegiate Athletic Ass'n, Inc., 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 21, 1996); Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997); Booth v. Univ. Interscholastic League, No. A-90-CA-764, 1990 WL 484414 (W.D. Tex. Oct. 4, 1990); Univ. Interscholastic League v. Buchanan, 848 S.W.2d (Tex. App. 1993) (court does not use "fundamental alteration" language but holds individualized determination required).

667. *See infra* Part III.11.d.

668. *See, e.g.,* Dennin, 913 F. Supp. at 668, *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Johnson, 899 F. Supp. at 585, *vacated and dismissed as moot*, 102 F.3d 1172 (11th Cir. 1997); Booth, 1990 WL 484414, at \*4 (preliminary injunction); Doe v. Marshall, 459 F.Supp. 1190 (S.D. Tex. 1978) (preliminary injunction), *vacated*, 622 F.2d 118 (5th Cir. 1980). *But see* Bowers v. Nat'l Collegiate Athletic Ass'n, 974 F. Supp. 459 (D.N.J. 1997) (denying preliminary injunction on the basis that allowing all special education classes to count towards NCAA's "core course" requirement for college athletes would violate purpose behind requirement), *summary judgment motion granted in part*, 9 F. Supp.2d 460 (D.N.J. 1998); Ganden, 1997 U.S. Dist. LEXIS 17368, at \*15.

669. *See, e.g.,* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997); Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994); Sadler v. Univ. Interscholastic League, No. A-91-CA-836, 1991 WL 633967 (W.D. Tex. Nov. 25, 1991).

670. *See, e.g.,* McPherson, 119 F.3d at 462; Sandison, 64 F.3d at 1033; Pottgen, 40 F.3d at 931. In *Sandison*, the court also applied an incorrect standard in assessing whether a modification was required, stating that 'modification' connotes a moderate change. *See* 64 F.3d at 1033.

671. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999) (finding that "whether a person has a disability under the ADA is an individualized inquiry").

672. *See* 42 U.S.C.A. § 12111(8) (West 2000).

673. *See* 28 C.F.R. pt. 35 app. A § 35.104 (1999); 28 C.F.R. § 36.208 (c) (1999); 29 C.F.R. § 1630.2(r) (1999); *see also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (remanding issue of whether teacher with recurring tuberculosis posed health threat to students and co-workers to trial court for individualized inquiry); ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II-2.8000.

everyone with a particular medical condition from serving in particular jobs are presumptively suspect precisely because they don't use an individualized determination.<sup>674</sup> Making an individualized determination of whether the purpose of a rule would be fundamentally altered if it is modified for a particular individual with a disability would be consistent with this approach.

(vii) The Timing of Fundamental Alteration and Undue Burden Determinations

The very nature of fundamental alteration and undue burden means that the question of whether program changes would be a fundamental alteration or undue burden may well change over time. As program administration improves and programs benefit from experience, technological changes, and economies of scale, a modification that was not reasonable in the past may become so. Advocates should always insist that public entities revisit these issues overtime as programs, funding, infrastructures, and state economies change.

(viii) The Title II Necessity Exception

Title II also contains a necessity exception for two of its provisions: the prohibition on the use of eligibility criteria that screen out or tend to screen out people with disabilities,<sup>675</sup> and the prohibition on the use of separate aids, benefits or services.<sup>676</sup> There is little case law interpreting this exception, though courts that have applied it appear to approach it in much the same way that they approach fundamental alteration and undue burden analysis. For example, in *Howard v. Department of Social Welfare*,<sup>677</sup> the welfare agency argued that it provided cash assistance to 18-year-olds only if they attended school and expected to graduate by age 19, thereby excluding some 18-year-olds with disabilities because imposing this rule was necessary to receive federal funds. The Vermont Supreme Court rejected this argument on the basis that nothing in the AFDC statute prohibited states from spending state funds to provide those benefits, and because the state had not attempted to get HHS to make an exception and provide federal funds for those 18-year-olds in order to avoid discrimination.<sup>678</sup> There does not appear to be any discussion in the case law about whether necessity is an affirmative defense, though this would be consistent with the general approach of Title II.

*B. The Olmstead Decision*

In *Olmstead v. L.C.*,<sup>679</sup> the Supreme Court for the first time interpreted Title II's fundamental alteration defense. The case involved two individuals who challenged their continued institutionalization under the Title II requirement that services be provided in the "most integrated setting appropriate to the needs of qualified individuals with disabilities"<sup>680</sup> and the reasonable modification requirement.<sup>681</sup>

The district court granted a permanent injunction and ordered the State to place plaintiffs in community-based programs.<sup>682</sup> It held that segregation was a form of discrimination and rejected the State's argument that it lacked the funds to serve plaintiffs in the community. The court held

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674. See EEOC TITLE I TECHNICAL ASSISTANCE MANUAL, *supra* note 132, at § 4.4.

675. See 28 C.F.R. § 35.130(b)(8) (1999).

676. See 28 C.F.R. § 35.130(b)(1)(iv).

677. 655 A.2d 1102 (Vt. 1994).

678. See *id.* at 1108.

679. 527 U.S. 581 (1999).

680. See 28 C.F.R. § 35.130(d).

681. See 28 C.F.R. § 35.130 (b)(7).

682. See *L.C. v. Olmstead*, No. 95-CV-1210-MHS, 1997 U.S. Dist. LEXIS 3540 (N.D. Ga. Mar. 26, 1997).

that it was not a fundamental alteration to serve plaintiffs in the community because the State already had community-based programs for people with mental disabilities, and it was less expensive to provide community-based services than to serve people in institutions.<sup>683</sup>

The Eleventh Circuit affirmed in part, but remanded on the question of whether it would be a fundamental alteration.<sup>684</sup> To meet its burden on the cost defense, the Eleventh Circuit held that the State would have to demonstrate that spending additional funds to serve the plaintiffs in the community would be “so unreasonable given the demands of the State mental health budget that it would fundamentally alter the services [the state] provides.”<sup>685</sup> Before certiorari was granted, the district court held on remand that the State had not met this burden.<sup>686</sup>

The Supreme Court affirmed in part, vacated in part, and remanded.<sup>687</sup> A majority of the Court affirmed the Eleventh Circuit’s holding that unjustified segregation is discrimination,<sup>688</sup> but there was no majority agreement on the standard courts should apply to determine whether community placement would be a fundamental alteration. In an opinion written by Justice Ginsburg, a plurality of four Justices rejected the Eleventh Circuit’s standard for measuring cost on the basis that it was overly simplistic. Specifically, it reasoned that because the institution in which plaintiffs lived would not close if plaintiffs moved into the community, the state would continue to bear the costs of running the institution as well as community services if relief was granted.<sup>689</sup> The plurality also reasoned that the Eleventh Circuit standard would leave the state “virtually defenseless” in this type of lawsuit because the cost of providing community services to a few plaintiffs would always be small in comparison with a state’s entire mental health budget.<sup>690</sup> Instead, the plurality articulated a standard that allows the state to show that, given “the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the state has undertaken to provide for the care and treatment of a large and diverse population of persons with mental disabilities.”<sup>691</sup> Elsewhere in the opinion the plurality spoke of the state’s “obligation to mete out [] services equitably.”<sup>692</sup> Thus, the plurality placed greater emphasis on the fairness of resource allocation than on absolute dollar amounts. The plurality explained that if a defendant could show that it had a “comprehensive. . . effectively working plan for placing qualified persons with mental disabilities in least restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the state’s endeavors to keep its institutions fully populated, the reasonable modification standard would be met.”<sup>693</sup> The plurality also stated that individuals should not be able to jump to the top of a waiting list for community services by bringing lawsuits.<sup>694</sup>

Justice Stevens concurred in the judgment, but would have affirmed the Eleventh Circuit.<sup>695</sup> He favored an interpretation in which a state would have to serve institutionalized individuals with disabilities in the community who are ready for such placements unless the state could show that spending funds to do so would be unreasonable when viewed in light of the state’s mental health budget.

In a separate concurrence written by Justice Kennedy and signed by Justice Breyer, Justice Kennedy took a narrower view of the state’s obligations, stating that to prove discrimination,

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683. *See id.*

684. *See* L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998).

685. *Id.* at 905.

686. *See* L.C. v. Olmstead, No. 95-CV-1210-MHS (N.D. Ga. Jan. 29, 1999).

687. *See Olmstead*, 527 U.S. 581 (1999).

688. *See id.* at 589.

689. *See id.* at 595.

690. *See id.* at 603.

691. *Id.* at 604.

692. *Id.* at 597.

693. *Id.* at 605-06.

694. *See id.* at 606 n.16.

695. *See id.* at 607-08.

people with disabilities should be required to show either differential treatment of people with mental disabilities compared to a similarly situated group or policies motivated by “animus or unfair stereotypes.”<sup>696</sup> He expressed the view that such a test might be met on the facts of the case because people with mental disabilities were forced to give up community life to receive the services they need, while others are not.<sup>697</sup> He also expressed the view that under the reasonable modification standard, “a State may not be forced to create a community treatment program where none exists,”<sup>698</sup> and he emphasized the importance of deferring to the views of treatment professionals.<sup>699</sup> He cautioned that if the prohibition on unnecessary segregation is applied without care, states may be pressured into compliance “on the cheap,” and place people with mental disabilities into the community without appropriate services.<sup>700</sup>

The dissent, authored by Justice Thomas, took the position that the ADA does not prohibit “disparate treatment among members of the same protected class”<sup>701</sup> and segregation of people with disabilities is not discrimination “by reason of disability” because the plaintiffs did not claim that disability was the reason for their segregation.<sup>702</sup> The dissent also expressed concerns about infringement on states’ decisions about how to deliver services.<sup>703</sup>

### *C. The Implications of Olmstead: Open Questions and Possible Strategies*

In some respects *Olmstead* is obviously a victory for people with disabilities, because a majority of the Court recognized that unnecessary segregation is a form of discrimination, and to withstand an ADA challenge on the failure to serve people with disabilities in the community, states must not create plans for moving some people with disabilities currently in institutions into the community. At the same time, many aspects of the decision are troubling, and may make it easier for defendants to prove that program modifications would be a fundamental alteration. One danger posed by the decision is that states will attempt to use their failure to provide adequate services to some individuals with disabilities as a justification for their refusal to provide reasonable modifications to others with disabilities. Under the test articulated by the plurality, the less services a state provides, the easier it is to demonstrate that it need not do more for those people already receiving some services. Nonetheless, this “race to the bottom” standard is plainly inconsistent with the intent of the plurality.

As there is currently little case law interpreting *Olmstead*, advocates have maximum leeway to shape its application. Below are some of the questions left unanswered by the decision and arguments advocates may want to consider.

Prior to *Olmstead*, defendants confronted many potential obstacles when they tried to demonstrate that program modifications would be a fundamental alteration or undue burden in lawsuits brought on behalf of one person or a few people,<sup>704</sup> for a number of reasons. It is easier for plaintiffs to frame a modification for one person as an exception to a rule, whereas providing modifications for a class begins to look like a change in the rule. In addition, the cost of a modification for one or a few individuals is usually minuscule compared with the budget for the

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696. *Id.* at 611.

697. *See id.* at 608-09.

698. *Id.* at 613.

699. *See id.* at 610.

700. *Id.*

701. *Id.* at 616.

702. *Id.*

703. *See id.* at 624-25.

704. *See Juvelis v. Snider*, 68 F.3d 648 (3d Cir. 1995) (holding that waiving a Medicaid domicile rule for one developmentally disabled person was not a fundamental alteration under Section 504 because the rule itself was not challenged and the essential nature of the program was not altered).

agency or the program in question. Third, the question of how many other people need or would qualify for the same modification is not raised by plaintiffs in an individual case and the onus is therefore on defendants to raise the issue and come forward with information on the number of other people who may have similar needs, as well as the cost of providing the same modifications for all of them. If defendants have no process in place for making exceptions to program rules for people with disabilities, they are unlikely to know how many other people might seek the same type of modification.

*Olmstead* complicates the situation. The plurality's concern that individual plaintiffs should not be allowed to jump to the head of a waiting list by filing lawsuits may suggest that individual cases have lost some of their advantage.<sup>705</sup> Yet, because the plurality's fundamental alteration standard considers the fairness of granting relief to plaintiffs in light of the overall resources available for programs and the current allocation of those sources, the larger the group of plaintiffs, the greater the share of resources they already receive. Because *Olmstead* was not a class action, it did not address how fairness of resource allocation will be measured in class actions and it is not possible to determine how advocates should weigh the relative advantages of individual cases and class actions.

As there was no majority opinion in the case, it is unclear how much weight lower courts will give to the plurality opinion. However, given Justice Stevens' concurrence, a strong argument can be made that the plurality opinion is the "floor" for the reasonable modification standard, as a majority of the Court embraced either this standard or one that is more protective of plaintiffs.

It is unclear whether the standard in the plurality opinion is a standard for determining whether the ADA has been violated or a standard for determining the timing of relief. Though the opinion phrases the standard in a number of different ways, the reference to "reasonable pace" could be interpreted as addressing only the question of the timing of relief for ADA violations. This would leave advocates free to argue for a different, more generous standard for proving whether a public entity has to provide a modification at all. While the difference between these two interpretations may be insignificant to plaintiffs waiting for community placements, it might matter a great deal in other types of cases, where the timing of compliance is less of a problem for public entities and the defense has taken the position that the ADA does not require the relief sought by plaintiffs at all.

*Olmstead* was brought under two Title II legal theories: the prohibition on unnecessary segregation, and the requirement that public entities make reasonable program modifications. The reasonable modification requirement in Title II has a fundamental alteration defense, but not an undue burden defense.<sup>706</sup> This may leave advocates free to argue for a different standard for undue burden.

Unnecessary segregation, the issue in *Olmstead*, is different in some respects from many other types of discrimination against people with disabilities. Waiting lists, for example, do not exist for many programs and services and many reasonable modifications. Moreover, unlike many Title II compliance issues, much of the resistance to serving people with mental disabilities in the community is political, not economic. Institutions have been favored in part because they provide jobs in communities. The plurality was aware of this and addressed this issue in the legal standard it articulated by requiring states to demonstrate that the "reasonable pace" of implementing an integration plan is not "controlled by [a] State's endeavors to keep its

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705. This has already occurred. *See, e.g.,* *Heartz v. Morton*, No. CIV. 98-317-B, 1999 WL 13273898 (D.N.H. Jan. 8, 1999) (denying a preliminary injunction to nursing home resident seeking a community placement in part because granting relief would allow the plaintiff to jump ahead of others on a waiting list or require the defendant to provide the same relief to everyone ahead of him on the list, which be a fundamental alteration and would violate Medicaid's cost effectiveness requirement).

706. *But see* *Pascuiti v. New York Yankees*, 87 F. Supp.2d 221, 224-25 (S.D.N.Y. 1999) (applying *Olmstead* to undue burden analysis).

institutions fully populated.”<sup>707</sup> This type of resistance will not exist in many other situations. Because some aspects of *Olmstead* do not transfer automatically to other Title II issues, it may be possible to argue that a reasonable modification standard identical to the one in *Olmstead* should not apply to other types of cases. Though there has been very little litigation to date on the issue, it appears that courts will apply at least some aspects of the *Olmstead* standard to issues other than unnecessary segregation.<sup>708</sup>

The plurality opinion does not provide guidance on the question of how courts are to measure the fairness of resource allocation. This leaves room for advocates to propose standards addressing this issue.

The opinion did not address the question of which funds are to be considered “available resources” when determining whether a state must provide community placements (or, by analogy, comply with other ADA requirements). Advocates should take the position that funds are “available” to states if they can make the effort to obtain them, even when they do not make the effort. The standard should be interpreted in a manner that avoids creating a disincentive to seek funding for programs or modifications.

Advocates should argue that the *Olmstead* standard should be adapted to the particular type of discrimination at issue. Though job retention in communities will not be a major reason for resistance to many types of ADA compliance, other forms of resistance to ADA compliance may exist. Applying the framework of the plurality opinion, public entities should be required to demonstrate good faith in making other types of reasonable modifications.

It may be possible to argue that a narrower definition of “fundamental alteration” should apply to Title II issues other than unnecessary segregation. Unnecessary segregation claims largely focus on *where* people with disabilities receive services, not *whether* they receive them.<sup>709</sup> Individuals seeking relief in unnecessary segregation claims are already receiving services of some kind. Thus an argument can be made that courts should view these claims somewhat differently than claims in which the resulting discrimination is that people with disabilities receive less services than others or no services at all.

If the reasonable modification and reasonable accommodation standards are treated by courts as synonymous, it may be more difficult to obtain program-wide systemic changes through the reasonable modification provision in Title II. Advocates may therefore need to rely on the reasonable modification requirement less, and other requirements of Title II, such as the prohibition on using criteria or methods of administration that have a discriminatory effect,<sup>710</sup> more.

If under the plurality standard, states must have “effectively working plans” for complying with Title II’s integration mandate, advocates can argue that *Olmstead* should be interpreted to require state and local government programs to develop plans for achieving compliance with other aspects of Title II issues as well, particularly where compliance requires structural changes or will take time to implement. Advocates can further argue that Title II entities that have not done so cannot meet their burden on a fundamental alteration defense. This argument compliments Title II’s transition and self-evaluation plan requirements.

Advocates should argue that the “reasonable pace” standard should be interpreted in light of the particular modification that is sought. Public entities should not be given the same latitude on simple modifications as complex ones. While it might take months to transition people with psychiatric or developmental disabilities to community programs, posting signs informing

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707. See *Olmstead*, 527 U.S. at 604.

708. See *Pascuiti*, 87 F. Supp.2d at 224-25 (applying *Olmstead* to accessibility of city-owned sports stadium).

709. The Second Circuit made this very point in *Rodriguez v. City of New York* when it distinguished the facts of that case from *Olmstead*, where “the Court addressed only -- where Georgia should provide treatment, not whether it must provide it.” *Rodriguez v. City of New York*, 197 F.3d 611, 619 (2nd Cir. 1999), *cert. denied*, 121 S. Ct. 156 (2000).

710. See 28 C.F.R. § 35.130(b)(3) (1999).

program applicants and recipients of their rights under the ADA, establishing procedures to make sign language interpreters available on an as-needed basis, and making staff available to assist people with disabilities in accessing benefits and services should not take much time.

In addition, advocates should take the position that “reasonable pace” should be interpreted in the light of the consequences of failing to provide the particular modification. When people with disabilities seek modifications needed to obtain any benefits or services, or those needed to avoid termination of benefits or services, the pace that is reasonable should be much faster than in other situations, because the result of delay is that people with disabilities receive no benefits or services.

Finally, advocates should take the position that “reasonable pace” should be interpreted in light of the nature of the particular program in which a modification is sought. While a delay of months may be reasonable when the issue is moving people from institutions into the community, because of the time involved in locating appropriate community services or creating those services if they did not already exist, a delay of one day may be too long when the benefit in question is public assistance, the very intent of which is to assist people in meeting basic needs in times of serious need.

#### *D. Reasonable Modifications, Fundamental Alteration and Undue Burden in TANF Programs*

Reasonable modification, fundamental alteration, and undue burden are relevant to every program change that advocates may want to seek for TANF applicants and recipients. The question of whether these changes are reasonable is highly fact-specific, and Part Three discusses in greater detail some of the likely modifications advocates might want for their clients with disabilities. Nevertheless, some principles and recommendations apply to many Title II TANF issues, and are discussed below.

##### (i) ADA Modifications and Program Flexibility

Because PRWORA gives states tremendous flexibility in how they design and administer TANF programs, many features of TANF programs are permitted, but not required, by PRWORA. Consequently, many program features that have a discriminatory effect on people with disabilities are permitted but not required by PRWORA, and many program changes advocates may seek on behalf of their clients are permitted but not required by PRWORA as well. Advocates should focus their efforts on seeking modifications of these program features, because they do not require programs to make changes that are prohibited PRWORA itself, which would be far more likely to constitute a fundamental alteration.

Title II also gives public entities flexibility in how they meet their ADA obligations. Providing programs and supports to TANF applicants and recipients with disabilities may be one way a TANF program can prevent or remedy discrimination, but it is probably not the only way it can do so.

To take one example, a TANF program may have requirements that applicants must satisfy before their applications for benefits are processed, such as job search requirements. These requirements may have a discriminatory effect on applicants with disabilities because they may be less able to satisfy these requirements for reasons related to their disabilities. If the program does nothing at all to address the issue, it has violated Title II. But if it chooses to do something, it can choose which option to take. The program can:

- 1) waive the requirement entirely for people with disabilities;

- 2) provide people with disabilities with supports such as accessible transportation, readers, and other measures, to provide an equal opportunity to have their applications processed;
- 3) shorten the period of job search required if this would provide equal access to benefits;
- 4) modify the job search requirement in other ways that would enable people with disabilities to have an equal opportunity to benefit from TANF benefits;
- 5) create an alternative requirement for people with disabilities who cannot participate in job search, as long as it is no more difficult than job search requirements, enables people with disabilities to have an equal opportunity to access benefits, and does not violate other ADA provisions, such as the prohibition on unnecessary segregation; or,
- 6) eliminate the job search requirements for everyone.

As long as the modification effectively addresses barriers in the application process caused by the job search program, the TANF program can choose among these remedies. However, if job search is a program in its own right that provides a service or benefit to people with disabilities, as opposed to simply functioning as an eligibility requirement for benefits, some of the options listed above may be unacceptable if they do not remedy the denial of equal access to the job search process.

*(ii) The PRWORA Statement of Purpose*

The purpose of PRWORA is to “increase the flexibility of States in operating a program designed to

- 1) provide assistance to needy families so that children may be cared for in their own homes or the homes of relatives;
- 2) end the dependence of needy parents on government benefits by promoting job preparation, work and marriage;
- 3) prevent and reduce out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- 4) encourage the formation and maintenance of two-parent families.”<sup>711</sup>

The program purposes of PRWORA are the purposes of TANF programs, not PRWORA itself. Put differently, a TANF program is permitted under PRWORA to have one of the four goals listed in PRWORA and to have additional program goals. Therefore, it should be difficult for TANF programs to argue that program modifications for people with disabilities conflict with the goals of PRWORA itself and are therefore would fundamentally alter TANF programs.

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711. 42 U.S.C.A. § 601(a)(1) (West 2000).

Generally, many program modifications that people with disabilities need, including help in the application process, help with job search, changes in sanction procedures so that people with disabilities are not sanctioned for disability-related reasons, and even modifications of time limits, are consistent with one of the four purposes mentioned in PRWORA, which is aiding needy families so they can care for children at home. Many other possible program modifications for people with disabilities, such as modifications in job training and education programs and providing aids and services so that people with disabilities can participate in and benefit from these programs, are consistent with another one of the four goals mentioned in PRWORA, ending dependence by promoting job preparation and work. Even when program modifications promote only one of the goals of a TANF program, if they don't conflict with others, an argument can be made that they shouldn't be considered fundamental alterations.<sup>712</sup>

Although PRWORA refers to increasing state flexibility in its statement of purpose, state flexibility is not independent of other TANF goals in PRWORA.<sup>713</sup> An argument that program modifications for people with disabilities are a fundamental alteration simply because they conflict with PRWORA's goal of increasing state flexibility should fail. As all ADA requirements could be construed as restricting state flexibility, this interpretation would absolve TANF programs from having to make any reasonable modifications, which is clearly not what Congress had in mind when it included language in PRWORA that TANF programs are subject to the ADA.<sup>714</sup>

### (iii) Statements of Purpose in TANF Programs

In light of the enormous flexibility that PRWORA gives to states to design their own programs, state TANF program statements of purpose are at least as important as PRWORA's statement of purpose in determining whether a particular program modification would be a fundamental alteration under the ADA.

Because TANF programs may have one of the four goals specified in PRWORA as well as additional goals, these additional program goals will be relevant to whether particular program modifications are a fundamental alteration under the ADA. For example, if a TANF job training program has a stated goal of decreasing dependence of needy parents on government benefits but also has a stated goal of lifting people out of poverty, providing program modifications so people with disabilities can participate in training for higher-paid jobs, even though training for lower-paid jobs is available and would not require program modifications, would further the goal of lifting people out of poverty, even though it may not be necessary to further the goal of decreasing dependence on government benefits. Therefore, advocates would have a strong argument that the modifications would not fundamentally alter the program by conflicting with TANF program goals.

Because many TANF programs have multiple goals and goals are often phrased in general terms, state authorizing legislation and state plans will rarely provide definitive answers to the question of what program changes would be a fundamental alteration under the ADA. Sometimes it is unclear whether statements in authorizing legislation or state plans qualify as statements of purpose. Nevertheless, even statements paraphrasing the "general assurances" required by PRWORA may be helpful in arguing that many program changes would not be a fundamental alteration.

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712. This situation is easily distinguishable from the situation in *Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994), where the court held that one of the program purposes identified in the statute was in direct conflict with the modification that was sought.

713. *See* 45 C.F.R. § 260.20 (1999).

714. *See* 42 U.S.C.A. § 608(9) (West 2000).

To take a few examples, New York TANF authorizing legislation states that it is “the policy of the state that there be programs under which individuals receiving public assistance will be furnished work activities and employment opportunities and necessary services in order to secure unsubsidized employment that will assist participants to achieve economic independence.”<sup>715</sup> This statement of purpose is consistent with a number of program modifications for people with disabilities. Because it is framed in terms of the availability of services, rather than ending public assistance or requiring people to work, modifying work requirements, and providing supports so that people with disabilities can participate in and benefit from education and training programs is consistent with this stated purpose. In addition, because the purpose is framed in terms of the state providing services, it would not be a fundamental alteration of this purpose for the state to create programs where an insufficient number of programs exist. Further, New York’s state TANF plan states that New York “intends to” conduct a program that “provides assistance to needy families with (or expecting) children and promotes individual responsibility and family independence.”<sup>716</sup> Most modifications, including exemptions from work requirements and extensions of time limits, would be consistent with this goal.

CalWORKS, California’s TANF program, is operated at the county level, and each county has drafted its own plan. The San Francisco plan contains “objectives” and “principles,” including several objectives relating to linkages between job seekers, businesses and service providers; strengthening child support enforcement; establishing career centers in disadvantaged neighborhoods; and creating more on-the-job and work experience opportunities for those transitioning from welfare to work.<sup>717</sup> There are no goals concerning public assistance and none that mention reducing the use of assistance or increasing employment. Program modifications that exempt people with disabilities from work requirements they cannot fulfill or that extend benefits beyond time limits should not fundamentally alter the plan’s stated goals.

Sacramento’s plan has very different language. Among the “major program goals and objectives” listed in the plan’s Executive Summary are “to reduce dependence on government assistance by promoting job preparation, work and marriage;” “to support overall state efforts to implement a system of outcomes which include ... the extent to which recipients have obtained unsubsidized employment;” and “to assist the State in reducing child poverty.”<sup>718</sup> The goal of reducing public assistance is to be carried out through “job preparation, work and marriage.” While this language places greater emphasis on work and reducing the use of public benefits than the San Francisco plan, an argument can still be made that providing exemptions from work requirements and extensions of time limits for people with disabilities that are unable to work despite job promotion efforts does not conflict with these goals. Certainly, providing reasonable modifications to enable people with disabilities to be able to work is compatible with these goals. The goal of reducing child poverty is consistent with extending benefits when failure to do so would cause greater poverty in children. A “fact sheet” from the county welfare agency also lists several program purposes, including, “promote and encourage work to enable families to become self-sufficient,” and “provide financial aid for children who lack financial support and care.”<sup>719</sup> These purposes are also consistent with many program modifications for people with disabilities.

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715. N.Y. SOC. SERV. LAW § 331(1) (McKinney Supp. 1999).

716. NEW YORK STATE DEP’T OF SOC. SERVS., NEW YORK STATE PLAN AND EXECUTIVE CERTIFICATION: ADMINISTRATION OF THE BLOCK GRANT FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (effective Nov. 1, 1999) at <http://www.dfa.state.ny.us/tanf/>.

717. See SAN FRANCISCO DEPARTMENT OF HUMAN SERVS., SAN FRANCISCO COUNTY CALWORKS PLAN (Jan. 7, 1998) at <http://www.dss.cahwnet.gov.wtw.countypl.html>.

718. SACRAMENTO COUNTY CALWORKS PLAN (Dec. 3, 1997) at <http://www.dss.cahwnet.gov.wtw.countypl.html>.

719. SACRAMENTO COUNTY DEP’T OF HUMAN ASSISTANCE, CALWORKS FACT SHEET (rev. Jan. 2000) at <http://www.co.sacramento.ca.us/dha/afdcfact.html>.

(iv) Include all Available Sources of Funding for TANF Programs and Recipients in Assessment of Fundamental Alteration and Undue Burden

When analyzing whether TANF program modifications would be a fundamental alteration and undue burden, all available funding must be considered, including federal TANF funds and state maintenance of effort funds.<sup>720</sup> Depending upon the modification sought, other sources of funding, including funding for training, vocational, educational, child care, community service and other programs,<sup>721</sup> funds available from the Workforce Investment Act,<sup>722</sup> the Transportation Equity Act for the 21st Century (TEA),<sup>723</sup> and any other similar sources of funding must be considered.

An assessment of fundamental alteration and undue burden should also include any TANF contingency funds available to states during an economic downturn,<sup>724</sup> and any performance bonuses available to states.<sup>725</sup> Even if a state did not obtain or seek a particular source of funding, it must be included in the fundamental alteration and undue burden analysis if the funding could have been sought and obtained.<sup>726</sup> Indeed, a state's failure to seek available sources that could be used for programs and modifications for people with disabilities should be considered powerful evidence that a state cannot make a showing of undue burden. According to a survey conducted by the U.S. General Accounting Office between July and December 1998, six states decided not to participate in the Welfare-to-Work formula grants at all.<sup>727</sup> Thus, some states have clearly not sought all available funding.

(v) State Surpluses

It should be very difficult for TANF programs to prove that program modifications would be a fundamental alteration and undue burden if the state has substantial amounts of unspent TANF funds, which is the case in many states.

The combined effect of PRWORA's federal block grant formula, state maintenance of effort requirements and rapidly decreasing welfare caseloads has resulted in surpluses of unspent TANF funds in most states. Indeed, most welfare programs have more funding available now for programs serving low income people than they did before PRWORA went into effect.<sup>728</sup> The General Accounting Office estimated that in fiscal year 1997, 46 states had more resources than they would have under the old welfare programs, with a median increase of 22 percent, or about \$4.7 billion additional state and federal funds nationwide. Unlike Welfare-to-Work grants, which must be returned to the federal government if they are not used within three years,<sup>729</sup> and unlike state maintenance of effort expenditures, which must be made within the same fiscal

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720. See *supra* Part I.I.C.vi for a discussion the PRWORA maintenance of effort requirement.

721. See 28 C.F.R. § 35.164 (1999).

722. See Workforce Investment Act of 1998, PUB. L. NO. 105-220, 112 Stat. 936 (1998) (codified as amended in scattered sections of 29 U.S.C.A.).

723. See PUB. L. NO. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of U.S.C.A.). TEA provides competitive grants to states and localities to develop flexible transportation systems to connect welfare recipients and other low income individuals to jobs and employment-related activities.

724. See 42 U.S.C.A. § 603(b) (West 2000).

725. See 42 U.S.C.A. §§ 603 (a)(2); 603(a)(4); 603(a)(5)(E) (West 2000).

726. See 28 C.F.R. § 35.164 (1999).

727. The states that decided not to participate in the formula grants in fiscal year 1998 were Idaho, Ohio, Mississippi, South Dakota, Wyoming and Utah. See U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATUS OF AWARDS AND SELECTED STATES' USE OF WELFARE-TO-WORK GRANTS (1999) *available at* <http://frwebgate.access.gpo.gov/cgi-bin/miltiddb.cgi>.

728. See U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: EARLY FISCAL EFFECTS OF THE TANF BLOCK GRANT, AIMD-98-137 (Aug. 1998) [hereinafter AUGUST 1998 GAO REPORT] *available at* <http://access.gpo.gov/cgi-bin/miltiddb.cgi>.

729. See 42 U.S.C.A. § 603(5)(C)(vi).

year,<sup>730</sup> states may carry over any unspent federal TANF funds.<sup>731</sup> By the middle of fiscal year 2000, states carried over a total of \$8.3 billion in unspent funds.<sup>732</sup> To quote GAO: these additional resources “present states with a unique opportunity to invest more in programs that can help people find and keep their jobs and prevent them from returning to welfare while still saving some resources for a ‘rainy day’.”<sup>733</sup> Clearly, many states have not taken full advantage of this opportunity.<sup>734</sup> Indeed, some states are using the new fixed federal financing formula for federal TANF grants to reduce their own spending on programs for the poor, instead of investing it in new programs.<sup>735</sup> Even under the *Olmstead* plurality standard, states should have difficulty demonstrating that the cost of many types of modifications for people with disabilities is a fundamental alteration given these unspent funds.

#### (vi) The Significance of Segregated and Separate State Funds

PRWORA allows states to co-mingle their maintenance of effort funds with federal TANF funds, segregate these funds within a program receiving federal TANF funds so that the state funds are spent on families who receive services paid for entirely by these funds, or use the funds for programs that receive no federal TANF funding at all.<sup>736</sup>

Individuals receiving benefits funded only with state funds are not subject to the 60 month lifetime benefit limit<sup>737</sup> or work requirements.<sup>738</sup> This means that states have the ability to serve families without having to include them in the federal work participation rates. Consequently, states cannot convincingly argue that some program modifications for people with disabilities, such as exemptions from work requirements and permitting individuals to participate in activities that do not satisfy federal work participation requirements, would be a fundamental alteration or undue burden by putting states at risk of being unable to meet PWRORA work participation requirements. The states’ ability to separate and segregate state funds seriously undermines this type of fundamental alteration and undue burden argument.

#### (vii) The Relevance of Other Exceptions in TANF Programs

PRWORA contains a number of mandatory and optional exceptions to its requirements.<sup>739</sup> In addition, TANF programs may also have additional exceptions to particular policies and requirements. Many of these exceptions are for reasons other than disability.

One possible argument is that because a TANF program makes exceptions to a particular program rule or requirement for reasons other than disability, it would not be a fundamental alteration to make the same modification as a reasonable modification for a disability. This

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730. See 42 U.S.C.A. § 609(a)(7)(B)(i)(I); 45 C.F.R. § 263.6(d) (West 2000).

731. See 42 U.S.C.A. § 604(e) (West 2000).

732. See ED LAZERE, CENTER ON BUDGET AND POLICY PRIORITIES, UNSPENT TANF FUNDS IN THE MIDDLE OF FEDERAL FISCAL YEAR 2000 (Aug. 2, 2000) <<http://www.cbpp.org/8-2-00wel.pdf>>. Some of this \$8.3 billion represents funds that states have committed to spend but not yet spent.

733. See AUGUST 1998 GAO REPORT, *supra* note 728, at 12.

734. See Robert Pear, *States Declining to Draw Billions in Welfare Money*, N.Y. TIMES, Feb. 8, 1999, at A1.

735. See Jason DeParle, *Life After Welfare: Spending the Savings; Leftover money for Welfare Baffles, Inspires, States*, N.Y. TIMES, Aug. 29, 1999, at 1 (nat'l ed.).

736. See *supra* Part I.1.C.ix.

737. See 42 U.S.C.A. § 608(A)(7)(F) (West 2000).

738. See *supra* Part I.1.C.xix.

739. See, e.g., 42 U.S.C.A. § 607(e)(2) (West 2000) (exception to sanctions for failure to satisfy work requirements for single custodial parents of children under six where appropriate child care is not available); 42 U.S.C.A. § 607(b)(5) (West 2000) (exception to work requirements and exclusion from work participation rates permitted for single custodial parents of children under one year of age); 42 U.S.C.A. § 608(a)(7)(C) (West 2000) (hardship exception and the exception for individuals who were battered or subject to extreme cruelty to the prohibition on using federal funds for assistance after 60 months).

argument would be based on a number of cases holding that when a program makes exceptions to rules and requirements for reasons other than disability, it would not fundamentally alter the program to make the same exception to people with disabilities as a modification for their disabilities.<sup>740</sup> However, there are some important differences between the exceptions made in these cases and exceptions to TANF requirements. The principal difference is that the cases did not involve exceptions to program requirements that were created by federal or state statutes. Most involved program rules.

In *Alexander v. Choate*, the Supreme Court rejected an interpretation of Section 504 that would have required recipients of federal funds to consider whether each contemplated action could be carried out in a way that caused fewer disadvantages to people with disabilities.<sup>741</sup> Interpreting the ADA to require state and local governments and agencies to grant exceptions to people with disabilities each time the legislature granted an exception to a program requirement to anyone else or for any other reason would do just that. Most courts are likely to hold that Congress and state legislatures are free to carve out some exceptions to requirements without also having to grant the same exception to people with disabilities. While the existence of an exception to program requirements for reasons other than disability suggests that it would not be a fundamental alteration to modify the same program requirement for people with disabilities, the fact that the program grants the exception in other circumstances does not mean that it is discriminatory to fail to do so for people with disabilities. In addition, PRWORA's emphasis on state flexibility in program design may make this type of argument more difficult, especially as Congress plainly contemplated that states would create their own program and work requirements. The existence of exceptions to rules for reasons other than disability is likely to be of greater relevance when these exceptions are informal, not legislated. Nevertheless, if a program maintains that it is unable to provide a particular program modification, it may be of some relevance to a court that the program is already providing this modification for others.

#### (viii) Fundamental Alteration Should be Analyzed for the Individual

Advocates should argue that the pertinent question should be whether a TANF program or program purpose will be fundamentally altered for the individual or a group of individuals with disabilities if a modification is provided; not whether it would be altered for everyone. If the purpose of sanctioning individuals for non-compliance with work requirements is to encourage recipients to improve compliance and take work requirements seriously, an argument can be made that this purpose will not be served when sanctions are imposed on individuals who are not able to comply because of their disabilities. Thus it will not alter the purpose of sanctions if they are not applied to those individuals.

An individualized analysis of TANF program purposes is not only consistent with the ADA,<sup>742</sup> it is consistent with PRWORA. PRWORA contains provisions requiring states to take a close look at the abilities and interests of individual recipients. The Individualized Responsibility Plan provisions<sup>743</sup> place an emphasis on the abilities, skills and employment goals of individual TANF recipients, and the services that will be provided to enable each recipient to meet those goals. Similarly, the preamble to the interim regulations of the Welfare-to-Work program requires operating entities to ensure that there is "an individualized strategy for transition to unsubsidized employment in place for each participant."<sup>744</sup>

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740. See *supra* Part I.10.A.iii.

741. 469 U.S. 287, 298-99 (1985).

742. See *supra* Part I.10.A.vi.

743. See 42 U.S.C.A. § 608(b) (West 2000).

744. 20 C.F.R. § 645.225(c)(1999).

TANF programs may argue that an individualized analysis of fundamental alteration and program purpose is not appropriate for some TANF modifications because making exceptions to program requirements for individuals with disabilities will send a message to other program participants that they need not take work or other program requirements seriously. Therefore, a program may argue, making program modifications for people with disabilities will fundamentally alter the program by affecting compliance with program requirements by others. In contrast, waiving the eight semester rule or the rule requiring students to expect to graduate by age 19, so learning disabled individuals can participate in interscholastic athletics,<sup>745</sup> will not cause 18 year-olds without disabilities to behave any differently than they would if these exceptions were not made. However, the desire to send a message to other program participants about the consequences of non-compliance with program requirements should not justify the application of rules to people with disabilities when they have a discriminatory effect and do not serve their intended purpose when applied to those individuals.

(ix) Whose Obligation is it to Provide Reasonable Modifications in TANF Work, Training and Other Programs?

Because welfare programs have a variety of different relationships with work, education, and training programs and these programs are organized in a variety of ways, it will not always be clear who has the obligation under the ADA to provide reasonable modifications to clients. In some situations, more than one entity will have this obligation.

Title II requires public entities to make reasonable modifications to its own programs and services. Depending upon how the program is described in state laws, regulations, plans, agency manuals, and other materials. This means that in some situations a training, education or work program is part of the TANF program, and the TANF agency will have an obligation to provide reasonable modifications to individuals after they have been placed in these programs. In other situations, a TANF agency may simply refer individuals to those programs, in which case it is the responsibility of these other programs to provide program modifications on the job or at the education or other program. Even when this is the case, however, the TANF agency may have an obligation to provide particular types of modifications, such as those that enable program participants to access these other programs. For example, if the TANF program makes placements or referrals to these programs, it must make modifications to the referral or placement process so that people with disabilities have an equal opportunity to participate in and benefit from this referral and placement process. In some instances, that will mean providing assistance so that people with disabilities can contact and communicate with and navigate these programs.

In addition, some TANF programs have a sufficient amount of control over the terms and conditions of employment of TANF recipients to meet the definition of “employer” or “employment agency” under Title I of the ADA.<sup>746</sup> When this is so, the TANF program will have an obligation under Title I to provide reasonable accommodations to applicants and employees on the job, in addition to their obligation under Title II to provide reasonable modifications in the TANF program. This, however, does not necessarily remove the obligation of other entities to provide reasonable accommodations to the individual. In many situations both the work or work training program and the TANF program will have an obligation under Title I to provide reasonable modifications to TANF applicants and recipients at job placements.

Finally, if a TANF program denies benefits, sanctions, or takes other adverse action against people with disabilities based on non-compliance with work, training, job search or other requirements, and modifications were not provided to the individual, even if the TANF agency

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<sup>745</sup>. See *supra* Part II.10.A.iii.

<sup>746</sup>. See *infra* Part III.11.

was not operating the program in question, the TANF program has discriminated on the basis of disability. Thus in some instances TANF programs may have an obligation to provide reasonable modifications at jobs or other placements they do not operate or control in order to avoid discriminating against TANF recipients.

### PART III: USING THE ADA TO ADDRESS COMMON PROBLEMS IN TANF PROGRAMS

#### CHAPTER 11: DOES THE ADA REQUIRE TANF PROGRAMS TO HELP APPLICANTS WITH DISABILITIES WITH THE BENEFIT APPLICATION PROCESS AND WITH NAVIGATING THE SYSTEM?

The TANF application process raises two types of issues for people with disabilities. The first is barriers to access that might occur when applying for any public benefits, such as a lack of physical accessibility of offices, and the need for assistance in completing applications and navigating the system.<sup>747</sup> The second is barriers specific to TANF programs, including diversion policies, job search requirements, and other policies and requirements intended to discourage individuals from receiving assistance.<sup>748</sup>

##### *A. The Obligation to Make Reasonable Modifications in the Application Process*

The ADA requires welfare agencies to provide a variety of different types of assistance to applicants for TANF benefits. This assistance is required as a reasonable modification of policies, practices, and procedures that are necessary to avoid discrimination.<sup>749</sup> It is also required because without such assistance, welfare agencies' application processes are a method of administration that have a discriminatory effect on people with disabilities.<sup>750</sup> Failing to provide modifications during the application process also prevents people with disabilities from having an equal opportunity to benefit from the TANF program,<sup>751</sup> otherwise limits the enjoyment of rights and advantages enjoyed by others receiving the benefits,<sup>752</sup> and denies meaningful access to TANF benefits, to name only a few of the applicable ADA prohibitions.

In fact, in its Title II Technical Assistance Manual, the Department of Justice uses this very program modification as an example of the type of reasonable modifications that may be required under Title II. It states:

A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing

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747. This type of barrier is discussed in this chapter.

748. This second type of barrier is discussed *infra* Part III.12-13.

749. See 28 C.F.R. § 35.130(b)(7)(1999).

750. See 28 C.F.R. § 35.130(b)(3) (1999).

751. See 28 C.F.R. § 35.130(b)(1)(iii) (1999).

752. See 28 C.F.R. § 35.130(b)(1)(vii) (1999).

applicants who have mental disabilities with individualized assistance to complete the process.<sup>753</sup>

In addition, the OCR TANF Guidance provides the following example of a reasonable modification:

[a] welfare program with a complicated application form will need to modify its application form or provide someone to help fill out the form when a person with a mental disability is unable to complete the form.<sup>754</sup>

### *B. Fundamental Alteration and Undue Burden*

Advocates have a very strong argument that providing reasonable modifications during the application process is not a fundamental alteration or undue burden. This assistance does not change the nature or substance of TANF benefits,<sup>755</sup> the substantive eligibility requirements for benefits, or the manner in which benefits are provided.<sup>756</sup> Making these modifications is not prohibited by federal law<sup>757</sup> and there is a strong argument that it is consistent with one of the TANF program goals mentioned in PRWORA, which is to “provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives.”<sup>758</sup> It is also unlikely that state law will have purposes that conflict with these modifications. The cost of providing this assistance should not be substantial. The barriers addressed by these modifications prevent some individuals with disabilities from getting any benefits, which courts are likely to view as a compelling reason for modifications.<sup>759</sup> Finally, the modifications put everyone on an equal footing by providing an equal opportunity to receive benefits; they do not give people with disabilities “more” than others.<sup>760</sup>

As the barrier denies meaningful access to the application process, the relevant inquiry is whether individuals are qualified to apply for benefits, not whether they would ultimately be able to qualify for them.<sup>761</sup> Moreover, where welfare agencies use joint applications for TANF and other benefits, the relevant question is whether an individual is qualified to apply for any of these benefits, not just TANF.

### *C. Possible Reasonable Modifications*

Clients may need and be entitled to a wide range of modifications during the TANF application process. A partial list of such modifications follows:

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753. ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II-3.6100.

754. OCR TANF GUIDANCE, *supra* note 242, Technical Assistance at § V.

755. See *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999); *Helen L. v. DiDario*, 46 F.3d 325, 337 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *Charles Q. v. Houstoun*, No. 1:CV-95-280, 1996 U.S. Dist. LEXIS 21671, at \*6 (M.D. Pa. Apr. 22, 1996); and *supra* Part II.10.A.iii.

756. See *Helen L.*, 46 F.3d at 337; and *supra* Part II.10.A.iii.

757. See *Howard v. Department of Soc. Welfare*, 655 A. 2d 1102, 1109 (Vt. 1994); and *supra* Part II.10.

758. 42 U.S.C.A. § 601(a)(1) (West 2000).

759. See *supra* Part II.10.

760. See *supra* Part II.10.A.iii.

761. See *supra* Part II.6.

- 1) readers to read application forms for people whose disabilities impair their ability to read, including individuals with learning disabilities, mild mental retardation, visual impairments, and any conditions treated with medication that causes blurred vision;
- 2) assistance in filling out forms for individuals whose disabilities impair their ability to complete forms, such as individuals with learning disabilities, psychiatric disabilities, visual disabilities, orthopedic, musculoskeletal, neurological and other disabilities;
- 3) providing additional explanations of forms and their requirements for individuals whose disabilities impair their ability to understand the forms;
- 4) providing an aide or additional person to accompany individuals through different stages of the application process, where such assistance is needed for physical, cognitive, psychiatric or other disabilities;
- 5) providing flexibility in appointment times, waiting times, and other aspects of the appointment process;<sup>762</sup>
- 6) making additional phone calls, advocating for, and taking other steps to assist individuals with disabilities with other stages of the application process;
- 7) helping individuals with disabilities to gather necessary documentation to demonstrate eligibility for services, including making phone calls on their behalf, accepting alternative forms of documentation and verification, where disabilities impair the ability to gather this information;
- 8) allowing individuals with disabilities to apply for benefits and attend other appointments at alternative sites, where disabilities impair access to existing sites, either because they are not physically accessible, because auxiliary aids and services are not provided, or because of transportation barriers;
- 9) modifying the application process in other ways, by allowing applicants to apply by telephone, mail, home visits, or by other means;
- 10) allowing family members, friends or others to attend and participate in various stages of the application process even where rules would otherwise prohibit attendance or participation;
- 11) simplifying the application process in other ways, by modifying application forms, eliminating steps in the process, or by other means, as long as programs can still obtain the information needed to make eligibility determinations;
- 12) providing auxiliary aids and devices, such as qualified interpreters, note takers, transcribers, assistive listening devices (such as TTYs), open and closed captioning,<sup>763</sup> when necessary to ensure effective communication with people with disabilities, giving primary consideration to the aids and devices of the individual's choice. Using a note pad to communicate with individuals who are speech or hearing impaired during some parts of the application process, may not be sufficient for more complex and lengthy

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762. See *Dees v. Austin Travis Co. Mental Health and Mental Retardation*, 860 F. Supp. 1186 (W.D. Tex. 1994).

763. Other examples of auxiliary aids and devices can be found in the Title II regulations, 28 C.F.R. § 35.104 (1999).

interactions in which complex information must be conveyed and understood.<sup>764</sup> Where clients have limited reading and writing skills, TTYs may not be adequate and interpreters may be required.<sup>765</sup>

13) using telecommunication devices for the deaf (TDDs) or equally effective means of communication (such as telephone relay services) to communicate by telephone with applicants, recipients and members of the public who are speech or hearing impaired.<sup>766</sup> In Interpretative Guidance, the DOJ has encouraged agencies that have extensive contact with the public to have TDDs, and identified “public aid offices” as among those having extensive contact.<sup>767</sup>

14) extending time periods for keeping pending applications open for people with disabilities to provide additional time to submit documentation demonstrating eligibility for benefits.<sup>768</sup>

Agency policies prohibiting staff at welfare centers from making any of the modifications listed above or prohibiting staff from assisting applicants with applications for benefits violate the ADA.

#### *D. Notice of the Availability of Modifications*

Title II notice requirements require TANF programs to provide notice to applicants of their right to the modifications listed above. To be effective, notices must give examples of modifications and not just use the term “reasonable modifications,” which is meaningless to many people. In addition, notices should give examples of conditions that may qualify as disabilities that entitle people to modifications, including assistance during the application process. TANF programs should not assume that applicants know how “disability” is defined under the ADA. Given the high number of TANF applicants and recipients with undiagnosed disabilities, this assumption would be particularly inappropriate. Notices should give examples of disabilities, and some examples should be described not just in terms of medical diagnosis but in terms of symptoms, such as difficulty reading or writing, trouble standing for long periods of time, or extreme nervousness.

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764. See 28 C.F.R. § 35.160 (1999).

765. See *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (reversing summary judgment for defendant in a Section 504 case brought by a deaf inmate who argued that an interpreter was required instead of a TTY because he had limited reading skills).

766. See 28 C.F.R. § 35.161 (1999).

767. See 28 C.F.R. pt. 35 app. A § 35.161.

768. Cf. *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998) (allowing additional time on a timed test is a reasonable modification under the ADA for individuals with particular disabilities); *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321 (2d Cir. 1998) (same), *vacated by* 527 U.S. 1031 (1999), *on remand* 226 F.3d 69 (2d Cir. 2000). Some states have extremely stringent documentation deadlines. New York requires applicants provide relevant medical information to welfare agencies documenting a disability within ten calendar days of receiving notice and to health care providers making disability determinations within four business days of an examination. See N.Y. SOC. SERV. LAW §§ 332-b(2)(a)-(b) (McKinney Supp. 1999). Wisconsin requires TANF agencies to give applicants seven working days to provide requested verification. See WIS. ADMIN. CODE § DWD 12.06(4)(b) (West 1997).

*E. Do TANF Programs Need to Know Which Individuals Have Disabilities to Provide Reasonable Modifications?*

TANF programs can eliminate many barriers in the application process by changing program policies and procedures, and they can do so without any need to know which applicants or potential applicants have disabilities. Requiring welfare workers to offer particular types of assistance to everyone during the application process and having a designated employee at each site to arrange for non-routine program modifications are examples of such practices. Programs can also adopt policies on how to handle modification requests and assign responsibility for providing modifications at each site. These changes require no knowledge of particular applicants' disabilities. Given the limited knowledge TANF programs have about applicants and their disabilities at this stage, these types of policy changes are essential to avoiding discrimination during the application process.

Title II requires TANF programs to make reasonable modifications when they are "necessary to avoid" discrimination on the basis of disability.<sup>769</sup> The preventive nature of this requirement also suggests that agencies need not know which particular individuals have disabilities and are at risk of experiencing discrimination to make program modifications. In addition, Title II prohibits programs from using methods of administration that have a discriminatory effect.<sup>770</sup> This too requires programs to eliminate such methods even in the absence of specific requests for modifications or knowledge of who will benefit from them.

*F. Can TANF Programs Ask Potential Applicants for Benefits if They Have Disabilities in Determining Who Needs Assistance with the Application Process?*

Welfare programs know less about clients before they have applied for benefits than at any other time. Some individuals who need assistance with the application process or other modifications will not ask for them even when notices inform them of the right to assistance. Unless this assistance is provided to everyone, programs will need to know which particular individuals need and want this type of assistance in order to provide it effectively. This raises a host of questions about the rights of TANF programs to ask about the disabilities of potential applicants.

Some welfare advocates have suggested that as soon as potential applicants enter the welfare center, programs should hand out a one-page form with a brief check list likely to identify the existence of a disability and the need for assistance in the application process.<sup>771</sup> While this approach has some appeal, it also has a number of practical, and possibly legal, drawbacks.

At an absolute minimum, TANF programs would have to make completion of such forms optional. Requiring potential TANF applicants to provide information about their disabilities, particularly before they have even applied for benefits, is unjustified and probably violates Title II. Though Title II regulations do not speak to the issue directly, the DOJ Title II Technical Assistance Manual states that "[a] public entity may not make unnecessary inquiries into the existence of a disability."<sup>772</sup> Information about applicants' disabilities is not needed by TANF programs to determine who is eligible to apply for benefits. Thus there is a strong argument that

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<sup>769</sup> See 28 C.F.R. § 35.130(b)(7) (1999).

<sup>770</sup> See 28 C.F.R. § 35.139(3)(i) (1999).

<sup>771</sup> This suggestion comes from the San Francisco Legal Aid Foundation, which undertook a major effort to work with other advocates and local welfare officials to re-identify barriers to the agency's programs and recommend modifications. RECOMMENDATIONS TO THE SOCIAL SERVICES COMMISSION FROM THE AMERICANS WITH DISABILITIES ACT ADVISORY COMMITTEE (undated).

<sup>772</sup> ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *supra* note 254, at § II-3.5300.

TANF programs have no need to know this information at this time and inquiries about disabilities are unnecessary.<sup>773</sup>

Requiring individuals to reveal the existence of a disability before they have applied for benefits will inevitably deter many individuals from applying for benefits simply because they do not want to reveal this information. Even when TANF programs make answering such questions optional, many applicants will believe that they will not receive benefits unless they provide the information. Others will not understand that they are optional, due to language barriers, developmental disabilities, or other reasons. This raises the question of whether even optional questionnaires can satisfy the requirements of Title II. Given this deterrent effect, asking such questions probably violates Title II's prohibitions on the use of "eligibility criteria that screen out or tend to screen out" people with disabilities from the full and equal enjoyment of the program that are not "necessary for provision of the service, program or activity being offered,"<sup>774</sup> and on using methods of administration that have a discriminatory effect.<sup>775</sup>

If TANF programs do ask potential applicants about their disabilities and advocates choose not to object to this process, advocates should urge TANF programs to adopt, publish, and comply with confidentiality policies that prohibit the sharing of the information requested on these forms with those outside the agency. Although Title II does not specifically address whether state and local government programs must keep such information confidential, confidentiality is essential. Potential applicants must be assured that the information will not be shared with other agencies, or requesting the information will inevitably screen out people.

In addition, asking potential applicants questions about their disabilities may violate Title I of the ADA, which prohibits discrimination in all terms and conditions of employment.<sup>776</sup> The U.S. Equal Employment Opportunity Commission (EEOC), which enforces Title I, has issued Enforcement Guidance that discusses the relationship between TANF agencies, recipients, and organizations operating job programs.<sup>777</sup> The Guidance makes clear that under some circumstances, TANF agencies meet the Title I definition of "employer" or "employment agency" in their relationship with TANF recipients, and TANF recipients will sometimes meet the definition of "employee" in their relationship with TANF agencies. It identifies a number of criteria relevant to determining whether an employment relationship exists between the TANF agency and benefits recipient, including: whether the TANF agency has the right to control when, where, and how the TANF recipient performs the job; the hours of work and the duration of the job; and other factors.<sup>778</sup> The Guidance makes clear that no one factor is determinative, and the critical issue is whether the TANF program has the right to exercise control over the worker's employment.<sup>779</sup>

Title I of the ADA severely restricts employers and employment agencies from asking job applicants questions about their disabilities and from requiring applicants to provide medical records or submit to medical examinations.<sup>780</sup> A question is prohibited if it is "likely to elicit

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773. The permissibility of asking questions about applicants' disabilities during the application process is discussed *infra* in Part III.14.D.

774. 28 C.F.R. § 35.130(b)(8) (1999).

775. See 28 C.F.R. § 35.130(b)(3) (1999). PRWORA does, however, permit TANF programs to test applicants for illegal drugs. See 21 U.S.C.A. § 826(b) (West 2000). Thus for the purpose of this analysis drug tests cannot be considered an improper inquiry about the existence of a disability.

776. See 42 U.S.C.A. §§ 12111-12117 (West 2000).

777. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY AGENCIES AND OTHER STAFFING FIRMS, EEOC NOTICE NO. 915.002 (Dec. 3, 1997) [hereinafter EEOC CONTINGENT WORKER GUIDANCE] *available at* <http://www.eeoc.gov/docs/conting.txt>.

778. See *id.*

779. See *id.*

780. See 42 U.S.C.A. § 12112 (d)(2)(A) (West 2000).

information about a disability.”<sup>781</sup> There are only a few exceptions to this prohibition. According to Guidance, employers may tell applicants about the availability of reasonable accommodations during the hiring process itself and ask applicants if they need such accommodations.<sup>782</sup> In addition, employers can ask whether applicants will need a reasonable accommodation on the job and what type of accommodation is needed when the employer could “reasonably believe that the applicant will need reasonable accommodations to perform job functions.”<sup>783</sup> Under the Guidance, this reasonable belief could be based on an applicant’s obvious disability, an applicant who voluntarily discloses a hidden disability, or any other circumstances that would justify an employer’s reasonable belief that the applicant will need a reasonable accommodation.<sup>784</sup> The Guidance does not say what circumstances would justify an employer’s reasonable belief. Employers may tell applicants about the availability of reasonable accommodations during the hiring process and ask applicants if they need accommodations for this process. Title I also restricts the questions employers are permitted to ask and medical information they are permitted to request from applicants who have been given conditional offers of employment<sup>785</sup> as well as from existing employees.<sup>786</sup> In general, Title I places the greatest restrictions on employers’ ability to ask questions about disabilities when they are dealing with job applicants.

The implications of these restrictions for TANF programs are not entirely clear. Some, but not all TANF agencies will qualify as employers under Title I in their relationships with some TANF clients, and some but not all TANF clients will qualify as employees of the TANF program. However, when individuals are applying for benefits, it will often be unclear which applicants will later qualify as employees and when TANF programs will qualify as employers in their relationship with those employees. Nevertheless, because many welfare agencies will go on to establish the legal equivalent of an employer-employee relationship with some TANF recipients under the ADA, they should be subject to the Title I restrictions in their dealings with TANF applicants and recipients. Moreover, the fact that some TANF applicants will not become employees of the TANF agency does not defeat the applicability of Title I, because Title I protects job applicants, many of whom never become employees of the employer. Further, individuals who enter welfare offices with the intention of applying for TANF are more analogous to job applicants than to applicants who have conditional job offers or to current employees, and so the Title I regulations governing the job application process are the ones that should apply. As Title I imposes the greatest restrictions on employers at the earliest stages of the employment process, the most protective standard should apply to applicants and potential applicants for TANF benefits.

If the Title I restrictions on medical examinations and inquiries for job applicants are applied to TANF applicants and those entering welfare centers with the intention of applying for TANF benefits, the following rules emerge: TANF programs cannot ask any questions of applicants that are “likely to elicit information about a disability,” but they can inform applicants and potential applicants about the availability of assistance with the TANF application process. In addition, TANF programs can ask a particular applicant or potential applicant if he or she will need a reasonable modification if there is reason to believe that the individual might need one because of an obvious disability, voluntary disclosure of a disability, or a reasonable belief that an

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781. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA ENFORCEMENT GUIDANCE: PRE-EMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995), available at <http://www.eeoc.gov/docs/preemp.html>.

782. See *id.*

783. See *id.*

784. See *id.* There is no support in the statute or regulations for these exceptions.

785. See *id.*; see also 42 U.S.C.A. § 12112(d)(3) (West 2000).

786. See 42 U.S.C.A. § 12112(d)(4) (West 2000); see also, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICAN WITH DISABILITIES ACT (July 27, 2000), available at [http://www.eeoc.gov/docs/guidance\\_inquiries.html](http://www.eeoc.gov/docs/guidance_inquiries.html).

individual has a disability based on objective factors. Under these criteria, making targeted offers of help with the application process or other reasonable modifications is permissible.

States may argue that because TANF programs do not have the same motive to screen out applicants with disabilities that employers have to screen out applicants with disabilities from jobs, the Title I restrictions should not apply to TANF programs. However, the danger that asking disability-related questions will screen out people with disabilities from the TANF program does exist. In addition, this argument should not carry much weight because Title II prohibits programs from using methods of program administration that have a discriminatory effect,<sup>787</sup> not just the intentional exclusion of people with disabilities.

Advocates may want to work with TANF programs to develop a list of objective criteria for programs to use in identifying individuals that they would be justified under Title I in approaching to ask about disabilities and modifications. Though any list has a danger of making inappropriate generalizations about people with disabilities and encouraging programs to stereotype individuals, it is still preferable to the unfettered discretion of welfare agency staff.

Advocates should encourage TANF programs to put questions to applicants in functional, not diagnostic terms, by asking about whether the individual needs help, and not a diagnosis. In addition, programs should offer help in every instance before they ask someone if he or she has a disability, even when they might be justified under EEOC Guidance in asking right away.

### *G. Can Programs Require Documentation of a Disability to Prove Eligibility for Assistance During the Application Process?*

In some situations, the ADA permits the entity providing the modification or accommodation to ask for proof that an individual has a disability that would entitle the individual to an accommodation. For example, in the employment context, Title I of the ADA allows employers to require applicants and employees to provide proof that they have disabilities that entitle them to reasonable accommodations.<sup>788</sup> While no regulation or case law addresses this specific issue, it would be particularly unreasonable for TANF programs to require documentation of a disability before providing help with the benefits application process. Given the prevalence of undiagnosed disabilities, many will not have such documentation.<sup>789</sup> Moreover, the very disabilities that make it difficult for people to complete applications on their own will often make it difficult for people to obtain and provide this documentation. Requiring documentation will also discourage people from requesting assistance.

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<sup>787</sup> See 28 C.F.R. § 35.130(b)(3)(i) (1999).

<sup>788</sup> See 29 C.F.R. § 1630 (1999) (“When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual provide documentation of the need for accommodation.”).

<sup>789</sup> See *Bradford v. County of San Diego*, No. 97-CV-1024 (S.D. Cal.) (settlement July 29, 1997) (settlement in case challenging welfare agency refusal to accept pre-existing medical documentation to establish eligibility for exception to work requirements. Agency agreed to accept documentation of medical professionals if verification period had not expired). *But cf.* *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976 (9th Cir. 1997) (holding that local transportation agency could deny half fare card to individual who did not submit updated medical documentation of disability because he could not afford an evaluation).

## CHAPTER 12: DO DIVERSION PRACTICES THAT DISCOURAGE INDIVIDUALS FROM APPLYING FOR BENEFITS VIOLATE THE ADA?

More than half of state TANF programs are using “diversion” strategies in their TANF programs to prevent or discourage individuals from applying for benefits until other options for support are attempted.<sup>790</sup> “Diversion” is a term used to describe many things. In some cases, it refers to offering only one-time short-term benefits. In others, it refers to efforts by programs to discourage people from applying for cash benefits and encourage them to seek help from families, charity, or food pantries.<sup>791</sup> Some programs divert applicants by turning people away and telling them to return to the welfare center on another day.<sup>792</sup> Others emphasize lifetime benefit limits and work requirements to discourage people from using benefits until they have no other option. Sometimes diversion refers to efforts to assist people getting jobs or providing additional supports. The focus in this Chapter, however, is on diversion efforts that discourage people from applying for benefits.

Diversion strategies have been extremely effective in reducing welfare rolls. Preliminary data from Oregon and Wisconsin estimate that approximately 40 percent of applicants who were likely to qualify for cash assistance are being diverted. During the first seven months of 1997, Oregon diverted 74 percent of the people who were likely to be eligible.<sup>793</sup> In New York City, 84% of the people seeking assistance at one local center left without filling out applications the same day during the center’s first month of operation, and another center diverted 69% of individuals seeking assistance during its first month of operation.<sup>794</sup>

### *A. The Discriminatory Impact of Diversion*

Diversion obviously diverts both people with and without disabilities from applying for benefits. Despite the impact of diversion on everyone attempting to apply for benefits, there is an argument that diversion violates the ADA. Diversion practices are extremely likely to have a “particularly exclusionary effect”<sup>795</sup> on people with disabilities. Requiring multiple trips to welfare centers to apply for benefits creates a barrier for people with disabilities because some are unable to make these trips, or can do so only with difficulty. Mobility and other impairments may make it difficult to travel; medical appointments related to disabilities may conflict with TANF appointments; lack of accessible transportation can make it difficult or impossible to make multiple trips to welfare centers; lack of available child care for children with disabilities can also make multiple trips difficult or impossible. Discouraging people from applying for benefits, or telling them to return at a later date, also creates barriers for individuals with psychiatric and cognitive disabilities (such as mild mental retardation) because these individuals may not understand why they are being sent away and think they are being permanently turned away from services.

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790. State TANF plans submitted to HHS in November 1997 indicated that 30 states are using diversion strategies. See U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATES ARE RESTRUCTURING PROGRAMS TO REDUCE WELFARE DEPENDENCE 60 (GAO/HEHS-98-109, June 1998) [hereinafter JUNE 1998 GAO REPORT], available at <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi>.

791. See PAMELA A. HOLCOMB ET AL., U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, BUILDING AN EMPLOYMENT FOCUSED WELFARE SYSTEM: WORK FIRST AND OTHER WORK-ORIENTED STRATEGIES IN FIVE STATES (1998) [hereinafter WORK FIRST STRATEGIES], available at <http://aspe.hhs.gov/hsp/isp/wfirst/work1st.pdf>.

792. See, e.g., Reynolds v. Giuliani, 35 F. Supp.2d 331 (S.D.N.Y. 1999) (describing diversion efforts in New York City); see also Rachel L. Swarns, *Welfare’s Job Centers Bring High Hopes and Thin Results*, N.Y. TIMES, Feb. 23, 1999, at A1.

793. See JUNE 1998 GAO REPORT, *supra* note 790, at 64.

794. See Reynolds, 35 F. Supp.2d at 343.

795. Alexander v. Choate, 469 U.S. 287, 302 (1985).

Under Title II, diversion practices are likely to exclude people with disabilities from benefits;<sup>796</sup> deny people with disabilities an opportunity to participate in the program;<sup>797</sup> provide an opportunity to participate that is not as effective as that provided to others;<sup>798</sup> and operate as criteria or methods of administration that have the effect of impairing the objectives of the program for people with disabilities.<sup>799</sup> They also function as eligibility criteria that screen out or tend to screen out people with disabilities from the full and equal enjoyment of the program.<sup>800</sup> Because this type of diversion, by definition, is designed to discourage individuals from applying for benefits, any disparate impact on people with disabilities means that people with disabilities have a less effective opportunity to participate in the TANF program. And, because diversion is an intentional barrier to services, diversion practices make a compelling disparate impact claim. Moreover, there will be no question in many instances that the inability to return to a welfare center on multiple occasions or the failure to understand that they are allowed to return at a later date is caused by or related to an individual's disability.

### *B. Reasonable Modifications to Diversion Policies*

One extremely modest modification to diversion practices would be to change the information provided to potential applicants to include information to diversion practices about exceptions to benefit limits and work requirements that might apply to people with disabilities. This would help prevent individuals with disabilities from being dissuaded from applying for benefits based on an inaccurate and unnecessarily pessimistic impression of work requirements and benefit limits.

Advocates can also argue that welfare programs modify their practices so that they “selectively divert” only people without disabilities. As a practical matter, however, this would be impossible to implement. Given the high numbers of people with hidden and undiagnosed disabilities in the TANF population and the limited information programs have about applicants at this stage, attempting to exclude people with disabilities from diversion efforts is doomed to failure, and many people with disabilities would be diverted anyway. Moreover, “selective diversion” would require welfare agencies to have some means of identifying people who should be exempt from diversion. Programs would probably have to interview or screen all potential applicants for disabilities during their first visit to a welfare center, which is of questionable legality,<sup>801</sup> labor-intensive, and presumably antithetical to the whole purpose of diversion, which often involves providing little or no individual contact with agency staff during the initial visit to a welfare center. Therefore, advocates may want to take the position that the only way to prevent diversion from having a discriminatory effect on people with disabilities is to eliminate this type of diversion strategy altogether.

### *C. Fundamental Alteration and Undue Burden*

Providing additional information about TANF exemptions to potential applicants will not change the substance or nature of TANF benefits<sup>802</sup> and it is practically cost-free. Distributing

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796. See 28 C.F.R. § 35.130(a) (1999).

797. See 28 C.F.R. § 35.130(b)(i) (1999).

798. See 28 C.F.R. § 35.130(b)(ii) (1999).

799. See 28 C.F.R. § 35.130(b)(3)(ii) (1999).

800. See 28 C.F.R. § 35.130(b)(8) (1999).

801. See *infra* Part III.14.D.

802. See *Helen L. v. DiDario*, 46 F.3d 325, 337 (3d Cir. 1994), *cert. denied*, 516 U.S. 813 (1995); *Charles Q. v.*

forms to potential applicants to flag possible disabilities that might make diversion should not be particularly burdensome, although it may require welfare workers review these forms before they decide whom to divert.

Advocates can argue that, if the purpose of diversion is to encourage people to look for employment or other sources of support and discourage people from exhausting time-limited benefits unless they have no other options, this purpose has little relevance to TANF applicants with disabilities who are extremely unlikely to find unsubsidized work simply by looking for it.<sup>803</sup> Building on the rationale of cases challenging high school and college athletic participation rules,<sup>804</sup> advocates can argue that the purpose of encouraging people to look for work before applying for TANF benefits is not compromised if diversion is waived for people who are extremely unlikely to find work in any event.<sup>805</sup> In fact, if state program materials describe the purpose of diversion as reducing the cost of benefits programs by discouraging people from applying for benefits, diversion is working all too well for people with disabilities. State program materials and program officials, however, are unlikely to describe diversion efforts program purposes in this way. If state authorizing legislation does not refer to diversion at all, it will be difficult for TANF programs to argue that modifying diversion policies is a fundamental alteration of program purpose. The fact that people may receive benefits more often, or more quickly, as a result of modifying diversion policies, does not change the nature or duration of the benefits.

#### *D. What if the State Defines the Program as a “Diversion Program” or Defines Diversion as the Purpose of the Program?*

Even if state statutes and other materials describe diversion as a “program,” modifying diversion practices would not be a fundamental alteration. TANF programs are obviously not diversion programs alone—they are benefits programs that may have other goals. Diversion is a practice, not a program, and it could not be a program in and of itself for the purpose of ADA analysis. Delay or denial of service is not a “service, program or activity.” If diverting individuals from benefits were considered a “program,” no discriminatory treatment or impact on people with disabilities that creates a barrier to TANF benefits could ever be actionable under the ADA. This is obviously not what Congress had in mind when it specifically stated that TANF programs must comply with the ADA. For the purposes of ADA analysis, it is the services that individuals are being diverted from that is the relevant program.

Some state plans identify diversion as a program purpose.<sup>806</sup> Even then, diversion can never be the sole purpose of a TANF program because diversion only makes sense as a program goal if

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Houstoun, No. 1: CV-95-280, 1997 U.S. Dist. LEXIS 17308, at \* 6 (M.D. Pa. Sep. 30, 1997); *see supra*, Part II.10.A.iii.

803. *See, e.g.*, *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96C 6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 21 1996); *Johnson v. Florida High Sch. Activities Ass'n*, 899 F. Supp. 579 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997).

804. *See supra* Part II.10.A.vi.

805. *See Washington v. Indiana High Sch. Athletic Ass'n Inc.*, 181 F.3d 840, 852 (7th Cir. 1999), *cert. denied* 120 S. Ct. 579 (1999); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994); *Booth v. Univ. Scholastic League*, 1990 WL 484414 (W.D. Tex. Oct. 4, 1990); *Doe v. Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978), *vacating as moot*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Ganden v. National Collegiate Athletic Ass'n*, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 21, 1996) (Title III case).

806. *See, e.g.*, MICH. COMP. LAWS ANN. § 400.57a(2)(d) (West 1997) (“the family independence agency shall administer the family independence program to accomplish all of the following: ... Ensure that families pursue other sources of support available to them.”); ORANGE COUNTY SOC. SERVS. AGENCY, COUNTY OF ORANGE CALWORKS PLAN (1997) (“The major goals and objectives of the program are to divert applicants from welfare to immediate employment”), *available at* <http://www.dss.cahwnet.gov/wtw/pdf/orange.pdf>.

there is a benefits program from which people can be diverted. Clever statements of program purpose do not change this.

## CHAPTER 13: DOES A WORK FIRST ORIENTATION VIOLATE THE ADA WHEN APPLIED TO PEOPLE WITH DISABILITIES?

Many TANF programs are using a Work First philosophy. Though the philosophy is carried out in a number of different ways, the common theme is a strong emphasis on helping or requiring individuals to find unsubsidized employment as quickly as possible, and a minimal emphasis on education and training. Job search is often mandatory, and if work is not found within a short period of time, clients may be routed into unpaid community service. Job search may require people to pound the pavement on their own seeking work or make a required number of telephone calls to employers listed in the phone book or in classified advertising, and document compliance with these requirements by submitting business cards from employers or other proof of compliance. Frequently, education and training are offered only when combined with work, and education and training is short-term. Some programs require everyone to participate in job readiness or job search activities, and in-depth screening and evaluation is given only to those who don't find work during this process. In its most extreme version, Work First means that individuals are required to engage in a job search for a specified period of time before benefits are authorized.<sup>807</sup>

### *A. The Discriminatory Impact of Job Search*

Requiring individuals to search for jobs before authorizing benefits may have a particular exclusionary effect on people with disabilities if necessary program modifications and supports are not provided. If people with disabilities are not provided with necessary modifications such as accessible transportation to conduct job search activities, TDDs and auxiliary aids and devices to use the telephone to call job listings, or help with reading or filling out applications when disabilities limit the ability to do these activities, mandatory pre-benefit job search is an eligibility criterion that is likely to screen out people with disabilities from benefits programs.<sup>808</sup> It also has the effect of providing an opportunity to participate in the TANF program that is not as effective as that provided to others,<sup>809</sup> is a method of administration that has a discriminatory effect,<sup>810</sup> and impairs the objectives of the program for people with disabilities.<sup>811</sup> Because mandatory pre-benefit job search operates as a gate to accessing benefits, it may present a particularly strong case for a denial of meaningful access claim when modifications and support services are needed by people with disabilities and not provided. Moreover, when mandatory pre-benefit job search takes place before TANF programs have much information about participants and their disabilities, including knowing who needs modifications and support services in the job search process, this type of discrimination is inevitable.

Even when job search is not required before benefits are authorized, it may have a discriminatory effect on people with disabilities. Job search is a program in its own right that must provide meaningful access to and make reasonable modifications for people with disabilities. Some people with disabilities, such as learning disabilities and mental retardation,

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807. See WORK FIRST STRATEGIES, *supra* note 791, at 12-13 (discussing Oregon and Wisconsin Work First programs).

808. See 28 C.F.R. § 35.130(b)(8) (1999).

809. See 28 C.F.R. § 35.130 (b)(1)(ii) (1999).

810. See 28 C.F.R. § 35.130(b)(3)(i) (1999).

811. See 28 C.F.R. § 35.130(b)(3)(ii) (1999).

need additional time to complete tasks and additional instruction. Inflexible rules in job search programs that don't allow people with these disabilities to receive additional time, explanations or assistance, may deny an equal opportunity to benefit from job search programs,<sup>812</sup> result in programs that are not as effective in providing an equal opportunity to obtain the same result<sup>813</sup> and violate other Title II requirements.

Discrimination may also occur if people with disabilities are routed into programs where they have less opportunity than others to receive education and training and develop job skills because TANF workers make stereotyped decisions about their abilities. It could also occur because TANF programs do not provide supports such as tutors, equipment, or extra help that is needed for people with disabilities to be able to participate in programs that do provide such training and skills.

Some types of Work First programs may be more difficult to challenge under Title II. If education and training are not offered to anyone in the TANF program until after a job search is conducted and is unsuccessful, it will be difficult to argue that people with disabilities are subject to discrimination simply because they don't receive education and training immediately, and are required to engage in Work First activities first. In addition, it is probably not discriminatory under the ADA to require people who can't find paid jobs to participate in activities other than education and training, such as community service. Though many people with disabilities will be unable to find jobs and will end up in community service as a result, there are also probably many people without disabilities who will not find jobs, and thus it may be difficult to demonstrate a disparate impact. Moreover, if those who find work as a result of job search are not receiving TANF benefits, they are arguably not an appropriate comparison group in a discrimination claim.

#### *B. Reasonable Modifications to Mandatory Pre-Benefit Job Search and Other Work First Programs*

One possible modification to Work First programs would be to provide assistance, accessible transportation, and other reasonable modifications that would enable people with disabilities to have an equal opportunity to benefit from job search, job readiness, and other similar activities. Another option would be to shorten or waive pre-benefit job search entirely for individuals with disabilities when it is obvious that they won't find jobs as a result. Another possibility is to have people with disabilities participate in Work First activities for the same length of time as others, but process their applications for benefits before job search or job readiness requirements are completed on the theory that people with disabilities are less likely to find jobs through these programs and should not have to wait to receive benefits they need.

#### *C. Do TANF Programs Have an Obligation to Investigate the Reasons for Non-Compliance with Work First Requirements?*

When individuals fail to satisfy Work First program requirements, welfare programs have an obligation under the Title II reasonable modification requirement to investigate the reason for non-compliance and, where there is a disability-related reason, provide reasonable modifications and program interventions to make compliance possible. If programs do not investigate the reason for non-compliance they will undoubtedly discriminate against some people with

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812. See 28 C.F.R. § 35.130(b)(1)(i) (1999).

813. See 28 C.F.R. § 35.130(b)(1)(iii) (1999).

disabilities because some non-compliance, will be caused by disability, the failure to provide modifications for a disability, or both. This is particularly true when the consequences of non-compliance with job search are sanctions or a denial of benefits. This type of ADA claim is compelling because Work First activities occur early on in the TANF process, when programs in most cases will not have conducted disability assessments and therefore know very little about whether participants have disabilities. The likelihood of failing to provide needed modifications and support services to people with disabilities who need them is therefore particularly high.

This type of legal argument can be based on a number of Title II requirements, one of which is Title II's requirement that public entities make reasonable modifications in practices and procedures "when necessary to avoid discrimination."<sup>814</sup> This language indicates that reasonable modifications that would prevent non-compliance must be provided *before* an individual with a disability is found to be non-compliant with Work First requirements and therefore not a "qualified individual" who is eligible to receive benefits. In addition, advocates can argue that the obligation to provide program modifications to avoid discrimination, coupled with the prohibition on using "methods of administration" that have a discriminatory effect,<sup>815</sup> requires TANF programs to investigate the cause of non-compliance with program requirements and to work with individuals to address non-compliance even when TANF recipients have not asked for the modifications they need before the non-compliance occurred.

Additional support can be drawn from a line of cases decided under the Federal Fair Housing Amendments Act of 1988 (FHAA),<sup>816</sup> a statute closely modeled on Section 504 of the Rehabilitation Act, which prohibits discrimination against people with disabilities in housing. A line of cases has held that when tenants with psychiatric disabilities violate lease provisions by destroying property or being physically or verbally abusive and this behavior is related to their disabilities, landlords cannot simply evict these tenants. They have an obligation to provide reasonable modifications that may remedy or alleviate the problem, such as giving the tenant an opportunity to obtain counseling or providing a mediator to resolve disputes, even if the tenant never asked for these modifications until after eviction proceedings began or after the tenant sued for discrimination.<sup>817</sup> Many of these cases rely on the legislative history of the FHAA, which states that in cases where a tenant poses a direct threat to others, "if a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation."<sup>818</sup>

Advocates should note that these cases differ in some respects from many Work First compliance issues. Most of these cases involved allegations that the tenant posed a threat to others. Both the ADA and Section 504 specifically require modifications to minimize the risk before any adverse action is taken against a person with a disability on the basis of a safety risk or threat to others.<sup>819</sup> Most non-compliance with Work First and other TANF requirements will not involve non-compliance based on a safety risk or threat to others. Nevertheless, the basic principle in these cases, that disabilities can be the cause of non-compliant behavior and that it may be discriminatory to deprive people with disabilities of a benefit on the basis of such behavior when those symptoms can be reduced or eliminated with reasonable accommodations, is consistent with the "necessary to avoid" language in Title II.

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814. 28 C.F.R. § 35.130(b)(7) (1999).

815. *See* 28 C.F.R. § 35.130(b)(3)(i) (1999).

816. *See* 42 U.S.C.A. §§ 3601-3619 (West 2000).

817. *See, e.g.,* *Roe v. Housing Auth. of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995); *Roe v. Sugar River Mills Ass'ns.*, 820 F. Supp. 636 (D.N.H. 1993); *Nicollet Towers, Inc. v. Georgiff*, No. C5-94-1364, 1995 Minn. App. LEXIS 181 (Ct. App. Minn. 1995)(unpublished opinion); *City Wide Ass'ns. v. Penfield*, 564 N.E.2d 1003 (Mass. 1991).

818. H.R. REP. NO. 100-711, at 29 (1988), *reprinted in* 1988 U.S.C.A.N., at 2173, 2190.

819. *See, e.g.,* 42 U.S.C.A. § 12113(b)(West 2000); 28 C.F.R. § 36.208 (1998); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). As noted in Part II.6, although Title II contains no "direct threat" exception, courts have assumed the "direct threat" standard from Titles I and III applies to Title II.

Advocates should also be aware that in the employment arena, the EEOC has taken a different approach to disability-related non-compliant behavior. EEOC Guidance states that employers may discipline employees with disabilities who violate workplace conduct standards even when the conduct is the result of a disability, as long as the workplace standard is job-related and consistent with business necessity. However, the Guidance also makes clear that employers must provide accommodations to these employees in the future that help them meet the workplace standard.<sup>820</sup> Nevertheless, there is a significant difference between these employment cases and Title II claims on behalf of clients in the TANF program. Advocates can argue that the EEOC Guidance does not provide the applicable standard for TANF programs under Title II. The EEOC's different treatment of employees' past conduct and employers' future obligations is derived from the nature of the Title I reasonable accommodation obligation, which the EEOC states is "always prospective."<sup>821</sup> As employees are generally required to request reasonable accommodations to trigger an employer's obligation to provide them under Title I,<sup>822</sup> the EEOC's approach to misconduct caused by disability can be understood in the context of Title I, because employees don't usually ask for permission from an employer before breaking work rules. In contrast, Title II requires state and local government programs to evaluate programs and services for accessibility and make program changes even in the absence of requests by people with disabilities. Thus state and local government programs should be required to provide reasonable modifications, in the form of investigating non-compliance with program requirements and attempting to rectify problems, before taking adverse action against TANF recipients.

#### *D. Would Modification of Work First Activities be a Fundamental Alteration?*

Providing supports to people with disabilities so that they can participate in mandatory pre-benefit job search would be a reasonable modification in most instances. It does not change the requirement that individuals participate in mandatory pre-benefit job search, but rather helps people to satisfy this requirement.

As for shortening or waiving mandatory pre-benefit job search, advocates can argue that it would not be a fundamental alteration of a TANF program when there is no realistic chance that an individual will find employment without receiving training and other services first.<sup>823</sup> Indeed, some states exempt individuals from job search or job orientation requirements when the agency believes that an individual will not benefit from them.<sup>824</sup> If this type of argument is made, advocates will have to grapple with the question of whether to make the argument on behalf of particular individuals with disabilities, or groups of people with particular disabilities. The second approach may pose a danger of stereotyping and encourage TANF programs to make the same types of generalized assumptions about the abilities of people with disabilities that advocates seek to prevent in many other situations.<sup>825</sup>

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820. See EEOC PSYCHIATRIC DISABILITIES GUIDANCE, *supra* note 417, at 30-31.

821. See *id.* at 31.

822. See EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 132, at § 3.6. Even under Title I, however, there is an exception to this requirement when the nature of an individual's disability would decrease the likelihood that an individual would request accommodations. See EEOC REASONABLE ACCOMMODATION GUIDANCE, *supra* note 653, at Q.39; Part II.10.A.v.

823. See *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840 (7th Cir. 1999); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994); *Ganden v. Nat'l Collegiate Athletic Ass'n*, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 21, 1996) (Title III case); *Doe v. Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978), *vacated* 622 F.2d 118 (5th Cir. 1980); *Booth v. Univ. Interscholastic League*, No. A-90-CA-764, 1990 WL 484414 (W.D. Tex. Oct. 4 1990). See also, *supra* Part II.10.A.vi.

824. See, e.g., WIS. STAT. ANN. §49.193(3m)(e) (West 1999).

825. A Louis Harris poll cited in the ADA legislative history found that the overwhelming majority of managers,

The real difficulty with this type of discrimination claim is proving discrimination. As many people without disabilities also stand little chance of obtaining employment from job search or job readiness programs alone, disparate impact on people with disabilities may be difficult to prove. The failure to find a job is not proof that these programs were futile for individuals because they have disabilities. In addition, even when Work First programs are of little benefit to anyone, advocating to remove people with disabilities from these programs gives programs very little incentive to change so that people with disabilities can participate and fully benefit from them.

Enabling legislation and other state TANF program materials describing TANF as a benefits program for needy individuals helps to support an argument that modifying and even waiving or eliminating pre-application job search for people with disabilities would not alter the nature of the program. Modifications that help people with disabilities search for work, such as transportation assistance, help with identifying appropriate jobs for which to apply, and other assistance in the job search process would also be consistent with that purpose.

TANF programs may take the position that waiving mandatory pre-application job search and other Work First requirements conflicts with the federal PRWORA purpose of ending the dependence of needy families on benefits. This, however, is not an accurate characterization of PRWORA's purpose. PRWORA's purpose is to increase flexibility of states in programs designed to "end the dependence of needy parents in government benefits by promoting job preparation, work and marriage,"<sup>826</sup> which does not conflict with waiving pre-application mandatory job search or other Work First requirements.

States may be resistant to extending the duration of job readiness and job search programs for individuals with disabilities because PRWORA has stringent limits on the number of weeks that count toward the state's work participation rates.<sup>827</sup> They may argue that extending job search and job readiness will make it more difficult for the state to meet work participation requirements and increase the risk that the state will be sanctioned. But because states have enormous flexibility in who is included in federal work participation rates,<sup>828</sup> this argument is not a strong one.

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department heads and equal opportunity officers believed discrimination against people with disabilities is a major barrier to employment. *See* LOUIS HARRIS ET AL., THE INTERNATIONAL CENTER FOR THE DISABLED SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986), *cited in* H.R. REP. NO. 101- 485(II) at 33, *reprinted in* 1990 U.S.C.C.A.N. 267, 314. A more recent survey found that 72% of working-age individuals with disabilities who are unemployed say they would like to work, and two-thirds of adults with disabilities say their disability has prevented them from working or made it more difficult to work. *See* 1998 NATIONAL ORGANIZATION ON DISABILITY/LOUIS HARRIS & ASSOCIATES SURVEY OF AMERICANS WITH DISABILITIES *available at* <http://www.nod.org/presssurvey.html#summary>.

826. 42 U.S.C.A. § 601(a)(2) (West 2000).

827. *See* 42 U.S.C.A. § 607(c)(2)(A)(i) (West 2000).

828. *See supra* Part I.I.C.xix.

## CHAPTER 14: DOES THE ADA REQUIRE TANF PROGRAMS TO SCREEN TO IDENTIFY DISABILITIES?

TANF programs cannot possibly move people from welfare to work, or even place people into appropriate education, training and work programs, without taking disabilities into account, and they can not take disabilities into account if they are not aware of them. Given the high number of TANF applicants and recipients with diagnosed and undiagnosed disabilities, the scope of any obligation by TANF programs to identify or confirm the existence of disabilities in applicants and recipients is critical. PRWORA contains no requirement that TANF programs conduct disability screenings and assessments.<sup>829</sup> Nevertheless, a number of arguments can be made that TANF programs must provide or arrange for both screening and assessment of disabilities for those who want to be screened and assessed, or in the alternative, must take other measures to avoid discrimination under the ADA.

The ADA applies to the disability screening and assessment process even though many of the people who go through these processes are people with disabilities. Even assuming that the disability screening and assessment process is considered to be a program in its own right,<sup>830</sup> the fact that a program or service exists solely for people with disabilities does not remove it from the ambit of the ADA.<sup>831</sup> Moreover, problems with screening and assessments create a barrier to accessing TANF benefits. The failure to properly screen and assess people with disabilities denies people with disabilities an equal opportunity to participate in and benefit from TANF benefits, and education and training programs. If disabilities aren't properly identified and accommodated, appropriate programs and supports will not be provided that enable people to work, and exemptions from work requirements and time limits will not be provided to many people with disabilities.

### *A. Do TANF Programs Have an Obligation to Conduct Initial Disability Screenings?*

A strong argument can be made that TANF programs have an obligation under the ADA to conduct some type of initial screening to identify likely disabilities for those individuals who wish to be screened. As a practical matter, this may be the only way that TANF programs can meet their obligation under the ADA to make reasonable modifications in the application process and avoid discriminating against people with disabilities in Work First activities. Given the high number of TANF clients with undiagnosed disabilities, there is a particularly high risk that discrimination will occur in all of these activities without an affirmative effort by TANF programs to identify those people who might have disabilities and need modifications in the early

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829. Many TANF programs and reports refer to the initial informal process used to identify those individuals who probably have a disability as a "screening" and the more formal and in-depth process given to individuals identified in a screening (or some other way) as likely to have a disability as an assessment. The Manual uses this terminology. Typically, initial screenings are performed by welfare workers who have little or no training or expertise in the area and the formal assessment by individuals with some formal training and another public agency or a private company under contract with the TANF agency. See OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at 15-20.

830. See *supra* Part II.8.

831. See, e.g., *Olmstead v. L.C.*, 527 U.S. 581, 598 n.10 (1999); *Guckenburger v. Boston Univ.*, 974 F. Supp. 106, 135 (D. Mass. 1997) (college requirement that individuals seeking accommodations for learning disabilities demonstrate that these disabilities are current through retesting tended to screen out people with disabilities under ADA and Section 504). *But see Doe v. Pfrommer*, No. 97-7614, 1998 U.S. App. LEXIS 12092 (2d Cir. 1998) (stating that vocational rehabilitation program serving only people with disabilities cannot discriminate on the basis of disability); *United States v. Univ. Hosp.*, 729 F.2d 144, 157 (2d Cir. 1984) (under Section 504, where handicapping condition is related to the benefit, it will rarely be possible to say with certainty that a particular program condition is discriminatory); *Cushing v. Moore*, 970 F.2d 1103, 1108 (2d Cir. 1992) (same). These latter cases are of questionable weight after *Olmstead*.

stages of their contact with the TANF program. Screening is also necessary to identify everyone who may need a more extensive disability assessment.

### *B. Do TANF Programs Have an Obligation to Provide In-Depth Disability Assessments?*

There are two possible ADA arguments that programs have an obligation to conduct in-depth disability assessments for those who want them. The first is that the information obtained from these assessments is necessary to develop an adequate Individual Responsibility Plan (IRP).<sup>832</sup> PRWORA requires TANF programs to make “an initial assessment of the skills, prior work experience, and employability of each recipient of assistance under the program” who is 18 years old or has not completed high school or obtained a high school equivalency diploma and who is not in school.<sup>833</sup> States then have the option to develop, “on the basis of the assessment,” in consultation with the individual, an IRP that identifies specific employment goals and the services that the state will provide so that the individual can obtain a job and stay employed.<sup>834</sup> PRWORA plainly contemplates that the initial assessments will be used by TANF programs in drafting IRPs. Although PRWORA does not require states to develop IRPs, every state has chosen to adopt IRP requirements.<sup>835</sup>

A strong argument can be made that it is not possible to assess the skills of people with disabilities or create an adequate IRP without accurate, detailed information about the existence and nature of an individual’s disability and its affect on “employability.” Apart from those limited situations in which TANF programs already have detailed information about clients’ disabilities or can easily obtain it from other agencies or providers, the only way for programs to meet their obligation to make an initial assessment, and draft an adequate IRP, is to conduct and arrange for such assessments. Because PRWORA allows states to reduce or terminate benefits to those who do not comply with signed IRPs,<sup>836</sup> and some states have opted to impose this requirement,<sup>837</sup> it is all the more important that IRPs be based on adequate assessments that accurately identify clients’ abilities and needs. The failure to conduct in-depth assessments has a discriminatory effect on the ability of people with disabilities to obtain adequate IRPs.

TANF programs may take the position that in-depth assessments are not needed to draft IRPs or do other employment and service planning because PRWORA gives states 30 days, or at state option, 90 days after eligibility for benefits is determined, to conduct “initial assessments,”<sup>838</sup> and many decisions must be made by TANF programs within this period of time. PRWORA does give TANF programs up to 90 days to conduct “initial assessments,” and many program decisions are made before then. Nevertheless, the best way to avoid ADA violations down the road is to conduct early in-depth assessments.

Advocates may be reluctant to frame arguments around the IRP process because of the one-sided and onerous nature of IRPs in some TANF programs.<sup>839</sup> In some TANF programs,

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832. Though PRWORA calls the plan an “Individual Responsibility Plan,” many state TANF programs have other names for this document.

833. See 42 U.S.C.A. § 608(b)(1) (West 2000). Though PWRORA calls these assessments “initial,” it gives programs 30 days, or up to 90 days at state option, after an individual is determined to be eligible for assistance, to conduct the assessments. See 42 U.S.C.A. § 608(b)(2)(B) (West 2000).

834. See 42 U.S.C.A. §§ 608(b)(2)(A)(i)-(v) (West 2000).

835. See U. S. DEP’T OF HEALTH AND HUMAN SERVS., TEMPORARY ASSISTANCE TO NEEDY FAMILIES PROGRAM (TANF): SECOND ANNUAL REPORT TO CONGRESS 166, § XIII (Aug. 1999) [hereinafter SECOND ANNUAL TANF REPORT], available at <http://www.acf.dhhs.gov/news/welfare/staloc/sfag-amt.htm>.

836. See 42 U.S.C. A. § 608(b)(3) (West 2000).

837. See, e.g., 305 ILL. COMP. STAT. ANN. 5/4-1(West 1999); MICH. COMP. LAWS. ANN. § 400.57g (West 1997).

838. See 42 U.S.C.A. § 608(b)(B)(ii) (West 2000).

839. Thirty-two states terminate TANF benefits for failure to sign or non-compliance with an IRP, and 14 states reduce benefits for non-compliance. See SECOND ANNUAL TANF REPORT, *supra* note 835, at 166.

recipients can be held to IRP requirements but state TANF enabling legislation does not appear to create a reciprocal requirement for programs to provide the services promised on the IRP, even when individuals cannot possibly meet goals listed on the IRP without them.<sup>840</sup> When TANF programs ignore a state requirement to draft IRPs or ignore IRPs that have been drafted, there may be good reasons for advocates to avoid arguments that rely on IRP requirements. Otherwise, there may be little to lose by using these requirements to obtain meaningful disability assessments.

The second ADA argument is that conducting in-depth disability assessments is not only the best way—but may be the only way—to ensure that TANF programs do not violate the ADA. If people with disabilities do not receive adequate, comprehensive disability assessments, some TANF clients with disabilities are likely to be placed in work experience, community service, job training or other programs that are not appropriate for them given their disabilities, or placed in such programs without appropriate reasonable modifications.<sup>841</sup> In addition, some people with disabilities are likely to be sanctioned for failure to comply with work or other program requirements when non-compliance is related to these oversights and thus could have been prevented.<sup>842</sup> In-depth assessments are a reasonable modification necessary to avoid discrimination,<sup>843</sup> at least for those individuals identified in brief screenings forms as likely to have disabilities. The failure to conduct in-depth assessments on those likely to have disabilities also violates the ADA prohibition on using methods of administration that have a discriminatory effect<sup>844</sup> or that substantially impair the accomplishment of program objectives for people with disabilities.<sup>845</sup>

### *C. Fundamental Alteration and Undue Burden*

Conducting short screenings and in-depth disability assessments does not conflict with PRWORA's purposes. It is consistent with the PRWORA goal of ending dependence on government benefits by increasing states' ability to determine the types of supportive programs and services people with disabilities need to become ready for work.<sup>846</sup> Indeed, screening and assessment is necessary to achieve these goals. In addition, comprehensive disability assessments may be consistent with state program purposes. Statements of program purposes related to ending dependence on benefits and encouraging people to work should be consistent with providing comprehensive assessments when necessary, because they will enhance the process of identifying appropriate services, programs, and modifications that will speed the process of helping people become employed.

States may take the position that in-depth assessments are a new, distinct program or service, and that it would fundamentally alter the TANF program to require them to provide a new

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840. See, e.g., 305 ILL. COMP. STAT. ANN. 5/4-1; MICH. ADMIN. CODE r.400.3603 (West 1997); N.Y. SOC. SERV. LAW § 332-a (McKinney Supp. 1999). It may, however, be possible to use other legal theories to enforce IRPs against TANF programs.

841. The Presidential Task Force on Employment of Adults with Disabilities has stated that the failure to identify people with disabilities "can significantly hinder their ability to gain and sustain employment as well as meet the other essential requirements of TANF." The Task Force has taken the position that screening and assessment "should always be taken before an individual with an undiagnosed disability or any other disabling condition is sanctioned for failure to comply with TANF work requirements." RECHARTING THE COURSE: REPORT OF THE PRESIDENTIAL TASK FORCE ON EMPLOYMENT OF ADULTS WITH DISABILITIES, at App. p. 22 (Nov. 15, 1998) available at [http://www.dol.gov/dol/\\_sec/public/programs/ptfread/rechart.htm](http://www.dol.gov/dol/_sec/public/programs/ptfread/rechart.htm).

842. See *infra* Part III.16.

843. See 28 C.F.R. § 35.130(b)(7) (1999).

844. See 28 C.F.R. § 35.130(b)(3)(i) (1999).

845. See 28 C.F.R. § 35.130(b)(3)(ii) (1999).

846. See 42 U.S.C.A. § 601(a)(2) (West 2000).

service. Advocates can argue that screenings and assessments are not a distinct program or service but a necessary means of providing existing services in a non-discriminatory manner. In addition, from a client's perspective, the assessment probably has no independent value. It may also be possible to argue that assessments are not a new service because the relevant service is disability identification, which includes initial cursory screenings, which many programs already provide. However, it is probably beyond dispute that in some circumstances, this type of assessment is a new service that is distinct from existing programs provided by TANF agencies.

States may also take the position that conducting comprehensive disability assessments is an undue burden because they are so costly. However, some comprehensive disability assessments will be paid for by vocational rehabilitation programs and Medicaid, so the entire cost will not fall on TANF agencies.<sup>847</sup> In addition, the Welfare-to-Work program requires operating entities to "ensure that there is an assessment of the skills, prior work experience, employability and other relevant information,"<sup>848</sup> and HHS requires Welfare-to-Work programs use TANF assessments for this purpose "where appropriate."<sup>849</sup> Thus both TANF and Welfare-to-Work programs will use some of these assessments, and Welfare-to-Work programs will benefit from not having to conduct all of their own assessments. At the very least, some of the resources available from the Welfare-to-Work program should be included when calculating the funds available for assessments in analyzing whether it would be a fundamental alteration or undue burden. In addition, assessments are likely to be cost-effective in the long run, by facilitating placement in appropriate jobs and programs that lead to employment.<sup>850</sup> In light of the *Olmstead* plurality opinion, however, the relevance of long-term savings to the determination of fundamental alteration is unclear at best.<sup>851</sup>

Under PRWORA, assessments are considered "program," not "administrative," costs,<sup>852</sup> and are not counted towards the 15 percent limit on administrative expenditures that applies to both federal TANF and state maintenance of effort funds.<sup>853</sup> This means that states have more flexibility to use funds for assessments without placing pressure on TANF programs to cut administrative costs. This should reduce the burden of paying for assessments.

States may argue that providing such assessments is a fundamental alteration or undue financial burden because the assessments are medical services and programs are prohibited from using TANF funds for medical services.<sup>854</sup> Assessments are not a medical service; no medical treatment is being provided, and the purpose of the assessment is not to identify a medical diagnosis for the purpose of treatment, but rather to identify the need for appropriate non-medical programs and services. HHS declined to define "medical services" in the TANF regulations, leaving TANF programs with maximum flexibility to apply their own understanding of the term.<sup>855</sup> This should be helpful in arguing that they do not meet a state's definition of medical service. Even if the assessments were considered medical services, PRWORA doesn't prohibit states from using their own funds for medical services.

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847. See *ANCILLARY SERVICES*, *supra* note 9.

848. 20 C.F.R. § 645.225(b) (1999).

849. See 20 C.F.R. § 645.225(c) (1999).

850. See *ANCILLARY SERVICES*, *supra* note 9.

851. See *supra* Part II.10.B.

852. See 20 C.F.R. § 645.220(g) (1999).

853. See 42 U.S.C.A. § 604(b)(1) (West 2000).

854. See 42 U.S.C.A. § 608(a)(6) (West 2000).

855. See Temporary Assistance for Needy Families (TANF), 64 Fed. Reg. 17,720, 17,841 (Apr. 12, 1999).

#### D. Disability Screening and Assessment Must be Voluntary

Some clients may resent the additional burden of participating in an in-depth disability assessment or feel that being singled out for such an assessment is itself discriminatory. Others may want to refuse screenings and assessments out of fear that TANF programs will use the results as a reason to contact child or adult protective services, or require participation in mental health drug or alcohol treatment. Though TANF programs violate the ADA if they fail to provide disability screening and assessment, in some instances they will also violate the ADA if they require individuals to be screened and assessed for disabilities.

Advocates can argue that requiring TANF applicants or recipients to participate in disability screening and assessment violates the ADA by using methods of administration that have a discriminatory effect<sup>856</sup> and using eligibility criteria that screens out or tends to screen out people with disabilities from full and equal enjoyment of the program.<sup>857</sup> Even if people with disabilities aren't denied benefits based on the results of a screening or assessment, requiring screening and assessment will "screen out" people with disabilities because many people with disabilities will decide not to apply for benefits if screening and assessment are required.

In addition, under some circumstances TANF programs may meet the definition of "employers" or "employment agencies" under Title I of the ADA in relation to individuals in the TANF program.<sup>858</sup> Title I severely limits the ability of employers to ask job applicants and employees about their disabilities and to request medical tests or information.<sup>859</sup> Because it is not clear in TANF programs when the applicant-employer or employer-employee relationship is established, or whether it will be in any particular instance, the only way to ensure that the rights of TANF applicants and recipients are protected is to apply the most stringent of the Title I protections to TANF applicants and employees.

As discussed in Chapter 12, PRWORA permits (but does not require) TANF programs to test benefits and recipients for illegal drugs and to sanction those who test positive for such drugs.<sup>860</sup> Thus it will not be possible to argue that drug tests are unnecessary and improper medical inquiries or medical tests under the ADA.

There have been many ADA challenges to program screening processes used on people with actual or suspected disabilities. In many of these cases, plaintiffs argued that disability screening processes imposed additional unnecessary and burdensome requirements on people with disabilities, or tended to screen out qualified individuals with disabilities from services, licenses, and employment. Cases have challenged questions about health and mental health history and alcohol and substance abuse on applications for admission to the bar; medical licenses; judicial screening forms;<sup>861</sup> applications for drivers' license renewals;<sup>862</sup> and procedures for demonstrating the need for accommodations for learning disabilities.<sup>863</sup> A number of these cases have held that screening procedures that included broad questions about past medical and mental health treatment violated the ADA as overly broad and unnecessary<sup>864</sup> or because they imposed

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856. See 28 C.F.R. § 35.130(b)(3)(i) (1999).

857. See 28 C.F.R. § 35.130(b)(8).

858. See EEOC CONTINGENT WORKER GUIDANCE, *supra* note 777. Consult *infra* Part II.11.G for further discussion of this issue.

859. See 42 U.S.C.A. § 12112(d) (West 2000).

860. See 21 U.S.C.A. § 826(b)(West 2000).

861. See, e.g., *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995); *Applicants v. Texas State Bd. of Law Exam'rs*, No. A-93-CA-74055, 1994 U.S. Dist. LEXIS 21290 (W.D. Tex. Oct. 11, 1994); *Ellen S. v. Florida Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S. D. Fla. 1994); *Medical Soc. of New Jersey v. Jacobs*, No. 93-3670, 1993 U.S. Dist. LEXIS 14294 (D.N.J. Oct. 5, 1993); *Application of Underwood*, No. BAR. 93-21, 1993 WL 649283 (D. Me. Dec. 7, 1993).

862. See *Therault v. Flynn*, 162 F.3d 46 (1st Cir. 1998).

863. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997).

864. See, e.g., *Clark*, 880 F. Supp. at 442; *Ellen S.*, 859 F. Supp. at 1493-94; *Underwood*, 1993 WL 64283, at \*2.

additional eligibility requirements on people with disabilities.<sup>865</sup> One important difference between many of these cases and TANF disability screenings and assessments is that in most of these cases, screening results were used to identify individuals who did not meet program eligibility requirements who therefore would be excluded from the program. Their very purpose was to “screen out” people with disabilities. In TANF programs, in theory at least, the purpose of disability screening and assessment would be to determine eligibility for reasonable modifications and the nature of the modifications needed, to determine the types of reductions and training programs needed, and to establish eligibility for exceptions to program requirements.

As many TANF programs want to avoid the expense of disability screening and assessment, they may be unlikely to argue that they have the right to screen and assess TANF applicants and recipients. If they did want to make such an argument, they might argue that they have this right because Title II permits eligibility criteria when they are “necessary for the provision of the service, program or activity being offered.”<sup>866</sup> The critical issue is the meaning of the phrase “service, program or activity” in this context. If the service, program or activity in question is TANF benefits, this argument is easily dismissed, because TANF programs have no need to know about disabilities to determine eligibility for cash and other benefits.<sup>867</sup> If, however, the “service” includes program supports, reasonable modifications or exceptions to program requirements, TANF programs have a stronger argument that they need information about recipients’ disabilities to determine eligibility for these services and program exceptions. Even then, however, individuals may be able to demonstrate eligibility by other means. In some situations, eligibility for reasonable modifications will be obvious or can be established by providing other documentation of disability, and there would be no legitimate basis to require people to be screened and assessed by the TANF program.

In a few instances, TANF programs may have a stronger argument that information about applicants’ disabilities is necessary to determine eligibility for benefits. When a TANF program is designed in such a way that the existence of a disability is relevant to whether an individual is eligible for TANF benefits or to the amount of benefits provided, programs have a much stronger argument that disability-related information is necessary for the provision of the service. In Wisconsin, for example, the TANF program has four different “tiers” for people at different stages of job readiness, and the amount of benefits people receive depends on which of the four tiers an individual is placed in. The lowest tier is for individuals in need of drug, alcohol or mental health treatment, and participation in treatment programs is a condition of receiving benefits.<sup>868</sup> As the TANF program may not be able to determine what tier an individual is in without screening for drug, alcohol, and mental health problems,<sup>869</sup> it may be difficult to argue that screenings for at least these conditions are not necessary to provide benefits in that program.<sup>870</sup>

Though the ADA does not permit TANF programs to require disability screening and assessment as a condition of receiving benefits in most instances, there are many reasons to encourage clients to be screened and assessed for disabilities where the possibility of disability

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865. See, e.g., *Guckenberger*, 974 F. Supp. at 138-9; *Jacobs*, 1993 WL 413016, at \*11.

866. See 42 U.S.C.A. § 35.130(b)(7) (West 2000).

867. As noted above, one major exception to this type of argument is testing for illegal drug use. PRWORA allows states to test welfare recipients for illegal drug use and sanction them if they test positive. See 21 U.S.C.A. § 862b (West Supp. 2000).

868. See WIS. STAT. ANN. § 49.148(1)(a) (West 1997).

869. It is always possible that an individual will have recent evaluations or medical information from other sources documenting their medical or mental health conditions or drug and alcohol problems, in which case re-screening by the TANF program may not be necessary.

870. The question of whether this particular program design, which provides less benefits to people with some disabilities, violates the ADA depends in part on how the relevant “program” is defined, and whether a court would consider all four tiers to be one program or each tier to be a distinct program for the purpose of ADA analysis. See Part II.8 for a discussion of program definition.

exists. Without proof of disability, it will be difficult for clients to show that they need and are entitled to reasonable modifications, exemptions from work requirements, support services needed to fulfill job search and work requirements, and eligibility for special programs designed for people with disabilities. Before advising clients to forgo this process, it is important that clients understand the trade-offs involved.

#### *E. Can an Existing Screening or Assessment Process Violate the ADA?*

TANF programs use a variety of methods to identify individuals with physical or mental conditions in order to identify individuals entitled to exceptions from work and other program requirements. Some of these methods may violate the ADA. A screening tool may fail to identify all of the individuals who may need program modifications. The assessment process may be so lengthy, complex or unpleasant that it serves as a barrier to accessing benefits or exemptions from work requirements.<sup>871</sup> Buildings where assessments are conducted may be inaccessible. Programs may refuse to make home visits to conduct assessments or arrange for or provide transportation to assessments when reliable accessible public transportation does not exist and disabilities make travel to the assessment site difficult or impossible. If staff conducting the assessments are poorly trained, this may have discriminatory effects when disabilities are missed entirely or not properly identified as a result.<sup>872</sup> Programs may provide insufficient time to gather and provide medical documentation required as part of the assessment process or fail to assist individuals in gathering this documentation. They may refuse to accept pre-existing current adequate documentation from other sources,<sup>873</sup> particularly when individuals have disabilities that do not change over time, such as learning disabilities or mild mental retardation. Requiring updated medical information on an unnecessarily frequent basis may create an unnecessary and discriminatory barrier to benefits, program modifications, and exceptions to program requirements.<sup>874</sup> Programs may close case files or sanction individuals with disabilities who are unable to keep appointments to get assessments when the failure to do so is disability-related. All of these practices may constitute “criteria and methods that have a discriminatory effect.”<sup>875</sup> and may violate several other Title II requirements.

#### *F. The Definition of Disability Used by TANF Programs*

When TANF programs make exceptions to program requirements for people with disabilities, it is very likely that they do not define disability in the same way that it is defined

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871. See Elisabeth Franck & Miranda Leitsinger, *System Failure: The Comptroller Says HS Systems Overcharged for Screening Disabled Welfare Recipients: So Why Did the Company Win a Fat New Contract?*, VILL. VOICE, May 23, 2000, at 23 (describing the disability assessment process in New York City, where there is only one assessment site for the entire city, clients using canes are forced to stand for long periods of time waiting for scheduled appointments, clients lack privacy and patient confidentiality is violated).

872. A number of reports have noted the need for additional training of staff and the fact that welfare workers have not been adequately trained for their new job responsibilities. See, e.g. OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at 16, 19, 34; JUNE 1998 GAO REPORT, *supra* note 790, at Part II.10.C.

873. See Frank and Leitsinger, *supra* note 853, at 23 (describing the failure of the New York City program to review or credit other medical documentation).

874. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 138 (D. Mass. 1997); cf. *Bradford v. County of San Diego*, No. 97-CV-1024 (S.D. Cal. June 17, 1998) (settlement July 29, 1997) (welfare agency agrees to accept pre-existing medical documentation of disability and grant work exemptions instead of requiring re-verification when old verification had not expired).

875. 28 C.F.R. § 35.130(b)(3)(i).

under the ADA.<sup>876</sup> State TANF programs are using a wide range of disability definitions. For example, California TANF program (CalWORKS) exempts from work requirements individuals who provide medical proof of a disability that will last for more than 30 days and “significantly impairs the recipient’s ability to be regularly employed or participate in welfare-to-work activities, provided that the individual is actively seeking appropriate medical treatment.”<sup>877</sup> The New York TANF program exempts from work requirements individuals who are “disabled or incapacitated” as defined by the welfare agency or a private doctor referred by the agency and those who are “ill or injured to the extent that he/she is unable to engage in work for up to three months.”<sup>878</sup>

The disability definitions used by TANF programs will have an enormous affect on who will receive modifications, work exemptions and other protections. When a TANF program uses a definition of disability that is different than the ADA definition, there is a danger that some people who meet the ADA definition—who are therefore entitled to reasonable modifications and other ADA protections—will not receive them. Though neither PRWORA nor the ADA specifically require TANF programs to use any particular definition of disability in their programs, programs must provide everyone who meets the ADA definition of a “qualified individual with a disability” with reasonable modifications if they need them. If, as a result of a disability definition used by a TANF program, people who meet the ADA definition of disability and need reasonable modifications do not receive them, the definition of disability used by the program must be changed or the program must address this problem in some other way, or the program has violated and will continue to violate the ADA. Advocates should work to eliminate inappropriately narrow definitions of disability used by TANF agencies and advocate for definitions that are at least as broad as the ADA, on the theory that definitions that are less broad will inevitably result in legally actionable discrimination against some people with disabilities. Ideally, agencies should have flexible definitions that leave room for individuals to come forward and demonstrate a medical condition that requires a modification of program procedures or requirements.

### *G. The Timing of Disability Assessments*

When TANF programs refer individuals to outside agencies for disability assessments, the assessment process may take so long that many important decisions are made before the results are available. Programs in some cases will therefore conduct employability assessments, draft IRPs, and make work or other program placements before assessment results are available. In some cases, assessment results are not available until an individual has already been sanctioned for non-compliance or the agency has already closed the individual’s case.

Advocates should argue that, to avoid discriminating on the basis of disability, TANF programs must refrain from taking any adverse action in an individual’s case before the assessment results have returned, unless the program makes an independent effort to investigate the reason for non-compliance.<sup>879</sup> Some states prohibit programs from imposing sanctions before assessments are completed.<sup>880</sup> Others prohibit work assignments before assessments are completed, unless the assignment is not inconsistent with the possible limitation.<sup>881</sup> If programs

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876. See OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at iii, 8.

877. CAL. WELF. & INST. CODE § 11320.3(b)(3)(A) (West. Supp. 1999)

878. N.Y. SOC. SERV. LAW § 332.1(a) (McKinney Supp. 1999); N.Y. COMP. CODES R. & REGS. tit.12 §§ 1300.2(b)(1); 1300.2(b)(4) (1999).

879. See *supra* Part III.13.C for a discussion of the obligation of TANF programs to investigate the reasons for non-compliance with Work First program requirements.

880. See, e.g., 305 ILL. COMP. STAT. ANN. 5/4-1.10 (West 1999).

881. See, e.g., N.Y. SOC. SERV. LAW § 332-b.5 (McKinney Supp. 1999).

cannot make appropriate placements in work or education activities without assessment results, waiving work and other program participation requirements before the results are available may be the only way to avoid discrimination.

## CHAPTER 15: DOES THE ADA REQUIRE TANF PROGRAMS TO PROVIDE EDUCATION, TRAINING, OR SUPPORT SERVICES TO PEOPLE WITH DISABILITIES? DOES THE ADA PLACE CONSTRAINTS ON THESE SERVICES ?

Under PRWORA, states have no obligation to provide employment-related, child care, transportation, mental health, substance abuse or other support services. PRWORA merely gives states the option of developing an individual responsibility plan that “describes the services the State will provide the individual so that the individual will be able to obtain and keep employment in the private sector and describe the job counseling and other services that will be provided by the State.”<sup>882</sup> While states risk penalties if they fail to meet federal participation rates,<sup>883</sup> states may be able to meet these rates without developing additional education and training programs and supportive services, or they may not view development or expansion of these programs and services as a means of achieving compliance with participation rates. In fact, a number of states have failed to meet the two-parent work participation rates,<sup>884</sup> which suggests, among other things, that additional support services are needed. Some state TANF programs require support services to be provided when work participation is mandatory,<sup>885</sup> but many do not. Does the ADA impose any requirements on TANF programs with respect to employment and support programs?

### A. *The Obligation to Provide Meaningful Access to Existing Support Services*

If a TANF program provides no employment, education, training or other programs and services to anyone, the ADA does not require it to develop programs and services. But if it provides any employment-related, education and training or supportive services at all, those services are “programs” subject to ADA requirements. This means that people with disabilities must have an equal opportunity to participate in and obtain these programs and supportive services<sup>886</sup> and an equal opportunity to achieve the same result or benefit from these services.<sup>887</sup>

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882. 42 U.S.C.A. § 608(b)(2)(A)(iv) (West 2000).

883. *See* 42 U.S.C.A. § 609(a)(3) (West 2000).

884. In fiscal year 1999, every state and the District of Columbia met the overall PRWORA work participation rate, but of the 36 states and the District of Columbia and Guam, which were subject to the two-parent rate, 10 failed to meet this rate. *See* THIRD ANNUAL TANF REPORT, *supra* note 22, at 1.

885. *See, e.g.,* CAL. WELF. & INST. CODE § 11323.2 (West 1999) (“necessary supportive services shall be available to every participant in order to participate in the program to which he or she is assigned, ... or the participant shall have good cause for not participating...”); 305 ILL. ADMIN. CODE tit. 89 §112.82(c) (West 1999) (“TANF participation in work and training activities shall not be required if supportive services are needed for effective participation but unavailable from the Department or some other reasonable available source.”); OR. ADMIN. R. 461-130-0327(1)(a) (“a client is excused for good cause in the following circumstances: . . . adequate child care, or day care for an incapacitated person in the household cannot be obtained”); (add no transportation available); MICH. COMP. LAWS ANN. § 400.57g(3) (West 1997) (“recipients who are willing to participate in activities leading to self-sufficiency but who require child care or transportation in order to participate shall not be penalized if the family independence agency determines that child care or transportation is not reasonable available or provided to them.”).

886. *See* 28 C.F.R. § 35.130(b)(1)(ii) (1999).

887. *See* 28 C.F.R. § 35.130(b)(1)(iii) (1999). *See also* OCR TANF GUIDANCE, *supra* note 242, Technical Assistance § V (“[j]ob training programs for welfare participants must provide sign language interpreters for deaf students when it is necessary to ensure effective communication for those students”).

For that to occur, existing supportive services and programs will often have to expand and change.

To take one example, if a TANF program operates basic education courses for TANF recipients, this qualifies as a “program, activity or service” under Title II that must be accessible to people with disabilities, including those with learning disabilities.<sup>888</sup> To accomplish this, all of the individual basic education courses for TANF recipients, viewed together, must be accessible to and usable by people with learning disabilities. Each and every basic education course need not serve people with learning disabilities, but the program as a whole must be accessible to and usable by people with learning disabilities and provide an equal opportunity for people with disabilities to participate and benefit. To achieve this, it may be necessary to add instructors experienced in teaching learning-disabled individuals to existing courses; provide aides or tutors experienced in working with learning-disabled individuals; operate additional basic education courses so there are enough slots to serve TANF clients with learning disabilities without requiring people with learning disabilities to wait longer or travel a considerable distance further than others; contract with private organizations to operate basic education courses so that there are enough slots to meet the needs of clients with learning disabilities and others who are interested; modify training materials and teaching methods; or make other reasonable modifications in policies and practices so that people with learning disabilities when necessary to avoid discrimination unless it would fundamentally alter the program. The failure to do any of these things may therefore violate the ADA. The more limited a TANF program’s existing education, training and support services are, the greater the likelihood that they will fail to provide an equal opportunity for people with disabilities to participate and benefit.

#### *B. Providing Programs to Prevent or Remedy Discrimination*

When a TANF program requires individuals to participate in particular work or training programs to receive benefits, and there are an insufficient number of programs or program slots available in the geographic area that are appropriate for people with disabilities, it violates the ADA to sanction individuals who are unable to fulfill work requirements on the basis that they did not participate in work training programs. Sanctioning individuals under these circumstances would use eligibility criteria for benefits that screen out people with disabilities in violation of the ADA. The same is true when people with disabilities need support services such as child care or transportation to participate in work or training programs, if the reason these services are not available to or usable by people with disabilities is disability-related. One way to remedy or prevent such discrimination is to create additional appropriate programs so that people with disabilities have a meaningful and equal opportunity to satisfy TANF program requirements. A TANF program is not specifically required to do this, however, because there are additional ways to prevent or remedy the discrimination. One is to modify existing supportive services, if there are a sufficient number to serve people with and without disabilities, so that some are accessible to and usable by people with disabilities. Other possible remedies would be to eliminate work or training participation requirements altogether or exempt those who cannot satisfy the requirement because of an insufficient number of appropriate program slots. Some states do exempt from benefit time limits months in which support services that individuals need to work were not provided to them.<sup>889</sup>

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<sup>888</sup>. See *Ramos v. McIntire*, Civ. Action No. 98-2154-E (Mass. Superior Court, Suffolk Co.) (Complaint filed April 28, 1998) (learning disabled individuals challenge the failure of a TANF program to provide basic literacy programs for people with learning disabilities and failing to consider learning disabilities when assigning recipients to training programs).

<sup>889</sup>. See LIZ SCHOTT, CENTER ON BUDGET AND POLICY PRIORITIES, STATE CHOICES ON TIME LIMIT POLICIES IN

### *C. Fundamental Alteration and Undue Burden*

Many, if not all, education and training programs and other supportive services that people with disabilities need as reasonable modifications to be able to satisfy work requirements can be funded out of federal TANF funds, because PRWORA permits, with certain specified exceptions, TANF funds to be spent in any manner reasonably calculated to accomplish the purposes of TANF.<sup>890</sup> This would certainly include programs and services needed to enable people to work and become self-sufficient.<sup>891</sup> In addition, PRWORA permits states to transfer TANF funds into other block grants that were created to fund some of these supportive services, such as the Child Care and Development Block Grant.<sup>892</sup> Thus, states have no viable argument that providing these services as reasonable modifications would be a fundamental alteration of TANF by forcing states to use TANF funds for other purposes.

### *D. Does the ADA Allow States to Operate Separate Programs for People with Disabilities?*

Many advocates believe that people with disabilities are more likely to receive appropriate education, training, and other services if they participate in programs that serve only people with disabilities, because the needs of people with disabilities are frequently ignored in other programs. Moreover, if programs serving only people with disabilities are funded exclusively with separate state funds, the TANF program could provide needed services to people with disabilities and at the same time exclude these individuals from the state's work participation rates, thereby eliminating any danger that providing these programs as an alternative to work would have a negative effect on a state's ability to meet federal work participation rates. One pressing question, therefore, is whether the ADA permits TANF programs to do this.

Title II places several constraints on the operation of separate programs for people with disabilities. It prohibits state and local governments from providing separate programs or services for people with disabilities "unless such action is necessary to provide qualified individuals with disabilities with aids, benefits or services that are as effective as those provided to others."<sup>893</sup> It also prohibits agencies from denying qualified individuals with disabilities "the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities,"<sup>894</sup> requires agencies to administer programs in the "most integrated setting appropriate to the needs of qualified individuals with disabilities,"<sup>895</sup> and permits public entities to provide services to people with disabilities "beyond those required by" Title II.<sup>896</sup>

Taken together, these provisions prohibit TANF programs from providing segregated programs for people with disabilities unless existing programs cannot be modified to include and

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TANF-FUNDED PROGRAMS (1998) [hereinafter STATE CHOICES ON TIME LIMITS], available at <http://www.cbpp.org/9-1-98wel.htm>.

890. See 42 U.S.C.A. § 604(a)(1) (West 2000). See *supra* Part I.1.C.iii.

891. See 42 U.S.C.A. § 601(a) (West 2000).

892. See 42 U.S.C.A. § 604 (d) (West 2000). See *supra* Part I.1.C.iii. See also SECOND ANNUAL TANF REPORT, *supra* note 835, at 55, § VI (listing employment training, substance abuse services and mental health services as services that TANF grants can fund).

893. 28 C.F.R. § 35.130(b)(1)(iv) (1999).

894. 28 C.F.R. § 35.130(b)(2) (1999).

895. 28 C.F.R. § 35.130(d) (1999).

896. 28 C.F.R. § 35.130(b)(c) (1999).

effectively serve people with disabilities. By implication they also prohibit TANF programs from failing to make an effort to modify existing programs so that people with disabilities can participate in them, and then use that failure as a justification for operating separate programs for people with disabilities. In addition, they permit TANF programs to provide or operate services such as drug and alcohol treatment and mental health programs to recipients who need them even though they are designed exclusively for people with particular disabilities. However, because Title II prohibits programs from denying qualified individuals with disabilities the opportunity to participate in services and programs “that are not separate or different, despite the existence of permissibly separate programs,”<sup>897</sup> the existence of these separate programs cannot be used as a justification for excluding people with disabilities from programs serving people without disabilities. Even if permissible separate state programs for people with disabilities exist, they do not eliminate the right of people with disabilities to participate in integrated programs.<sup>898</sup>

Advocating for separate education, training, and other programs for people with disabilities poses many dangers, even when the inclination to do so stems from a realistic assessment of the limits of existing programs and a concern that clients’ needs will not be met in those programs. While separate programs for people with disabilities may have short-term appeal when the needs of clients with disabilities are not being met in existing programs, segregation may have adverse long-term consequences. Segregated programs may increase the danger that individuals with disabilities will be “tracked” into particular types of skills training and jobs, which may not match their interests or use their full potential. Segregation often fosters stigma.<sup>899</sup> And, it does not adequately prepare people with disabilities for an integrated work life. Moreover, if one reason for placing people with disabilities in separate programs is to provide them with needed services while removing them from the population of people who must satisfy federal work participation rates, this can be achieved without placing people with disabilities in separate programs. If states segregate federal TANF funds from state maintenance of effort funds, they can provide services to people with disabilities in integrated programs, and as long as those individuals receive assistance funded only with state funds, they do not have to be included in calculating state participation rates.<sup>900</sup>

### *E. Program Admission Criteria*

Education, training or other support programs cannot have admission criteria that screen out people with disabilities unless they are “necessary for the provision of the service, program or activity being offered.”<sup>901</sup> For example, a day care program cannot refuse to admit children with disabilities, children who use medication or children with particular types of disability-related behaviors such as emotional problems.<sup>902</sup> If the program provides day care, the essential eligibility requirement for the program is being a child and needing supervision and care (and possibly meeting financial criteria), not being a child needing supervision and care who is

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897. 28 C.F.R. § 35.130(b)(2) (1999).

898. See OCR TANF GUIDANCE, *supra* note 242, Technical Assistance § V (“[a] county vocational training program may offer special training opportunities for people with vision impairments, but it may not require people with vision impairments to participate in the special program or refuse to permit them to participate in courses open to other program participants”).

899. See *Olmstead v. L.C.*, 527 U.S. 581, 600-01 (1999).

900. See *supra* Part I.1.C.ix .

901. 28 C.F.R. § 35.130(b)(8) (1999).

902. See OCR TANF GUIDANCE, *supra* note 242, Technical Assistance § V ([t]he director of a county day care program for the children of welfare recipients who are attending employment training programs may not refuse to accept children who have emotional problems or who take medication for a disability into the program”). See also U.S. DEPARTMENT OF JUSTICE, COMMONLY ASKED QUESTIONS ABOUT CHILD CARE CENTERS AND THE AMERICANS WITH DISABILITIES ACT (1997), available at <http://www.usdoj.gov/crt/ada/childq%26a.htm>.

disability or medication-free. Likewise, requiring a high school diploma for admission to a program that trains TANF recipients for jobs involving heavy labor in the construction industry would violate the ADA by screening out people with some disabilities, such as learning disabilities and mild mental retardation, who cannot satisfy this requirement, when a high school diploma is not needed to train for or perform jobs involving heavy manual labor. However, it would be permissible to require applicants to be able to lift heavy objects as a condition of admission even though this has an exclusionary effect on individuals with disabilities who cannot lift heavy objects, because lifting heavy objects is related to the ability to do heavy manual labor jobs.

Because all of the training courses viewed together are also considered to be a program for ADA purposes, even if one particular training course has legitimate entry criteria that screen out people with disabilities, the complete mix of training courses cannot do so. If there is a heavy concentration of courses for jobs involving heavy labor and only a few courses for people who cannot do this type of work because of disabilities, the TANF training program does not provide an equal opportunity to participate.

#### *F. The Implications of the Lack of Entitlement to Employment Programs and Supportive Programs*

The fact that neither TANF nor the ADA creates an entitlement to education, training, and other programs has several implications for advocacy efforts.

Some states link work exemptions and benefit time limits, and exempt families from the benefit time limits if the adult in the family is exempt from work requirements.<sup>903</sup> Where this is so, people with disabilities who have obtained exemptions from both work requirements and time limits may find it difficult to obtain education and training, because education and training slots may be reserved for people subject to work requirements who will be without benefits, and possibly wages as well, if they don't obtain the education and training they need. The ADA will probably not serve as an effective means of obtaining education and training programs for exempted individuals with disabilities in this situation. Using participation in work activities as an eligibility requirement for education and training programs may have a disparate impact on people with disabilities who cannot work,<sup>904</sup> but a TANF program's decision to allocate available education and training slots to those who may need them to participate effectively at current work activities or be ready to work when benefits run out will seem fair to many policy makers and courts. Though exempted individuals are disadvantaged by this allocation of services making a discrimination claim would be difficult because under this program design people with disabilities may be receiving fewer education and training services, but they are also receiving TANF benefits for a longer period of time than others. As counter-intuitive as it may seem to deny services to those who may most need them to be able to work, litigation may not be the best avenues for addressing this issue. In programs that link work requirements and time limits in this way, clients also need to be made aware of the effect of "opting out" on obtaining education and training.

As it will not always be possible to use the ADA to require the development of additional education and training programs and other supportive services, non-litigation advocacy on this issue is critical. Advocates should urge states to develop additional support services and argue that such programs are cost-effective if they enable individuals who are currently exempt from

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903. See OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431.

904. Whether it does will depend in part on the nature of the other exemptions to work requirements and time limits in the program.

work requirements to obtain and retain jobs.<sup>905</sup> Advocates should also point out that PRWORA allows states to define work to include services, such as education and training, mental health, and substance abuse programs. Furthermore, states can provide these services after 24 months without risking penalties for failing to meet federal work participation rates if these services, and other assistance provided to individuals are paid for through state maintenance of effort funds. In addition, some support services are not considered “assistance” under TANF and does not subject a family to federal benefit time limits or work participation requirements.<sup>906</sup> Thus, in some instances, support can be provided beyond the 60-month lifetime limit for receiving federal TANF assistance.<sup>907</sup>

## CHAPTER 16: IS IT REASONABLE UNDER THE ADA TO MODIFY WORK REQUIREMENTS AND SANCTIONS FOR PEOPLE WITH DISABILITIES WHO ARE UNABLE TO WORK?

### *A. Discrimination in Work Requirements and Sanctions*

State work requirements, and sanctions for non-compliance with those requirements, may have a disparate impact on people with disabilities for a multitude of reasons that are related to their disabilities. Some possible causes of disparate impact, and the viability of ADA challenges to this disparate impact, are discussed below.

#### (i) Narrow State Definitions of Work

Under PRWORA, states have broad discretion to define “work” for the purpose of meeting the state’s own 24 month (or shorter) work requirement.<sup>908</sup> If the state uses a broad definition of work, the definition may cause little problem for people with disabilities. If the state defines work narrowly, people with disabilities may be less likely to be able to fulfill work requirements and therefore less likely to continue receiving benefits. If the state uses a narrow definition, work participation may be an eligibility requirement that screens out or tends to screen out people with disabilities from qualifying for continued benefits.<sup>909</sup> A discrimination claim made on this basis would be strengthened if reasonable modifications or support services were not provided to people with disabilities who needed them at work activities. The nature of any exceptions to work requirements<sup>910</sup> are also relevant to this type of argument. If a TANF program also has broad exceptions to work requirements for people with disabilities, the harm caused by narrow definitions of work is obviously reduced.

The question of whether a narrow state definition of work can be successfully challenged under a disparate impact theory depends a number of factors. One factor is how the court measures disparate impact. If many people without disabilities are unable to satisfy state work requirements and a court compares everyone who can satisfy work requirements with everyone who cannot, a disparate impact on people with disabilities may be difficult to prove. If a court

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905. See ANCILLARY SERVICES, *supra* note 9 (discussing the cost-effectiveness of substance abuse treatment and the high cost of mental illness as compared with mental health services); LEGAL ACTION CENTER, MAKING WELFARE REFORM WORK: TOOLS FOR CONFRONTING ALCOHOL AND DRUG ABUSE PROBLEMS AMONG WELFARE RECIPIENTS (1997) (discussing cost-effectiveness of drug and alcohol treatment programs); U.S. GOVERNMENT ACCOUNTING OFFICE, CHILD CARE: CHILD CARE SUBSIDIES INCREASE LIKELIHOOD THAT LOW INCOME MOTHERS WILL WORK, GAO/HEHS-95-20 (1994), available at <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi> (discussing data demonstrating a link between the availability of fully subsidized child care and the likelihood that low-income mothers would work).

906. See *supra* Part I.1.C.viii for a discussion of the concept of “assistance”.

907. See *supra* Part I.1.C.viii.

908. See 42 U.S.C.A. § 602(a)(1)(A)(ii) (West 2000).

909. See 28 C.F.R. § 35.130(b)(8) (1999).

910. See *infra* section (ii).

looks only at the impact on people with disabilities and focuses on the disability-related impact to those individuals, there would obviously be a greater chance of success. Courts have used both approaches in ADA and Section 504 cases.<sup>911</sup> As state definitions of work under state work requirements do not affect initial access to benefits, but continued access after state work requirement applies, this is not the type of ADA claim where a court is likely to ignore comparison groups in conducting disparate impact analysis.<sup>912</sup>

If disparate impact can be proven, it should not be a fundamental alteration to change the state definition of work. PRWORA gives states sufficient discretion to define work as they choose, so states have the right to define work to include treatment for substance abuse problems or participation in other services needed by people with disabilities, particularly where those services will help people with disabilities to be able to participate in other work activities in the future. Some states have taken this approach.<sup>913</sup>

## (ii) Narrow Exceptions to Work Requirements

TANF programs may provide some exceptions to work requirements, but not make exceptions for people with disabilities, or make exceptions for only some individuals with disabilities. Where a program has exceptions for only some people with disabilities but not others, there may be an argument that the state is discriminating between disabilities, or on the basis of severity of disability.<sup>914</sup> The strength of this type of claim will depend on the way in which the state has defined those eligible and ineligible for the disability exception. Exceptions that refer to particular disabilities are probably rare, but should be the easiest to challenge.<sup>915</sup> Exceptions that refer to the degree of functional limitation may have a disparate impact on the basis of severity of disability but would be extremely difficult to challenge. In most claims of discrimination based on severity of disability that courts have allowed to go forward, less favorable treatment was given to individuals with more severe disabilities.<sup>916</sup> Indeed, that is how discrimination on the basis of severity usually occurs, because agencies often prefer not to serve people they perceive as having greater needs. In TANF programs, exceptions to work requirements are more likely to apply to people with more severe disabilities and exclude those with less severe ones. Many courts will view this as reasonable on the theory that those with severe disabilities are probably less likely than those with mild or moderate disabilities to be able to work.

TANF programs may argue that modifying work requirements for people with disabilities would be a fundamental alteration because the ability to engage in work is an essential eligibility requirement for receiving TANF benefits, and individuals who cannot satisfy this requirement

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911. See *supra* Part II.9 discussing discrimination “by reason of such disability.”

912. See *supra* Part II.7.A for a discussion of disparate impact discrimination and the use of comparison groups in analyzing claims.

913. See, e.g., CAL. WELF. & INST. CODE §§ 11322.6(k), (q) (West 1999) (welfare to work activities include adult basic education and mental health, substance abuse and domestic violence services); WISC. ST. ANN. 49.147(5)(b)(1) (West 1999) (transitional services that qualify as work activities include alcohol and drug abuse treatment, mental health services, and counseling and rehabilitation).

914. See *supra* Part II.7.A for a discussion of discrimination between disabilities and on the basis of severity of disability.

915. See, e.g., *Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999).

916. See, e.g., *Plummer v. Branstad*, 731 F.2d 574 (8th Cir. 1983); *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1983); *Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1243 (D.N.M.), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1984); *Homeward Bound v. Hissom Mem. Ctr.*, 1987 U.S. Dist. LEXIS 16866 (N.D. Okla. July 24, 1987); cf. *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985) (in dicta court states that plaintiff would have had a claim if facts supported), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986); *Garrity v. Gallin*, 522 F. Supp. 171 (D.N.H. 1981).

are not “qualified” individuals” under the TANF program.<sup>917</sup> In one case challenging an AFDC waiver program that reduced benefits to those unable to work, a federal district court adopted this approach.<sup>918</sup> In response, advocates can point out that TANF programs are already making exceptions to work requirements for others. PRWORA requires states to make some exceptions to work requirements, namely, for single caretakers of children under six without available child care.<sup>919</sup> This undercuts the argument that making exceptions to work requirements is by definition a fundamental alteration.

Advocates need to exercise caution in making this type of argument because the fact that a program makes exceptions for others does not, alone, mean that it is not a fundamental alteration to make the same exception for people with disabilities. This is particularly true when an existing exception, like TANF’s exception to work requirements for single caretakers of young children, was created and in fact required by Congress, which demonstrated no similar intention to require states to make other specified exceptions to this requirement.<sup>920</sup> This type of argument is stronger when it is based on exceptions to program rules in state statutes, regulations, or best of all, less formal policies and practices. The question of whether work is an essential eligibility requirement for receiving benefits will also depend on how states structure their work and benefits programs, whether they are considered to be one program or two,<sup>921</sup> and how state statutes and plans describe program purposes.<sup>922</sup>

Advocates can also argue that the purpose of work requirements and sanctions will not be fundamentally altered if they are modified for individuals unable to comply because of disability. Any motivating purpose served by work requirements and sanctions will simply not motivate someone who is unable to comply with requirements as the result of a disability.<sup>923</sup>

Significantly, many states have exempted at least some individuals with disabilities from work requirements. Eighteen states have chosen to use JOBS participation policies and exempt individuals who meet the JOBS definition of disability.<sup>924</sup> Seventeen states require broader participation than JOBS did<sup>925</sup> but still have some exceptions for people with disabilities.<sup>926</sup> California, for example, exempts from work requirements recipients who provide medical proof of a disability that will last at least 30 days and that “significantly impairs the recipient’s ability to be regularly employed or participate in welfare-to-work activities, provided that the individual is actively seeking appropriate medical treatment.”<sup>927</sup> Michigan defines “good cause for non-compliance with employment and training requirements” to include temporary debilitating illness or injury of the individual or family member where the applicant or recipient is needed to care for the family member.<sup>928</sup> Though fundamental alteration and undue burdens must be analyzed separately for each state’s TANF program, the fact that so many states are exempting at least some individuals with disabilities suggests that would not be a fundamental alteration or undue burden them to do so.

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917. See *supra* Part II.6.

918. See *Beno v. Shalala*, 853 F. Supp. 1195, 1214 (S.D. Cal. 1993), *rev’d on other grounds*, 30 F.3d 1057 (9th Cir. 1994). The Ninth Circuit held that the court had no jurisdiction to review the waiver under the ADA but held instead that the waiver violated the Administrative Procedure Act, in part because there was no evidence in the record that HHS considered the impact of the waiver on people with disabilities.

919. See 42 U.S.C.A. § 607(e)(2) (West 2000).

920. See *supra* Part II.10.A.iii for a discussion of this issue.

921. See *supra* Part II.8.A.2 for a discussion of this issue.

922. See *supra* Part II.10.D.ii for a discussion of this issue.

923. See *supra* Part II.10.A.vi for a discussion of program purposes as applied to individuals with disabilities and fundamental alteration analysis.

924. See OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at 12-13.

925. See *supra* Part I.1.A for a discussion of the JOBS program.

926. See *id.*

927. CAL. WELF. & INST. CODE § 11320.3(a)(3)(A) (West 1999).

928. See MICH. ADMIN. CODE r. 400.3607 (1997).

A state may try to argue that it will not be able to meet required participation rates if it exempts people with disabilities from work requirements, but this argument is extremely weak. States have the ability to exclude people from being counted towards these rates by providing them with services from separate state funds.<sup>929</sup> In any event, the highest participation rate applicable to families with a disabled adult is 50 percent,<sup>930</sup> which makes it easier for states to meet participation rates while exempting people with disabilities from work requirements.

### (iii) TANF Program Non-Compliance with the ADA Prior to Imposing Sanctions

TANF programs may fail to comply with the ADA in any number of ways, by conducting inadequate disability assessments, placing individuals in programs that are inappropriate for their needs, or failing to make reasonable modifications in education and training programs. If individuals with disabilities are sanctioned for non-compliance with work requirements when a cause or contributing factor to the non-compliance was an ADA violation by the TANF program, an argument can be made that using compliance with work requirements as a criterion for receiving continued benefits has a discriminatory effect on people with disabilities.<sup>931</sup> It compounds earlier discrimination and punishes individuals for the TANF program's failure to comply with the ADA when non-compliance was not only no fault of their own, but was caused by unlawful action by the TANF program.

One potential difficulty with this type of argument is that it may be difficult to prove a class-wide disparate impact on people with disabilities from the failure of TANF programs to provide support services such as child care, transportation, and education and training activities that people without disabilities often need as well. When, however, there is evidence that the service or support that was needed for particular individuals because of a disability, advocates can make individual discrimination claims. The less clear it is that programs and services were needed *because of* disability, the more the argument begins to look like *Alexander v. Choate*,<sup>932</sup> because if people with disabilities need the same support services as others for the same reasons, any disparate impact on people with disabilities from failing to receive those services probably comes from the fact that people with disabilities are more likely to need a particular service, or more likely to need it in greater amounts than others. As described in Chapter 7, this is one of the most difficult types of disparate impact claims to make.

One possible remedy for the failure of a TANF program to comply with the ADA is for the TANF program to provide additional cash benefits beyond the state's benefit limit. Where program participants' inability to be able to work was the result of an ADA violation in the TANF program, remedying prior discrimination by extending benefits would not be a fundamental alteration because it is not a program change, but a corrective measure for prior violations of law by the TANF program. Most states already have mechanisms to extend benefits, by providing extensions, and exemptions from time limits, which "stop the clock" entirely or for a limited period of time, so that particular months of benefits do not count towards the time limit. According to HHS, most state TANF programs exempt months in which an individual was physically or mentally disabled or caring for a family member with a disability, and some states extend benefits past the time limit for a fixed or unlimited period of time in a variety of circumstances.<sup>933</sup> PRWORA requires states to exempt months in which an individual

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929. See *supra* Part I.1.

930. See 42 U.S.C.A. §§ 607(a)(1), 607(a)(2)(C) (West 2000).

931. See 28 C.F.R. §§ 35.130(b)(1)(ii); 35.130(b)(8) (1999).

932. 469 U.S. 287 (1985).

933. See SECOND ANNUAL TANF REPORT, *supra* note 835, at § XIII at 164, Table 13.1. See also STATE CHOICES ON TIME LIMITS, *supra* note 890.

was a minor and not the head of a household, and for a few other reasons,<sup>934</sup> so states should have a mechanism in place to make eligibility determinations for exemptions from time limits.

Another way to remedy the discriminatory effect of sanctions when non-compliance with work requirements is the result of the TANF program's failure to comply with the ADA is to investigate the reasons for non-compliance or give recipients an opportunity to explain the reasons for non-compliance before sanctions are imposed and attempt to address them. A strong argument can be made that investigating the reason for non-compliance with work requirements is a reasonable modification under the ADA.<sup>935</sup> Some TANF programs do investigate before imposing sanctions and a number have conciliation processes that provide recipients an opportunity to explain their non-compliance so that misunderstandings can be resolved or so that steps can be taken to address the reasons for non-compliance.<sup>936</sup> Of course, to fully rectify the discrimination, benefits would need to continue during the investigation period and during attempts to address the cause of non-compliance.

States may argue that investigating the cause of sanctions is administratively burdensome and requires substantial additional work by staff. However PRWORA requires TANF programs to grant exceptions to sanctions when lack of available child care is the cause of non-compliance with work requirements,<sup>937</sup> so programs already have a process in place to make individualized determinations about whether individuals qualify for exceptions. In addition, some states have adopted other exceptions to sanctions for non-compliance with work requirements, such as discrimination by an employer, hazardous working conditions, and other reasons that require fact-specific determinations.<sup>938</sup> The additional burden required by investigating disability-related reasons should not be that great.

If advocates intend to urge TANF programs to investigate the reasons for non-compliance, one issue that should be considered in advance is whose non-compliance the TANF program should investigate. Given the high percentage of people with disabilities in the TANF program, including undiagnosed and hidden disabilities, a strong argument can be made that in order to avoid discriminating on the basis of disability, programs must investigate the reasons for all non-compliance, to avoid imposing any sanctions that may be related to the failure of the TANF program to provide reasonable modifications for people with disabilities or fulfill its other obligations under the ADA. In response, TANF programs may argue that the ADA requires only that they investigate non-compliance of individuals they know or have a good reason to believe have disabilities. Because disability screening and assessment is inadequate in so many programs, restricting the investigation to these individuals will exclude many people with disabilities who may be in danger of being sanctioned for disability-related reasons. Moreover, as one possible type of earlier ADA violation is the failure to appropriately screen and assess disabilities or discrimination in the screening and assessment process, investigating only those individuals who were previously identified as having disabilities runs a high risk of perpetuating the very discrimination the investigation is intended to prevent. Thus advocates have a strong argument that whenever there is evidence of a systemic failure to adequately screen and assess disabilities, provide appropriate job and training placements, provide reasonable modifications or

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934. See 42 U.S.C.A. § 608(a)(7)(D) (West 2000).

935. See *supra* Part III.13 for a discussion of the similar argument that programs have an obligation to investigate non-compliance with Work First requirements.

936. See, e.g., CAL. WELF. & INST. CODE §§ 11327.4(c); 11327.9 (West 1999); 305 ILL. COMP. STAT. ANN. 5/9A-7 (West 1999); ILL. ADMIN. CODE tit. 89 § 112.77 (1999). See generally, *The Use of Sanctions Under TANF*, Issue Notes 3(3), Welfare Information Network (1999) at [http://www.welfareinfo.org/sanctionsissue\\_notes.htm](http://www.welfareinfo.org/sanctionsissue_notes.htm) [hereinafter]. See also STATE CHOICES ON TIME LIMITS, *supra* note 890.

937. See 42 U.S.C.A. § 607(e)(2) (West 2000).

938. See, e.g., CAL. WELF. & INST. CODE § 11320.31 (West 1999) (no sanctions imposed when the reason for non-compliance with work requirements was discrimination or violation of health and safety standards by the employer); MICH. ADMIN. CODE § 400.3607g(1)(k) (1997) (good cause for failure to comply with work requirements exists when employer engages in illegal discrimination).

of other ADA violations, in order to avoid further discrimination, TANF programs have an obligation under the ADA to contact individuals who are non-compliant with program requirements and who are at risk of being sanctioned to determine the reason for non-compliance and provide necessary services to make compliance possible. When individuals have been offered adequate disability screening and assessment and have refused to be screened or assessed, it may be more difficult to make a legal argument that programs have the obligation under the ADA to investigate disability-related non-compliance of these individuals.

(iv) Discrimination in the Design and Administration of Sanctions

Sanction policies and procedures may have a disparate impact on people with disabilities if programs define the PRWORA “good cause and other exceptions as the State may establish”<sup>939</sup> language in such a way that it does not include good cause for disability-based reasons. The question of whether this disparate impact is actionable discrimination will depend on who is eligible for exceptions to sanctions and which comparison group, if any, is used by a court to measure disparate impact.

Sanction policies may also discriminate by failing to create a meaningful opportunity for people with disabilities to challenge sanctions. Sanction notices may be incomprehensible to people with learning disabilities, psychiatric disabilities, and mild mental retardation.<sup>940</sup> TANF programs may require numerous appearances at welfare centers to challenge sanctions, which has a disparate impact on people with disabilities who lack accessible transportation, have conflicting medical appointments for disabilities or are unable to make numerous trips to welfare centers for disability-related reasons. Sanction procedures may discriminate for any number of reasons if people with serious impairments have difficulty using the procedures and assistance is not provided or modifications are not made to make it possible for people with disabilities to access them.

There are a number of ways to remedy the discriminatory impact of sanction procedures, including simplifying sanction notices to improve readability, simplifying procedures for avoiding or challenging sanctions, providing additional and comprehensible information to participants about sanctions, and removing other disability-related barriers such as physical and communication barriers.<sup>941</sup>

Emerging data indicates that families with multiple barriers to employment, including disabilities, are being sanctioned at an extremely high rate. A Utah study found that three-quarters of all sanctioned families had at least three barriers to employment, most commonly a health, medical or mental health problem. In Minnesota, sanctioned families were four times as likely to report a family health problem and twice as likely to report a mental health problem as other program participants. In Connecticut, sanctioned families had a significantly higher incidence substance abuse, health or mental health problems.<sup>942</sup> Whether these sanctions are the

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939. 42 U.S.C.A. § 607(e)(1)(b) (West 2000).

940. *C.f.*, *Thibault v. Dep't of Transitional Assistance*, No. SUCV97-047600 (Mass. Super. Ct., Suffolk County Dec. 29, 1998) (preliminary injunction granted), available at <http://www.neighborhoodlaw.org/thibaultinfo.htm>. *Thibault* is a class action challenging various aspects of a TANF program disability determination process. The Massachusetts Superior Court granted a preliminary injunction preventing individuals denied disability exemptions from time limits benefits from being terminated from benefits if the reason for the termination was that they had received and did not respond to an agency letter. The court held that the letter was “confusing; difficult to understand, complete and return; and technical in nature,” and because it probably required an educational level or language skills not found in many program participants. The court did not rely on the ADA in making this ruling.

941. A number of helpful suggestions on how improve welfare notices to make them more understandable can be found in: Adinah Robertson & Russ Overby, *Making Written Notices Understandable: A Collaborative Approach*, WELFARE NEWS (Apr. 1999), available at <http://www.welfarelaw.org/wn99apr.htm>.

942. These studies are discussed in LIZ SCOTT ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, THE DETERMINANTS OF WELFARE CASELOAD DECLINE: A BRIEF REJOINER (rev. ed. June 22, 1999) [hereinafter WELFARE

result of inability to understand or comply with procedural requirements necessary to avoid sanctions or difficulty in complying with other program requirements is not clear. One study, from Delaware, found that sanctioned individuals were more likely than others to have difficulty understanding TANF rules and the consequences of not participating in work or other program requirements.<sup>943</sup> These studies strongly suggest that either prior non-compliance with the ADA by TANF programs or confusing and inaccessible procedures for challenging sanctions, or both, are a widespread problem, and they provide support for ADA challenges to discriminatory sanction procedures.

Advocates can argue that the purpose of work requirements and sanctions will not be fundamentally altered if they are modified for those unable to comply with them because of disability. If one purpose of sanctions is to motivate individuals to comply with work requirements, this purpose will not motivate someone who is unable to work because of a disability or because of lack of supports needed for a disability.<sup>944</sup>

TANF programs may argue that withholding sanctions from those who do not comply with work requirements is an undue burden because states risk federal penalties for failing to sanction non-compliant individuals. However, if a TANF program chooses to define “good cause and other exceptions as the State may establish” in a way that leaves people with disabilities in a worse position than those without disabilities, that should not justify an argument that it would be a fundamental alteration to make exceptions for disability-related reasons. States have the power to define exceptions to sanctions, and so they have the capacity to avoid penalties from failing to impose sanctions in accordance with their policies.

States have taken a number of approaches to soften the harsh impact of sanctions. Some use escalating sanctions, in which a family loses only some of its cash benefits initially and is subject to “full family” sanctions only after repeated instances or continuing non-compliance with work requirements. Others have a conciliation process available to clients to make sure that the individual understands program requirements, and to identify the reasons for non-participation and address them where appropriate, before sanctions are imposed. Others still use outside parties to review cases and check with families to ensure they understand program procedures and give them an opportunity to comply before sanctions are imposed. And at least one state provides non-cash safety net assistance to families who have been sanctioned and continues to work with these families even after sanctions are imposed to achieve compliance.<sup>945</sup>

A number of arguments can be made that modifying sanctions policies is not a fundamental alteration. Modifying sanctions does not change the substance or nature of the TANF benefits nor does it undercut TANF purposes, when non-compliance with work requirements was caused by disability because sanctions will not serve to motivate people to work or comply with other program requirements if they are unable to do so.<sup>946</sup> The preamble to the TANF regulations make clear that states can be penalized for imposing sanctions when they should not have done so,<sup>947</sup> suggesting that withholding sanctions under some purposes is consistent with TANF purposes. PRWORA has an exception for state penalties for failure to comply with overall work participation rates for “reasonable cause.”<sup>948</sup> Unfortunately, the definition of “reasonable cause” in the TANF regulations does not include accommodating people with disabilities.<sup>949</sup>

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CASELOAD DECLINE] available at <http://www.cbpp.org/6-22-99we1.htm>. See also RECENT STUDIES, *supra* note 5.

943. See *id.*

944. See *supra* Part II.10.D.ix.

945. See WELFARE CASELOAD DECLINE, *supra* note 944; see also USE OF SANCTIONS, *supra* note 938.

946. See *supra* Part II.10 for a discussion of program purpose and its application to people with disabilities in analyzing fundamental alteration.

947. See Temporary Assistance for Needy Families Program (TANF), 64 Fed. Reg. 17,793, 17,794 (April 12, 1999).

948. See 42 U.S.C.A. § 609(b)(1) (West 2000).

949. See 45 C.F.R. §§ 261.52, 262.5 (1999). The regulations define “reasonable cause” for non-compliance to include natural disasters, state reliance on incorrect federal guidance, isolated problems, a diversion of resources to address Y2K

Nevertheless, states may be able to request an exception to penalties from HHS where sanctions have been withheld on this basis, and advocates may want to take the position that states should not be permitted to make an undue burden argument until they have sought such an exception from HHS.<sup>950</sup> In addition, states reduce their required work participation rates by reducing welfare caseloads,<sup>951</sup> which in turn reduces the risk of having to face penalties.

#### (v) Discrimination at Work Activities

People with disabilities may be unable to work at assigned work activities because they have not been provided with reasonable modifications for their disabilities at these activities. Some states have exceptions to requirements that TANF recipients must accept and keep jobs where employers discriminate on some basis,<sup>952</sup> where work conditions are generally unsafe<sup>953</sup> or are unsafe for particular individuals given their particular medical conditions.<sup>954</sup> Nevertheless, even when exceptions exist, they may not always be granted to people with disabilities when appropriate.

If people with disabilities have been denied reasonable modifications of work activities and are sanctioned as a result, the TANF program is discriminating against people with disabilities by basing eligibility for continued benefits on discriminatory criteria.<sup>955</sup> This is true whether the work activity is operated by the TANF program, another public entity, or a private organization. All are prohibited from discrimination on the basis of disability and are all required to make reasonable modifications or accommodations to people with disabilities.<sup>956</sup> The failure to do so is discriminatory, and it compounds this discrimination to base benefits decisions on the effects of non-compliance. Modifying sanctions is only one means of preventing or remedying this discrimination, however; TANF programs could also provide the needed modifications.

#### (vi) Disability-Related Conduct

People with disabilities may engage in conduct that is symptomatic of their disabilities, which results in non-compliance with work requirements. For example, some individuals with psychiatric disabilities may attend work or education and training programs on an irregular basis during an acute phase of their disability. If people with disabilities are sanctioned as a result of such non-compliance, an argument can be made that the work requirements are “criteria and methods of administration” that have a discriminatory effect on access to TANF benefits<sup>957</sup> that distinguish “between those whose coverage will be reduced and those whose coverage will not be on the basis of [a] test, judgment or trait that the handicapped as a class are less capable of

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problems, and other matters. It also includes inability to meet participation rates as a result of grant domestic violence waivers or assistance to refugees.

950. *Cf.* Howard v. Dep’t of Soc. Welfare, 655 A.2d 1102 (Vt. 1994) (rejecting state’s fundamental alteration argument because the state submitted no evidence that the federal government refused to modify its funding criteria).

951. *See* 45 C.F.R. § 261.40 (1999).

952. *See, e.g.,* CAL. WELF. AND INST. CODE § 11320.31(a) (West 1999); MICH COMP. LAWS ANN. § 400.3607(g) (West 1997).

953. *See, e.g.,* CAL. WELF. AND INST. CODE § 11320.31(d).

954. *See, e.g.,* OR. ADMIN. R. § 461-130-0327(a) (West Supp. 1999); ILL. ADMIN. CODE §§ 112.72 (a)(3)(B)-(C) (2000).

955. *See supra* Part II.8.B.

956. *See* 42 U.S.C.A. § 12112(b)(5)(A) (West 2000) (Title I reasonable accommodation requirement applicable to employers and employment agencies); 42 U.S.C.A. § 12182(b)(2)(a)(ii) (West 2000) (Title III reasonable modification requirement applicable to privately owned or operated work or training programs); 28 C.F.R. § 35.130(b)(7) (1999) (Title II reasonable modification requirement for public entities).

957. 28 C.F.R. § 35.130(b)(3)(i) (1999).

meeting.”<sup>958</sup> A discrimination claim may also be framed as a failure to provide reasonable modifications when necessary to avoid discrimination.<sup>959</sup> Modifications could consist of flexible work and program policies, investigating the reasons for non-compliance with program requirements and attempting to rectify the problem prior to taking adverse action,<sup>960</sup> working one-on-one with individuals to make sure they understand program requirements or other modifications.

It is unclear under existing case law whether Title II prohibits state and local government programs from taking adverse action against people with disabilities who do not comply with program requirements because of behavior that is symptomatic of their disabilities. It may be possible to analogize to case law on related issues, such as case law under the Federal Fair Housing Amendments Act,<sup>961</sup> although EEOC Guidance on Title I of the ADA rejects a similar approach in the ADA employment context.<sup>962</sup> The key ADA issues are whether regular attendance or other work requirements are essential eligibility requirements, and whether individuals who cannot comply with them are “qualified individuals.”<sup>963</sup> Because some individuals in the TANF program are not merely employees of the employer in a work activity, but also participants in the TANF program, it may be possible to argue that even if they are not qualified for a particular job, they are “qualified individuals” under the TANF program. To a large extent this will depend on how work participation and benefits are conceptualized in state legislation and other materials, and whether there is an obligation on the part of the program to help people find appropriate jobs.

It may also be possible to argue that where non-compliance with work requirements occurs for disability-related reasons, sanctions should not apply because the individual did not “refuse” to engage in work at all, but simply was not able to comply.<sup>964</sup> Depending upon the state enabling legislation and regulations, there may be no authority under state law to sanction an individual who is unable to comply with work requirements because of a disability. Some states do make a distinction between “refusal” to work and “failure” to do so, and sanction only the former, or neither, in some circumstances.<sup>965</sup>

#### (vii) Inability to Work Because of Disabilities

The question of whether there are some TANF applicants and recipients with disabilities who cannot participate in work activities because of their disabilities is a controversial one among disability and welfare advocates. Some advocates believe that there are certain people with disabilities who are unable to participate in any of the qualifying work activities and therefore should be exempt from work requirements. Others believe that everyone with a disability, including those with severe disabilities, can work if given the proper supports. To some extent the dispute comes down to a timing issue. Most likely everyone would agree that

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958. *Alexander v. Choate*, 469 U.S. 287, 302 (1985).

959. *See* 28 C.F.R. § 35.130(b)(7) (West 1999).

960. *See supra* Part III.13.B.

961. *See* 42 U.S.C.A. §§ 3604(f)(3)(A), (B) (West 2000). The Federal Fair Housing Amendments Act uses the term “reasonable accommodations” to describe changes in rules, policies and practices that are required when necessary to afford an equal opportunity to use and enjoy housing. *See* 42 U.S.C.A. § 3604(f)(3)(B) (West 2000). “Reasonable modifications” refer to architectural changes needed to make housing accessible to people with disabilities. *See* 42 U.S.C.A. § 3604(f)(3)(A) (West 2000).

962. *See supra* Part III.13.C.

963. *See supra* Part II.6 for a discussion of the concept of “qualified individual with a disability.”

964. This is not an argument based on the ADA. It relies on the language in PRWORA requiring states to reduce assistance to an individual who “refuses to engage in work required in accordance with this Section...” 42 U.S.C.A. § 607(e)(2)(A) (West 2000).

965. *See, e.g.,* CAL. WELF. & INST. CODE § 11320.31 (West 1999) (listing situations where failure or refusal to work will not trigger sanctions); N.Y. COMP. CODES R. & REGS. tit.12 § 1300.12(a)(3)(ii) (1999).

there are some people who cannot work for short periods of time during an acute phase of a medical or mental health condition. The real dispute is whether there are individuals who cannot work for longer periods of time or indefinitely. In part, this is a medical issue, but to some extent the issue is also political and strategic. Some advocates are fearful of taking a position that will too readily lead to the exclusion of people with disabilities from the very programs that will enable them to become employed. They fear that in turn may take the pressure off of TANF programs to make program modifications and develop programs that are appropriate for people with disabilities.<sup>966</sup> However, most advocates agree that if a TANF program has inadequate disability screening and assessment or support services and reasonable modifications are not available for people with disabilities, exceptions to work requirements may be only viable alternative until these problems are remedied.

The question of whether there are people with disabilities in the TANF program who are unable to work depends largely on how a state TANF program defines “work activities,” and what kinds of services and supports are provided for these activities. Indeed, the question of whether there are people with disabilities who are unable to work even when a TANF program defines work broadly and provides reasonable modifications is largely academic, as it is unlikely that many TANF programs meet this description. Given Title II’s unwavering preference for integrated programs,<sup>967</sup> the ADA requires that TANF programs to attempt to make it possible for people with disabilities to satisfy work requirements by broadening definitions of work and providing appropriate assessment, placement, and supports, rather than simply making exceptions to work requirements for these individuals.

However, assuming there are at least some individuals who are unable to participate in available work activities, denying benefits to these individuals because they are unable to work would obviously have a disparate impact on people with disabilities. Moreover, there would be a direct causal link between a disability and the denial or termination of benefits. However, this does not necessarily mean that there is a strong ADA claim. The strength of this type of claim depends in part on the type of comparison that is made. A court might consider the impact of work requirements only on people with disabilities who are unable to work; the impact on all people with disabilities (many of whom are able to work, and some of whom cannot); or the comparative impact on everyone eligible for exceptions to work requirements and everyone who is not eligible for these exceptions. Disparate impact may not be visible if a court applies either of the last two approaches because there may be many people who are unable to work for reasons other than disability who are not eligible for exceptions to work requirements, and people with disabilities who are eligible for exceptions on some other basis.<sup>968</sup> Program purpose and design will also be critical in this type of ADA claim. States may be able to argue that work is an essential eligibility requirement of the program, and that people who are unable to work are therefore not “qualified individuals” who are protected under the ADA,<sup>969</sup> or that it would be a fundamental alteration to modify this essential program requirement.<sup>970</sup> Given that most states have some exemptions of work requirements for individuals who are unable to work because of disability or caring for a disabled relative for at least some period of time,<sup>971</sup> it might be difficult for states to prevail on such an argument.

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966. The Office of Civil Rights of the U.S. Department of Health and Human Services (HHS) appears to share this concern. The OCR TANF Guidance states that “[a] welfare office may not exempt individuals with disabilities from work activities, education or training opportunities based on assumptions that such individuals are not qualified to participate in training or work.” OCR TANF GUIDANCE, *supra* note 242, at Technical Assistance § V.

967. See 28 C.F.R. § 35.130(d) (1999).

968. See *supra* Part II.7 for a discussion of the concept of discrimination “by reason of such disability” and disparate impact discrimination.

969. See *supra* Part II.6 for a discussion of the concept of “qualified individual with a disability.”

970. See *supra* Part II.10 for a discussion of this issue.

971. According to HHS, in fiscal year 1999 almost 14 percent of adult TANF recipients nationwide were exempt from

(viii) Is there an Argument that the 24 Month (Or Shorter) Work Requirement Has a Disparate Impact on People with Disabilities?

PRWORA requires parents and caretakers in the TANF program be engaged in work once the state determines they are ready to do so or within 24 months of receiving assistance, whichever is sooner.<sup>972</sup> Twenty-three states have adopted the 24-month requirement (or sooner if the individual is able to work); 20 states have an immediate work requirement, and eight states have other deadlines.<sup>973</sup> Particularly in states where work requirements take effect immediately or after only a short period of time, some people with disabilities may be disadvantaged because they will need more time than has been provided to prepare for work, and thus will be less ready to work when the work deadline arrives.

It will be very difficult to bring a successful ADA claim challenging the time frame within which state work requirements take effect. First, it may not be possible to prove that these requirements have a disparate impact on people with disabilities, because many people without disabilities also need additional time before they are ready to work. Second, even if it were possible to demonstrate a disparate impact, if the same time limit applies to everyone in the state's TANF program, any disparate impact would stem from the fact that some people need more time than others to be ready to work, not from disparities in the work deadline itself. The discrimination argument would be difficult to distinguish from *Alexander v. Choate*.<sup>974</sup>

If discrimination could be demonstrated, however, it would be relatively easy to demonstrate that extending state work deadlines would not be a fundamental alteration if the state's deadline is less than 24 months. Extending the deadline to 24 months for people with disabilities who are not ready to work before then would not conflict with PRWORA. It is far more difficult to argue that extending the deadline beyond 24 months would not be a fundamental alteration in states that have adopted a 24-month deadline, because 24 months is the maximum permitted by PRWORA. In *Howard v. Department of Public Welfare*,<sup>975</sup> the court held that even though the rule in question was required by federal law and compliance with it a condition of receiving federal matching grants, the ADA and Section 504 required the state welfare program to modify the rule for individuals. However, one difference between *Howard* and the 24 month TANF work requirement is that the 24 month requirement in PRWORA is not just a prohibition on the use of federal funds, but a requirement must be included in all TANF state plans and is not tied to any particular source of funding.

Advocates can try to argue that because PRWORA contains an exception to the 24 month rule for single parents of children under the age of six without appropriate child care, it would not be a fundamental alteration to make exceptions for people with disabilities. As noted elsewhere, the fact that programs already have an exception to the 24-month rule provides some support for the fact that Congress requires this exception probably makes this argument difficult.

PRWORA has no specific penalties against states for failure to comply with the 24-month (or shorter) rule,<sup>976</sup> so the threat of penalties is not a legitimate reason for a TANF program to refuse to modify this rule. Though states may incur penalties for failing to satisfy PRWORA work participation rates, the relationship between state work deadlines and participation rates is indirect, and many other factors have at least as much effect on work participation rates.

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work requirements for "good cause," which included individuals who are unable to work for disability and health reasons. See THIRD ANNUAL TANF REPORT, *supra* note 22, at § IX, 75.

972. See 42 U.S.C.A. § 602(a)(1)(A)(ii)(West 2000).

973. See SECOND ANNUAL TANF REPORT, *supra* note 22, at § X, 110.

974. See *supra* Part II.7.A for a discussion of *Alexander v. Choate*.

975. 655 A.2d 1102 (Vt. 1994).

976. It is unclear under PRWORA whether a state's failure to comply with the 24-month requirement could be considered a misuse of funds.

(ix) Is there an Argument that Federal Work Participation Requirements Have A Discriminatory Impact?

Although PRWORA defines “work activities” that qualify as “engaging in work” for federal work participation rates broadly, it places a lesser value on job readiness and job search, vocational educational activities, and secondary school participation. It counts participation in these activities for only limited periods of time as work activities;<sup>977</sup> limits the percentage of individuals who engage in some of these activities who can count towards the state’s work participation rate;<sup>978</sup> and prohibits these activities from being the sole qualifying work activity in which an individual or family must engage.<sup>979</sup> No other qualifying work activities are subject to these types of restrictions in PRWORA.

These restrictions could have a disparate impact on people with disabilities in several ways. If people with disabilities are more likely to need job readiness, vocational education, or secondary school than others, one possible effect of these limitations is that people with disabilities who remain in these programs will have less opportunity to satisfy work requirements, and therefore will be more likely to be sanctioned. In addition, if people with disabilities are more likely to need these activities than others, the fact that these activities qualify in lesser amounts means that people with disabilities needing to engage in these activities for employability will not have an equal opportunity suited to their needs.<sup>980</sup> Further, the limits may cause a disparate impact on people with disabilities because, of all of the people who participate in these particular activities, people with disabilities may be more likely than others to need more of these activities than the amounts that count for federal work participation rates. Though PRWORA does not prohibit TANF recipients from participating in these activities, because clients risk sanctions if they do not spend a minimum amount of time on “countable” activities, there is an obvious disincentive for people to do so. Finally, these limits may have an indirect effect by influencing the nature of educational and vocational training programs that states fund and TANF programs offer to clients.

Unfortunately, these arguments do not make strong ADA claims. Given the high percentage of people in TANF programs with multiple barriers to employment, not all of which are disability-related,<sup>981</sup> it may be difficult to demonstrate that people with disabilities are affected by these limitations to a greater extent than others. In addition, PRWORA does not limit the amount of these services that are provided to TANF recipients. It merely restricts the amount of these services that count towards federal work participation rates. Therefore, to prove discrimination, it would probably be necessary to present evidence that the availability of these programs is affected by the fact that only limited amounts count toward federal work participation rates. Finally, these limitations are imposed by PRWORA itself. It is not clear that states could even be held responsible for these restrictions, as it is HHS that determines whether state work requirements have been met for the purpose of imposing penalties. In any event, these distinctions were plainly intended by Congress.

Advocates should address this issue through non-litigation advocacy. States have ample flexibility under PRWORA to design TANF programs to increase the likelihood that people with disabilities and others will be more likely to access education and training for longer periods of

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977. See 42 U.S.C.A. §§ 607(d)(8); 607(c)(2)(A) (West 2000).

978. See 42 U.S.C.A. § 607(c)(B) (West 2000).

979. See 42 U.S.C.A. § 607(c)(2)(D) (West 2000).

980. Studies do suggest that people with disabilities are among those who are likely to receive welfare for longer periods of time than others and, in addition, that those who receive benefits for longer periods of time are more likely than others to lack basic skills. See *ANCILLARY SERVICES*, *supra* note 9. Thus there is some factual support for the argument that people with disabilities are among those who generally need greater levels of education and training than others.

981. See *ANCILLARY SERVICES*, *supra* note 9.

time. States have broad discretion to define work for the purpose of the state's 24-month work requirement, and can do so in a way that includes education and training.<sup>982</sup> States can also structure TANF programs so that months in which recipients are in education and training do not count towards the benefit time limits, by providing individuals receiving these services with state maintenance of effort funds.<sup>983</sup> This will remove individuals receiving these services from federal work participation rates,<sup>984</sup> and consequently, states would not risk penalties when they design their programs in a manner that enables more TANF recipients to participate in education and training for larger periods of time. States can also support education and training in less direct ways, by using federal or state funds for services and supports, such as work study, child care, and transportation benefits, for TANF recipients participating in education and training. It can also use maintenance of effort funds to fund education and training activities.<sup>985</sup>

### *B. Sanctioning Families of Older Children Who Lack Child Care*

PRWORA prohibits TANF programs from sanctioning single-parent families with children under age six for failure to comply with work requirements where lack of available child care is the reason for non-compliance with work requirements.<sup>986</sup> It contains no similar protection for families with children over the age of six. When a child is over the age of six and has a disability, does the ADA limit a state's ability to sanction the family when lack of child care is the reason for the non-compliance?

Like many of the disability discrimination issues addressed in this Manual, it is more difficult to demonstrate that this policy discriminates against people with disabilities than it is to demonstrate that modifying the policy would not be a fundamental alteration or undue burden.

#### (i) Is the Failure to Exempt Families with Children with Disabilities Age Six or Older From Sanctions When Lack of Child Care is the Reason for Non-Compliance with Work Requirements Disability Discrimination?

The failure to exempt families with children ages six and older who have disabilities without appropriate child care from sanctions is an age-based, not a disability-based, distinction. As a result, it might be difficult to bring a facial challenge to a policy of exempting only families of younger children. Another problem with this type of challenge is that the exemption required by PRWORA applies only to single-parent families. A state could argue that since it does not grant this type of exemption to any two-parent families, it can hardly be guilty of disparate impact discrimination against two-parent families with older disabled children. Thus any disparate impact challenge to this policy would have to be limited to single-parent families. Presumably, however, these are the families that would be most in need of the exemption. When a child's disability is so severe that both parents need to remain at home to care for a child, a two-parent family would have a strong argument that they should be exempt from sanctions as a reasonable modification.

Sanctioning families with children age six or older for non-compliance with work requirements when lack of child care was the reason for non-compliance with work requirements

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982. See Part I.1.C.iv.

983. See Part I.1.

984. See Part I.1.C.xvii.

985. These options are discussed in MARK GREENBERG ET AL., CENTER FOR LAW AND SOCIAL POLICY, STATE OPPORTUNITIES TO PROVIDE ACCESS TO POSTSECONDARY EDUCATION UNDER TANF (1999) available at <http://www.clasp.org/pubs/jobseducation/Postsec%20and%20TANF%20final.htm>.

986. 42 U.S.C.A. § 607(e)(2) (West 2000).

may have a disparate impact on families with children with disabilities because access to child care for older children with disabilities is far more limited than access to child care for older children without disabilities. There is certainly evidence that child care for children with special needs is in short supply.<sup>987</sup> However, given the increased demand for child care created by PRWORA and escalating federal work participation rates, there is, and will likely continue to be, a high unmet need for child care for *all* families in the coming years,<sup>988</sup> making class-wide disparate impact on families with older children with disabilities difficult to prove.

Discrimination might also exist if a TANF program (or other state or local government entity) operates child care programs for children six and older but operates none, or proportionally fewer, serving children with disabilities. This would constitute a failure to provide an equal opportunity to participate in child-care programs in violation of the ADA. This type of claim would challenge access to services, not the age limit on the sanctions exception.

As with many other potential ADA claims, even if discrimination can be proved, exemption for work requirements is not the only possible remedy for discrimination. A TANF program or other public entity could remedy the discrimination by making available additional child care programs appropriate for children with disabilities over age six.

#### (ii) Fundamental Alteration and Undue Burden

Nothing in PRWORA prevents states from granting exemptions from sanctions to families with children over age six without appropriate child-care. In fact, PRWORA gives states extremely broad discretion to define exceptions to sanctions, by allowing for “good cause or other exceptions as the State may establish.”<sup>989</sup> Unlike *Aughe v. Shalala*<sup>990</sup> and *Howard v. Department of Social Welfare*,<sup>991</sup> in which a federal statute defined the class of people eligible for benefits in a manner that excluded some children with disabilities, here federal law gives maximum discretion to states to define exceptions.

Making an exception to sanctions for those who are unable to find appropriate child care for children with disabilities over age six would be consistent with PRWORA’s goal of providing care so that children can “be cared for in their own homes.”<sup>992</sup> If the threat of sanctions creates a risk that caretakers of children with disabilities will send their children elsewhere to live, it would be consistent with PRWORA’s purpose to make an exception to sanctions.

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987. See U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATES’ EFFORTS TO EXPAND CHILD CARE PROGRAMS, available at <http://fwebgate.access.gpo.gov/cgi-bin/multidb.cgi>.

988. See *supra* at Part I.1.C.xix, discussing Urban Institute report which predicted that only 48 percent of the potential child care needs of low income families would be met even if states maximized federal dollars available for child care under welfare reform.

989. 42 U.S.C.A. § 607(e)(1)(B) (West 2000).

990. See *Aughe v. Shalala*, 885 F. Supp. 1428 (W. D. Wash. 1995).

991. See *Howard v. Department of Soc. Welfare*, 655 A.2d 1102 (Vt. 1994).

992. 42 U.S.C.A. § 601(a)(1) (West 2000).

## CHAPTER 17: DOES THE ADA REQUIRE PROGRAMS TO MODIFY THE LIFETIME LIMIT FOR TANF CASH BENEFITS FOR PEOPLE WITH DISABILITIES?

PRWORA imposes a 60 month lifetime limit on federal cash assistance,<sup>993</sup> but states are free to set shorter benefit limits.<sup>994</sup> Many have done so, some as short as 21 months.<sup>995</sup> Although many states have exceptions to time limits for some people with disabilities, many do not,<sup>996</sup> and those that do may not make exceptions to everyone with disabilities who needs them. The result is that people with disabilities will be subject to lifetime limits on cash benefits when they are not able to support their families and need additional benefits. Does the ADA require states to extend TANF benefits beyond state lifetime benefit limits for people with disabilities?

### *A. Do Time Limits Have a Disparate Impact on People with Disabilities?*

Time limits for benefits create a hardship for many TANF recipients, but may have a particularly harsh impact on people with disabilities. People with disabilities on the whole may be less ready to work when they exhaust lifetime benefits, for a number of reasons related to their disabilities, including:

- 1) the failure to receive appropriate support programs and reasonable modifications in programs during the benefit period that would have made them ready for work, due to absence or unavailability of programs to meet their needs;
- 2) the failure to be appropriately assessed for a disability or given an appropriate plan that would help the individual receive the services needed to prepare for work;
- 3) lack of accessible transportation to jobs and job interviews;
- 4) the failure to make modifications in the job application process;
- 5) the disability itself is sufficiently limiting as to make work impossible or possible only at great risk or pain, when benefits are due to end;
- 6) discrimination by employers against people with disabilities; and
- 7) lack sufficient time to become work-ready.

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993. See 42 U.S.C.A. § 608(a)(7)(A) (West 2000).

994. See 42 U.S.C.A. § 608(a)(7)(F) (West 2000).

995. See THIRD ANNUAL TANF REPORT, *supra* note 22, at § XIII, 219-21; See also OCTOBER 1998 URBAN INSTITUTE REPORT, *supra* note 431, at app. D. One state has an 18-month limit, but individuals become re-eligible for benefits after 3 months.

996. See *id.* § XIII, 197.

### *B. Discrimination in Providing Services at an Earlier Point in Time*

One possible ADA argument is that people with disabilities are affected by time limits to a greater extent than others because they need education and training programs, support services, and reasonable modifications to become ready for work. Thus, one result of the failure to provide these services when people are receiving benefits is that people with disabilities are, on the whole, less ready to work when benefits are exhausted. This argument has numerous drawbacks. The first is the difficulty in proving that the failure to receive these services at an earlier point in time is the reason for lack of readiness to work. Another is that many people without disabilities need these services as well and thus disparate impact may be difficult to prove. A third is that there is little evidence that either Congress or states intended to make ending cash assistance contingent on an individual's ability to work. And, where states explicitly treat TANF benefits and work requirements as separate programs, it will be even more difficult to link the two.<sup>997</sup> States may also argue that extending benefits is not the only way to remedy this type of disparate impact, and they can satisfy their obligations under the ADA by providing people with disabilities with additional education, training, and support services after benefit limits have been reached. However, a strong argument can be made that this is not an adequate remedy because one purpose of providing assessments, programs, modifications, and supports is to assist people in becoming ready for work before their benefits run out.

### *C. Is There an Argument that People with Disabilities Need More Time to Become Self-Sufficient?*

The argument that lifetime limits on benefits discriminate against people with disabilities because they generally need more education, training, and support before they can become economically independent, and therefore need to receive cash benefits for a longer period of time while they are preparing for work, is also problematic. The ADA claim would be that additional cash benefits are needed to “[p]rovide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording an equal opportunity to obtain the same result . . . or to reach the same level of achievement as that provided to others.”<sup>998</sup> There is certainly evidence that people with disabilities are more likely to stay on benefits for longer, and have a greater difficulty finding work. This is particularly true for individuals with drug and alcohol problems, psychiatric disabilities, cognitive disabilities, and learning disabilities.<sup>999</sup> Disparate impact, however, may be difficult to demonstrate, because disability is not the only barrier associated with needing public benefits for longer periods of time.<sup>1000</sup>

Moreover, it may be difficult to prove that people with disabilities have been denied “meaningful access” to TANF benefits under the *Choate* standard.<sup>1001</sup> If people with disabilities have been given the same number of months of benefits as others (or in some cases more, if some months of benefits were excluded from the calculation), the discrimination claim would be based on the fact that people with disabilities need more time. This is a very difficult disparate impact claim. The lifetime benefit limits do not meet the disparate impact test in *Choate*, because time limits “leave both handicapped and nonhandicapped Medicaid users with identical and effective services fully available for their use, with both classes of users subject to the same

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997. See *supra* Part II.8 for a discussion of this issue.

998. 28 C.F.R. § 35.130(b)(1)(iii) (1999).

999. See *ANCILLARY SERVICES*, *supra* note 9.

1000. See *id.*

1001. See *supra* Part II.7 for a discussion of this issue.

limitation;”<sup>1002</sup> there is no evidence that people with disabilities “will be unable to benefit meaningfully” from the benefit they do receive; <sup>1003</sup> the time limit does not have a “particular exclusionary effect” on people with disabilities;<sup>1004</sup> and the time limit does not “distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment or trait that [people with disabilities] as a class are any less capable of meeting or less likely of having.”<sup>1005</sup>

It is difficult to argue that people with disabilities have been denied meaningful access to cash benefits when they have received between 21 and 60 months of benefits (or more if the time clock has been tolled). If the purpose of the benefits is to provide income support to families in need, that purpose was fulfilled during the months in which benefits were received, and it was fulfilled to the same degree that it was fulfilled for families without members with disabilities. This type of claim may be somewhat stronger if TANF programs described the purpose of benefits in a particular way, but given the *Choate* meaningful access standard, and the difficulty of demonstrating a “particular exclusionary effect” on people with disabilities, it would still be extremely difficult. In *Choate*, people with disabilities who used hospital services during a recent year were more than three times as likely to need more than the maximum amount of hospital coverage provided by the state Medicaid program as those without disabilities using hospitals that year,<sup>1006</sup> and people with disabilities were more than four times as likely as Medicaid recipients without disabilities to need five days more than the maximum covered amount,<sup>1007</sup> but the Court was still not satisfied that the limit distinguished on the basis of a test or trait “that people with disabilities are less capable of meeting or less likely of having.”

Arguing that “readiness to work at the time limit” is the trait people with disabilities are less likely to meet is not a viable means of getting around the problem discussed above, because state time limits are framed in terms of months, not readiness to work. In addition to the fact that there may be little if any evidence to support such an argument, “readiness to work” would not necessarily require TANF programs to offer any particular duration of benefits. In *Choate*, the Supreme Court identified the general purpose of Medicaid as “assuring that individuals will receive necessary medical care,”<sup>1008</sup> but did not hold that this required states to provide any particular duration of hospital coverage in their Medicaid programs. At a minimum, an argument of this kind would have to be based on statements of purpose in state statutes, plans, and other TANF program materials linking the benefit cap to the assumption that people will be ready to work when benefits are exhausted.

One difference between the facts of *Choate* and TANF time limits is that in *Choate* the coverage limit only had a disparate impact on a small percentage of Medicaid recipients with disabilities and an even smaller percentage of the overall state Medicaid population. The data showed that the coverage limit would fully meet the hospital needs served of 95 percent of state Medicaid recipients with disabilities.<sup>1009</sup> In contrast, a much larger percentage of TANF recipients with disabilities would not have their full need for income support met under lifetime benefit limits. But *Choate*’s holding did not rely heavily on these statistics. In fact, the Court seemed more concerned with the prospect of interpreting Section 504 in a manner that would in effect require an entity subject to Section 504 to assess the effect of every contemplated action on people with disabilities and adopt the least harmful alternative.<sup>1010</sup> Given the fact that benefits

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1002. 469 U.S. 287, 302 (1985).

1003. *See id.*

1004. *See id.*

1005. *Id.*

1006. *Id.* at 303.

1007. *See id.* at 291 n.3.

1008. *Id.* at 303.

1009. *See* 287 U.S. at 303.

1010. *Id.* at 298-99.

time limits are neutral and the same limit applies to everyone; the fact that they do not restrict initial access to benefits but affect the amount of services provided; the fact that neutral benefit limits will always be insufficient some people; the fact that many people without disabilities will also need benefits beyond the time limit; and the fact that PRWORA gives states maximum flexibility in program design; a challenge to neutral benefit time limits under the ADA would be extremely difficult.

#### *D. Fundamental Alteration and Undue Burden*

If it were possible to make a successful discrimination argument challenging a lifetime limit for cash benefits, it would be possible to overcome a state's fundamental alteration or undue burden arguments.

When a state has adopted a lifetime benefit limit that is less than 60 months, it would not be inconsistent with PRWORA for states to extend that time limit and provide TANF cash benefits for up to 60 months. Even where a state has adopted a 60-month lifetime limit, it would not be a fundamental alteration of or inconsistent with PRWORA to extend benefits beyond that limit, because benefits that are provided after the time limit has been reached could be paid for with state maintenance of effort funds.<sup>1011</sup> In addition, PRWORA specifically allows states to exempt up to 20 percent of the average monthly number of families receiving assistance from the 60 month requirement for "hardship,"<sup>1012</sup> or if the family has an member who has been battered or subject to extreme cruelty.<sup>1013</sup> Nothing prevents a state from defining "hardship" to include people with disabilities. If a state chooses not to include people with disabilities in this exemption, it can hardly rely on this choice to argue that it would be a fundamental alteration to do it for people with disabilities. Extending benefits does not change the eligibility requirements for or the substance of TANF benefits (though it does change the overall amount of benefits provided). As many states already provide extensions of time limits for a variety of reasons, they already have a process in place to make individualized determinations of eligibility for extensions and thus cannot reasonably argue that granting extensions would be an undue burden because of the cost of creating such a mechanism.

Other PRWORA provisions undercut arguments that it would be burdensome to the state to extend benefits beyond a state's lifetime benefit limit. PRWORA has a "reasonable cause" exception to penalties for non-compliance with the 60-month requirement,<sup>1014</sup> and an exception to penalties when a state corrects or discontinues the violation under an approved corrective action plan.<sup>1015</sup> Thus states have a number of opportunities to avoid any penalties they risk incurring by extending federal cash benefits beyond 60 months.

It would not be advisable to argue that extending the time limits to people with disabilities who are unable to work would not be a fundamental alteration because the purpose of time limits make no sense when applied to these individuals.<sup>1016</sup> The purpose of benefit limits is not just to motivate people to work, but to make people less dependent on benefits. Ending benefits will achieve that purpose for everyone, whether they or not they are able to work at that time.

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1011. *See* 42 U.S.C.A. § 608(a)(7)(F) (West 2000).

1012. 42 U.S.C.A. § 608(a)(7)(c)(ii) (West 2000).

1013. *See id.*

1014. *See* 42 U.S.C.A. § 609(b)(1) (West 2000). This argument has the same problem as in the one identified above: TANF regulations define "reasonable cause" in a manner that does not include exempting people who can't get work for disability-related reasons. *See* 45 C.F.R. § 262.5 (1999). In fact, the regulations have 2 additional ways of demonstrating reasonable cause for failing to satisfy the 60 month limit. *See* 45 C.F.R. § 262.5(b)(2) (1999), and neither are disability-related.

1015. *See* 45 C.F.R. § 264.2 (1999).

1016. *See supra* Part II.10.D.i for a discussion of this issue.

Generally, concrete, limited extensions of time are more likely to be regarded as reasonable than open-ended ones under the ADA.<sup>1017</sup> Therefore, any requests for extensions of benefits should be for finite amounts of time when possible. Advocates can also argue that months in which an individual did not receive appropriate education and training programs or other services and supports needed because of disability should not be counted towards the time limit.<sup>1018</sup>

*E. Can States Deny Extensions of Time Limits to Individuals with Disabilities Who Have Been Sanctioned?*

A number of states require TANF recipients who want to continue to receive benefits beyond a lifetime benefit limit to show “good faith” compliance with work requirements or other TANF program requirements. Others deny extensions to individuals who have been sanctioned for non-compliance with work requirements.<sup>1019</sup> States will probably take the position that people with disabilities who cannot meet work requirements or those who have been sanctioned are not “qualified individuals” with disabilities under the ADA because they do not meet an essential eligibility requirement for receiving additional benefits. However, when individuals with disabilities are unable to meet these requirements for reasons related to their disabilities, these requirements are “eligibility criteria” for the extension of benefits that “screen out or tend to screen out” people with disabilities from the full and equal enjoyment of benefits<sup>1020</sup> and methods of administration that have a discriminatory effect.<sup>1021</sup> People with disabilities may be unable to satisfy these requirements for all of the reasons previously listed in the Manual. They include: the failure of programs to adequately screen and assess disabilities;<sup>1022</sup> the failure to provide appropriate work placements and education and training programs; failure to provide reasonable modifications at these placements and programs;<sup>1023</sup> and so on. Programs may also have sanction procedures that make it more likely that people with disabilities will be sanctioned, including notices and procedures that are difficult for people with disabilities to understand or follow.<sup>1024</sup> Programs may also define work narrowly, making it more difficult for people with disabilities to fulfill work requirements.<sup>1025</sup> In all of these situations, the TANF program is using the result of one type of discrimination to discriminate in another manner, by using these results as criteria for eligibility for continued benefits. Preliminary data indicating that people with disabilities are being sanctioned at higher rates than those without disabilities<sup>1026</sup> suggests that requiring families to have sanction-free records will have a disparate impact on people with disabilities. In addition, even if states do not investigate the reasons for program requirements under other circumstances, a strong argument can be made that to avoid discriminating on the

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1017. In the employment context, courts have held that time-limited leave can be considered a reasonable accommodation under Title I of the ADA, but open-ended indefinite leave is far less likely to be reasonable. *See, e.g., Morton v. GTE North Inc.*, 922 F. Supp. 1169 (N.D. Tex. 1996), *aff'd mem.*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995). This case law is arguably of limited relevance to TANF time limits, because open-ended extensions of benefits may be far more reasonable than open-ended leave. Employers need to know about employees’ expected return to the job so they can make staffing decisions; TANF programs obviously do not have the same concern when extending benefits.

1018. *See supra* Part III.16.A.iii.

1019. *See* STATE CHOICES ON TIME LIMITS, *supra* note 890.

1020. *See* 28 C.F.R. § 35.130(b)(8) (1999).

1021. *See* 28 C.F.R. § 35.130(b)(3)(i) (1999).

1022. *See supra* Part III.14.

1023. *See supra* Part III.16.A.

1024. *See supra* Part III.16.A.iv.

1025. *See supra* Part III.16.A.i.

1026. *See* RECENT STUDIES, *supra* note 5; WELFARE CASELOAD DECLINE, *supra* note 944.

basis of disability, they must do so if they require a sanction-free record as a condition of obtaining an extension of benefits.

States will no doubt argue that showing good faith compliance and having a record free of sanctions are “essential eligibility requirements” for receiving additional benefits and that they have no obligation to modify these essential program requirements for people with disabilities. There are two possible approaches advocates can take in response. One is to argue that cash benefits up to the lifetime limit and extensions of those benefits are one program,<sup>1027</sup> and people who have already received cash benefits (who continue to meet other eligibility requirements) are therefore obviously qualified for that program. To support this argument, advocates can argue that the substance of the benefits and of continued benefits past the state time limit are the same, and every eligibility requirement, with the exception of showing good faith compliance or having a record free of sanctions, is the same. In addition, state statutes and regulations are unlikely to describe the cash benefits program and extension of those benefits past a lifetime limit as separate programs. One problem with this argument is that it may appear inconsistent with arguing that the requirements for receiving continued benefits are “eligibility criteria” that screen people with disabilities out of the program or service of continued benefits, which suggests that continued benefits are a separate program, at least for some purposes. There may be some instances in which a state’s program for individuals who have exhausted benefits under a time limit does qualify as a separate program. Advocates can also argue that cash benefits up to the lifetime limit are one program, and benefits beyond that point another, and the continued benefits program uses the effects of discrimination in one program as eligibility criteria for another, and the effect of failing to provide appropriate screening and assessment, support programs, and reasonable modifications at work placements cannot be essential eligibility requirements.

States may also try to argue that their benefits extension policies do not discriminate because benefit extensions are not required by the TANF program but are something “extra.”<sup>1028</sup> This is irrelevant. State and local governments and agencies are not permitted to administer any program, service or benefit in a manner that has a discriminatory effect.

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1027. See *supra* Part II.8 for a discussion of the concept of “program, service or activity.”

1028. See *supra* Part II.7.A.i for a discussion of this argument.

1. APPENDIX

Activity	Countable Toward First 20 Hours	Countable Toward Hours in Excess of 20
Unsubsidized employment	Yes	Yes
Subsidized private sector employment	Yes	Yes
Subsidized public sector employment	Yes	Yes
Work experience (including work associated with refurbishing of publicly assisted housing)	Yes, if sufficient private sector employment is not available	Yes, if sufficient private sector employment is not available
On-the-job training	Yes	Yes
Community service programs	Yes	Yes
Provision of child care services to an individual participating in a community service program	Yes	Yes
Vocational educational training	Yes, but not to exceed 12 months for any individual and subject to the 30% cap described below	Yes, but not to exceed 12 months for any individual and subject to the 30% cap described below
Education for Married Recipients or Single Heads of Households Under Age 20	Can count – subject to the 30% cap described below – if the recipient: 1) maintains satisfactory attendance at secondary school or the equivalent during the month; or 2) participates in education directly related to employment for at least 20 hours a week during the month	If married or single head of household under 20 is maintaining satisfactory attendance at secondary school or the equivalent or participating in education directly related to employment for at least 20 hours per week during the month, he or she will be deemed to be meeting the participation rate requirements (subject to 30% cap)
Job search and job readiness	Yes, but only for 6 weeks per year, and not for a week after four consecutive weeks; provided that job search will be countable for 12 weeks if the State's unemployment rate is at least 50% greater than the unemployment rate of the United States. On not more than one occasion per fiscal year, the State may count an individual as having participated in job search for a week if the individual participated for three or four days.	Hours can only count if individual is still within the 6 week/12 week limits on counting job search and job readiness toward participation rates
Job skills training	Only if it can fit into another category	Yes, if directly related to employment
Education directly related to employment	Only for married recipients or single heads of household under age 20 (see above), unless it can fit into another category	Yes, if satisfactory attendance by a recipient who has not completed secondary school or received a GED
Postsecondary education	Only if it can fit into another category	Only if it can fit into another category

**30% Cap:** Not more than 30% of individuals counting toward participation rate may be determined to be engaged in work for a month by participating in vocational education training. Beginning in FY 2000, the 30% cap applies to the combination of individuals in vocational educational training and single heads of household or married teens under age 20 who are attending secondary school or its equivalent or participating in education directly related to employment.

**Two-parent Rates:** For purposes of the two-parent rates, at least 30 of the required 35 hours must be attributable to activities which are countable toward the first 20 hours of the overall rate. If the two-parent family is subject to a 55-hour participation requirement, at least 50 of those hours must be attributable to hours that are countable toward the first 20 hours of the overall rate.